



European Ombudsman

Putting it Right?

Annex

Detailed analysis of the responses to
the Ombudsman's remarks,
recommendations and proposals in
2012

9 December 2013

EN



Table of contents

The annex to the report contains summaries of the friendly solution proposals and draft recommendations accepted in 2012 and analyses the follow-up which the EU institutions, bodies, offices, and agencies concerned have given to critical remarks and further remarks made in 2012. It starts with the 10 star cases.

A. Star cases	3
Friendly solution accepted	3
Draft recommendations accepted	3
Follow-up replies to critical and further remarks	5
B. Friendly solutions accepted	12
1. European Commission	12
2. European Medicines Agency	16
C. Draft recommendations accepted	17
1. European Commission	17
2. European Medicines Agency	21
D. Draft recommendations partly accepted by institution	22
1. European Commission	22
E. Follow-up to critical and further remarks by institution	23
1. European Parliament	23
2. European Commission	24
3. European Anti-Fraud Office (OLAF)	53
4. European External Action Service (EEAS)	55
5. European Personnel Selection Office (EPSO)	57
6. European Economic and Social Committee (EESC)	66
7. European Central Bank (ECB)	66
8. European Aviation Safety Agency (EASA)	67
9. European Centre for Disease Prevention and Control (ECDC)	68
10. FRONTEX	68
11. EUROPOL	68
12. Education, Audiovisual and Culture Executive Agency (EACEA)	69
13. Research Executive Agency (REA)	70
F. Other	71
1. European Commission	71



A. Star cases

Friendly solution accepted

Case 53/2010/OV: Commission agrees to pay NGO's project costs

The complainant, a Flemish NGO that assists refugees, obtained a grant from the European Commission to carry out a project in the Democratic Republic of Congo. In September 2004, the complainant sent an e-mail and a letter to the Commission, requesting approval for an alternative simplified method for reporting the costs of the project, including those incurred by local entrepreneurs. The Commission's contact person replied in an e-mail: "*Hereby, ..., I give you our agreement ...*". Following an ex-post audit, however, the Commission decided to recover EUR 150 000 from the complainant, arguing that the relevant costs had not been reported in accordance with the provisions of the Grant Agreement. According to the complainant, those costs were reported using the alternative cost reporting method, which the Commission had approved. The complaint to the Ombudsman alleged that the Commission had infringed the principle of legitimate expectations by failing to respect the agreed methodology for the reporting of costs.

The Commission argued that the e-mail sent by its contact person did not constitute an amendment to the Grant Agreement. The Ombudsman found that the relevant e-mail did constitute an approval of the alternative cost reporting method proposed by the complainant and that it was at least arguable that the Commission had agreed to waive the relevant parts of the Grant Agreement with a view to allowing the complainant to use that alternative method. He made a proposal for a friendly solution to the Commission asking it to review, with regard to the costs incurred by the local entrepreneurs, whether, and to what extent, the complainant had complied with the alternative means of justifying expenditure and, on that basis, to consider paying the complainant the corresponding amount. The Commission accepted the friendly solution proposal and stated that, for those projects where the complainant had respected the alternative cost reporting method, it would consider the corresponding costs to be eligible and make an additional payment.

The complainant subsequently informed the Ombudsman that the Commission had paid it EUR 104 842.

Draft recommendations accepted

Case 2493/2008/FOR: European Medicines Agency (EMA) releases adverse-reaction reports on acne drug

The European Medicines Agency supervises the placing of medicinal products on the EU market. It receives information concerning suspected adverse reactions to drugs from the competent authorities in the Member States and from drug companies. The complainant asked the Agency for access to documents containing details of all suspected serious adverse reactions relating to an anti-acne drug. The Agency refused this request. The complainant then turned to the Ombudsman.



In its opinion, the Agency argued that the EU rules on access to documents did not apply to suspected serious adverse reaction reports. The Agency underlined that their release would not benefit citizens because it could result in the circulation of data that could prove to be misleading or unreliable.

The Ombudsman found that the EU rules on access apply to all documents held by the Agency and made a draft recommendation calling on the Agency to review its refusal to grant access to the adverse reaction reports. In response, the Agency released the documents in its possession after having redacted personal data.

Subsequently, the complainant argued that the Agency had not released all the relevant documents in its possession and that it had wrongly redacted the documents sent to him. The Ombudsman carried out further inquiries and was able to confirm that the Agency had not withheld relevant documents and that the redactions were justified in order to protect personal data. He thus closed the inquiry with a finding that the Agency had accepted the draft recommendation.

OI/3/2008/FOR: Commission commits to reform of Early Warning System on threats to financial interests and reputation

The Commission's Early Warning System ('EWS') is a computerised information system that seeks to identify "threats" to the EU's financial interests and reputation.

After receiving several complaints about the operation of the EWS, the Ombudsman launched an inquiry, including a public consultation to which many stakeholders contributed. Among the concerns raised in the consultation was the fact that individuals and companies are not systematically informed that they have been listed in the EWS. Participants also argued that there was a lack of clarity on how to appeal against such a listing.

In its opinion, the Commission confirmed that entities listed in the EWS are not normally informed of this fact. It also acknowledged the absence of a formal appeals mechanism.

The Ombudsman found that the scope of certain EWS warnings is not clearly defined. He also called on the Commission to guarantee the right to be heard before any decisions to include persons or companies in the EWS are taken. Furthermore, the right of access to the file should be respected. In addition, affected persons or companies should be informed of their right to complain to the Ombudsman or to seek judicial redress.

In reply to the draft recommendation, the Commission stated that it aimed to present a revised EWS decision before the end of 2013. Such a revised decision will be prepared, in light of both the Ombudsman's draft recommendation and the outcome of an appeal to the Court of Justice in the *Planet* case (which concerns the EWS)¹.

The Ombudsman considered the Commission's commitment to reform the EWS as an acceptance of the draft recommendation. A further remark called on the

¹ The Court of Justice handed down its judgment in Case C-314/11 P *Commission v Planet* on 19 December 2012.



Commission to ensure that it also takes steps to protect fundamental rights in the period before the EWS is reformed. (See below for the follow-up to the further remark).

Follow-up replies to critical and further remarks

Case 2558/2008/EIS: European Parliament agrees indefinite library ban was disproportionate

The European Parliament prohibited the complainant from accessing its library "until further notice". After an inquiry, the Ombudsman made the following critical remark:

"It follows from the fundamental right to good administration, as enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, that Union institutions should ensure due respect for the principle of proportionality. In the case at hand, Parliament's decision to deny the complainant access to all its premises for an unlimited period of time as a consequence of a breach of its library rules and his allegedly improper behaviour towards library staff was not proportionate. Parliament also failed to take into account the invitation which an MEP seems to have extended to the complainant."

Parliament's reply recognised that a decision to deny anyone access to its premises should be an exceptional measure and should comply with the principle of proportionality. It informed the Ombudsman that it had taken measures to ensure that, in the future, any denial of access is not indefinite. Rather, the period for which access is denied will be clearly stated in the relevant decision. Moreover, in cases where it is necessary to remove a long-term access badge, this step will not prevent the person concerned gaining access to Parliament's premises as a guest of an MEP or of an official. Parliament added that since it wishes to maintain a maximum degree of accessibility of its buildings for citizens and visitors, it would carefully consider any future access restrictions in light of the Ombudsman's critical remark.

Parliament's helpful reply shows that it has taken the necessary follow-up measures to ensure that the maladministration identified in this case should not occur again.

Case 3373/2008/JF: Commission acknowledges Non-Profit reimbursement demand unfair. EUR 93,000 debit note cancelled

The case concerned an EU-sponsored project carried out by a French non-profit scientific organisation. The project was successful an audit report identified certain costs as ineligible. The Ombudsman found that the Commission's claim for reimbursement was disproportionate and unfair and urged it to waive the recovery. The Commission refused. The Ombudsman then emphasised that, when faced with silence from EU project officers concerning their actions in projects they execute, organisations such as the complainant's may reasonably be led to believe that they are acting in accordance with the applicable rules. The Ombudsman closed the case with a critical remark.

In its follow-up, the Commission acknowledged the existence of serious shortcomings in its management of the relevant grant and decided to cancel the debit notes, amounting to almost EUR 93 000.



Although it would have been better if the Commission had changed its position earlier, in response to the friendly solution proposal or subsequent draft recommendation, the Ombudsman very much welcomes the Commission's full and constructive response to the critical remark.

Case 2386/2010/MHZ: Commission issues new guidance on dismissal/replacement of experts

This case concerned an expert's dismissal from his position as team leader in an EU-funded project in Bosnia and Herzegovina (BiH). The complainant argued, inter alia, that his right to be heard and to be informed of the reasons why the Commission requested his dismissal were not respected. The Ombudsman considered the Commission's failure to ensure the complainant's right of defence before it made a request to his employer for his dismissal to constitute maladministration. He also criticised the Commission's failure to provide convincing explanations as to why it did not inform the BiH authorities about its request for the complainant's dismissal.

In its reply, the Commission explained that the Delegation to BiH has now issued an administrative note ('the Note') in the form of guidance to staff setting out the procedures to be followed whenever the Delegation is considering replacing an expert. The Note refers explicitly to the Ombudsman's critical remarks and outlines the concrete measures introduced by the Delegation in response to them.

Specifically, in response to the failure to inform the BiH authorities about its request for the complainant's dismissal, the Note provides as follows: "*Prior to requesting an expert's replacement, the Delegation (Project manager) must communicate the following in writing to the beneficiary: 1. Intention to request the replacement of the expert; 2. Describe the reasons for such a request; 3. Request the beneficiary's comments providing a reasonable time limit to do so. This information can be sent in the form of a note or by email, and may be signed by the Programme Manager only after it has been seen by the Head of Section. The communication to the beneficiary must not request its APPROVAL but only its COMMENTS. Comments from the beneficiary should be assessed carefully, especially where they do not follow the Delegation's position. In case the position of the Delegation and the beneficiary cannot be reconciled, a note to the file should be drafted with the final position of the Delegation.*"

As regards the right of defence, the Note provides as follows: "*In order to comply with principles of good administration, it is important that Article 17(2) of the General Conditions for Service Contracts is applied comprehensively, but also that the Delegation makes sure that the expert is properly informed of the intention of the Commission to request his replacement and that he has the opportunity to present his arguments before the decision is taken, either by the contractor or by the Delegation. The Delegation must communicate in writing to the contractor the following: 1. Intention to request the replacement of the expert; 2. Describe the reasons for such a request; 3. Request the contractor's comments, including the expert's comments, providing a reasonable time limit to do so. It is expected that the contractor will inform the expert of the intention of the Delegation to request his /her replacement, and that the expert will have the opportunity to comment on the reasons presented for such a decision. This information can be sent in the form of a note or by email, and may be signed by the Programme Manager after it has been seen by the Head of Section. However, it would be good practice, whenever possible, prior to informing the contractor, to have a meeting with the expert during which he/she is informed of the*



intention to request his/her replacement, and he/she is requested to express his/her position."

The final section foresees that, after the beneficiary and the contractor have been properly informed, and have provided their comments on the Commission's intention to request the expert's replacement, and after the expert's right of defence has been ensured, the Delegation can proceed with the replacement request "*if the decision to do so is maintained in spite of the arguments presented.*"

In the Ombudsman's view, the Commission's reply constitutes an excellent example of how an institution can improve its behaviour if it carefully analyses the Ombudsman's decisions and adopts, without delay (in this case less than one month after the Ombudsman's decision) proper measures. Moreover, it appears that for the very first time the Commission accepts that, although it has no contractual relationship with subcontractors involved in EU contracts, it has an administrative relationship with them as a public authority. It should, therefore, ensure subcontractors' rights under Article 41 of the Charter of Fundamental Rights of the EU. In this context, it appears to adopt some procedural guarantees for subcontractors in cases where it asks a contractor to replace a subcontractor.

The Note further responds to the vulnerable situation of subcontractors in that the Commission appears to consider Article 17(2) of the General Conditions for Service Contracts (which provides that the contractor should submit to the Delegation the subcontractor's observations on his/her suggested replacement) as the *de minimis* rule. The authors of the Note go further and provide for a meeting between the Delegation and the subcontractor before the Delegation's request for the subcontractor's replacement is submitted to the contractor.

The Ombudsman welcomes the Commission's constructive follow-up and has already written to thank the services responsible. He also suggested that the Note mentioned in the response be taken as a benchmark for good practice and considered for adoption by other Delegations as well.

Case 339/2011/AN: Commission adopts faster procedures for access requests

In this access to documents case, the Ombudsman found that there was unjustified delay by the Commission in dealing with the complainants' confirmatory application for access to documents. Moreover, the Commission infringed the procedural rules applicable to it under Article 8(2) of Regulation 1049/2001 by (i) extending for a second time the deadline for reply to the complainants' confirmatory application and (ii) not providing the complainants, at the time of the second holding reply, with an estimated date for its decision. The Ombudsman also made a further remark to the effect that, when environmental information is involved, the Union institutions should take Article 6(1) of the Aarhus Regulation into account in exercising the discretion that the Court has recognised they have as regards the exceptions to the right of access foreseen in Article 4(1) of Regulation 1049/2001. Moreover, the fact of having taken Article 6(1) of the Aarhus Regulation into account should be expressly stated and, as necessary, explained in the institutions' decisions on applications for public access to documents.

The Commission's follow-up reply explained that it had taken internal measures to improve its handling of initial applications and speed up its



handling of confirmatory applications. These organisational measures are beginning to bear fruit and the time taken to handle applications has been significantly shortened. Where the service handling an application feels that, due to the volume or to the complexity of the request, it will not be able to decide within the time limits, it will contact the applicant more systematically with a view to finding an agreed fair solution. In any case, when a time limit is extended, the handling service must give an indication of the time it will need to deal with the case.

With regard to the further remark, the Commission explained the evolution in its practice as regards public access to documents containing environmental information. Such requests are systematically examined on the basis of Regulation 1049/2001 and the Aarhus Regulation. This dual analysis is explicitly reflected in the decisions on applications involving environmental information.

The Ombudsman welcomes the steps taken by the Commission.

Case 2016/2011/AN: European Central Bank commits to better engagement with public on transparency issues

The complainant asked the European Central Bank (ECB) for public access to a letter its President sent to the Spanish Government. The ECB refused access on the ground that disclosure would undermine the protection of the economic and monetary policy of the EU or a Member State. After inspecting the letter, the Ombudsman agreed that the relevant exception applied and that the ECB had adequately explained its refusal. Since the complainant's main concern was to know whether the letter suggested amending the Spanish Constitution, the Ombudsman asked the President of the ECB to agree that the Ombudsman could inform the complainant, on the basis of the inspection, that the letter did not suggest any such amendment. The President agreed to this suggestion and the Ombudsman informed the complainant accordingly.

In closing the case, the Ombudsman made a further remark suggesting that the ECB should continue to view the disclosure of documents to the public, and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as an opportunity to demonstrate its commitment to the principle of transparency and thereby to enhance its legitimacy in the eyes of citizens.

In a first reply, the ECB underlined its commitment to the principle of transparency and to demonstrating its accountability vis-à-vis European citizens. The ECB stated that it carefully monitors developments in the field of public access and transparency. It is therefore in close contact with other European institutions to ensure a consistent approach, while at the same time respecting the need for adequate protection of the sensitivity of certain documents held by a central bank.

The ECB President subsequently informed the Ombudsman that he has personally instructed the Director General for Secretariat and Language Services, who is responsible for access to documents matters, always to be as helpful as possible to applicants and to explain the reasons leading to a refusal of access. The ECB now systematically provides applicants with as much detail as possible concerning the documents to which access is denied, to allow them to appreciate the sensitivity of the document's content. This enables applicants to assess the legitimacy of the reasoning. This approach is followed with due regard to the ECB's responsibility to protect sensitive documents from



disclosure. Moreover, in the case of unclear requests, ECB staff have been instructed to interact closely with applicants and to be as helpful as possible.

By way of conclusion, the ECB acknowledged the importance for it to live up to and demonstrate its accountability obligations, which are the natural counterpart to its statutory independence.

The Ombudsman welcomes the concrete measures taken by the ECB to enhance transparency and to engage positively with the public on transparency issues.

Case 328/2011/TN: European Centre for Disease Prevention and Control (ECDC) promises clearer recruitment procedures

The complaint concerned a selection procedure carried out by the European Centre for Disease Prevention and Control (ECDC). The Ombudsman identified a number of flaws and proposed a friendly solution, which the ECDC accepted. In closing the case, the Ombudsman made further remarks to assist the ECDC in improving its procedures for the future:

"(1) If a minimum number of points is required for candidates to be placed on a reserve list, this information should be mentioned in the relevant vacancy notice.

(2) The weighting allocated to the different tests in a particular recruitment procedure should be mentioned in the relevant vacancy notice.

(3) Any decisions that allow the recruitment procedure to deviate from standard procedures should be mentioned in the relevant vacancy notice.

(4) ECDC should set out, in its vacancy notices, its policy on the information provided to candidates concerning the outcome of recruitment procedures.

(5) It could perhaps be useful to add in the 'Internal Procedure on Recruitment' an article entitled 'Information to candidates', which sets out ECDC's policy and procedures in respect of points (1)-(4) above."

The ECDC replied to each of the remarks. With regard to the first, it explained that the Internal Procedure on Recruitment and Selection of Temporary Agents and Contract Staff, introduced on 1 January 2012, clearly stipulates that, to be placed on a reserve list, candidates must obtain at least 70 points in the interview. With regard to the second, it said that the Internal Procedure specifies the weighting allocated to the different tests. On the third, it explained that, in the event that a recruitment procedure needs to deviate from standard procedures and this is known at the time of publication of the vacancy notice, the ECDC will ensure that this is stated in the vacancy notice. On the fourth, it said that ECDC vacancy notices state that "[d]ue to the large volume of applications only applicants selected for interviews will be notified". After interviews have been conducted and an appointment decision taken, the ECDC sends three different types of correspondence to candidates depending on the outcome: (a) an offer letter is sent to the successful candidate; (b) a reserve list letter is sent to candidates who are put on the reserve list; (c) a rejection letter is sent to candidates who have not obtained the minimum number of points to be put on the reserve list, clearly stating that they are not shortlisted. In reply to the fifth remark, the ECDC said that it has added to its vacancy notices an article entitled 'The Selection Process'. Under this article there is a direct link to the aforementioned Internal Procedure, which sets out ECDC policy and



procedures in respect of the four points mentioned above. The Internal Procedure is published in the Job Opportunities section of the ECDC website to ensure that it is easily accessible and visible.

The Ombudsman applauds the good spirit of cooperation shown by the ECDC throughout the inquiry. The follow-up to the further remarks is comprehensive and the improvements achieved in respect of information to candidates greatly reduce the risk of problems rising in future ECDC selection procedures.

Case 1291/2012/OV: Commission acknowledges systemic problem with non-EU family member residence cards

The complainant alleged that the Commission's *Your Europe* service failed to provide him with appropriate advice to allow him, his Russian partner and their daughter to travel from Belgium to the Netherlands. While concluding that the Commission's eventual reply was accurate and complete, the Ombudsman took the opportunity to make the following further remark:

"I would, however, like to draw the Commission's attention to the systemic problem brought to light by the present complaint. A non-EU family member of an EU citizen who travels to another Member State is exempted from a visa entry requirement, provided that s/he is in possession of a valid residence card. However, it may take several months for the Member State of residence to process the application for a residence card and deliver the card to the non-EU family member. During this period, it may be practically impossible for the non-EU family member to travel to another EU Member State, because s/he has no effective means to demonstrate his/her right to do so. The Commission might wish to consider whether action at the Union level would be appropriate to address this problem".

In its follow-up reply, the Commission confirmed that, as provided in Article 5(2) of the Union citizenship Directive (Directive 2004/38/EC), Member States may, where an EU citizen exercises the right to move and reside freely in its territory, require the family member who is a non-EU national to have an entry visa. As confirmed by the Court of Justice, non-EU family members have the right to obtain an entry visa for that purpose². However, where non-EU family members of an EU citizen do not have the necessary entry visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to corroborate or prove by other means that they are covered by the right of free movement and residence by establishing their identity and family ties with the EU citizen.

Against this background, Article 5(2) of the Directive provides that possession of a valid residence card, referred to in Article 10 of the Directive, exempts from the visa requirement non-EU family members of an EU citizen accompanying or joining that citizen in a Member State other than that of his or her nationality. The Commission recalled that, in essence, the Ombudsman had invited it to examine whether Union action would be appropriate to facilitate visa-free travel of non-EU family members before they are issued with a residence card under Article 10.

The Commission underlined that non-EU family members have the right to travel together with EU citizens throughout the Union, not because they have

² Case C-503/03 *Commission v Spain* [2006] ECR I-1097.



been authorised to do so by issuance of a visa by the national authorities, but because EU law on free movement of EU citizens gives them this right. Against this background, an entry visa is a useful document to present to border guards in order to establish, in a practical manner, that the holder is a family member of an EU citizen. Having an entry visa, however, is not a condition *sine qua non* to be able to enter the territory, as provided in Article 5(4) of the Directive.

Within this legislative framework, non-EU family members could rely on Article 5(4) of the Directive to have their right of entry established. The application of Article 5(4) of the Directive is, however, dependent on the discretion of the national border authorities involved and the quality of evidence presented to establish identity and family ties. Article 5(4) of the Directive should thus be seen as a fall-back option, not as something that should be routinely relied upon by travellers.

The Commission further explained that it is aware of the fact that non-EU family members who have moved with an EU citizen to another Member State may find it more difficult to travel within the EU before they receive a residence card. The Commission has taken action to promote the timely issuance of residence documents by Member States. As part of that process, DG Justice launched, in December 2012, a study into the way Member States issue residence documents under the Directive in view of identifying best practices and areas for improvement. In addition, the Commission is working towards the adoption of a proposal aimed at simplifying the administrative procedures on use and acceptance of civil status documents issued by other Member States. This proposal, once adopted by Union legislators, is likely to have the indirect effect of speeding up the process of issuance of residence documents.

The Ombudsman welcomes the Commission's willingness to address the systemic problem identified in this case, by promoting the timely issuance of residence documents by Member States and by launching a study to identify and promote best practices in this regard.



B. Friendly solutions accepted

1. European Commission

Case 2765/2009/VL: Alleged infringement of Directive on misleading advertising

The complainant was a company based in the Czech Republic. In March 2004, it received a leaflet promising free listing in the 'European Internet Register', which it signed and returned to the sender. It then emerged that the sender considered that the company had entered into a three- year contract and had to pay an annual fee of EUR 690.

The complainant lodged an infringement complaint with the Commission, alleging that the Czech Republic failed to apply Directive 84/450/EEC (subsequently replaced by Directive 2006/114/EC) concerning misleading advertising. In particular, the complainant had turned to a number of Czech authorities, such as the Regional Trade Licensing Offices, from which it considered it had received incorrect information. Initially, the Commission took the view that the interpretation of Directive 2006/114 provided by the Regional Trade Licensing Offices was too narrow and contemplated opening an infringement procedure. However, in a subsequent communication, the Czech authorities explained that the Regional Trade Licensing Offices were not competent for the enforcement of the said Directive – this task was for the courts alone, it said. As a result, the Commission closed its investigation.

The complainant then turned to the Ombudsman, who suggested that the Commission could, among other things, resume its investigation in order to examine the issues that still needed to be clarified, especially the impact that the information provided by Regional Trade Licensing Offices may have had on the practical effect of Directive 2006/114 in the Czech Republic.

In reply to this proposal for a friendly solution, the Commission offered to write to the Czech authorities in order to obtain additional clarifications on the practical implementation of Directive 2006/114.

The complainant provided additional elements to support his assertion that the Czech authorities had not correctly applied Directive 2006/114. Given that this information was not available to the Ombudsman prior to his proposal for a friendly solution, he considered that he could not base his decision on it. He decided to forward the complainant's submissions to the Commission so that it could take them into account in assessing the information to be provided by the Czech authorities. The Ombudsman suggested that the Commission should inform both him and the complainant of the outcome in this respect. The complainant would remain free to turn to the Ombudsman again if he were not satisfied with the Commission's position. (*The Ombudsman also made a further remark in this case: see below*).



Case 3000/2009/JF: Commission fails to ensure equal treatment for tenderers. EUR 10,000 compensation paid

The complainant, an engineering and environmental consultancy company based in Brussels, submitted an unsuccessful bid in response to an invitation from the Commission to tender for the organisation of a number of seminars on green public procurement. It alleged, in summary, that the Commission's explanations for rejecting its bid were not convincing and claimed that its bid should be reassessed, or, if that were no longer possible, that it should receive appropriate compensation.

The Commission explained that although the complainant's bid was slightly lower than that of the only other bidder to reach the award stage (the 'successful tenderer'), it did not represent the best value for money. In addition, the complainant's proposed budget did not appear to be sufficient to allow it successfully to perform the tasks. Indeed, the budget raised doubts as to whether the complainant had understood those tasks at all. The successful tenderer duly identified the venues where the seminars would take place and proposed a budget compatible with their organisation.

The Ombudsman's inquiry revealed that the applicable rules provided for the Commission to make the formal decision at a later stage concerning the Member States where the seminars would take place. However, in practice, those Member States were already known both to the Commission and to the successful tenderer, but not to the complainant. In light of the fact that the Commission did not inform the complainant as to where the seminars would take place, the Ombudsman found that the Commission failed to ensure equal treatment of tenderers and that this undermined the complainant's chances of success in the tender process. He proposed as a friendly solution that the Commission should compensate the complainant for the expenses it incurred in participating in the tender process. The Commission accepted the proposal and paid the complainant over EUR 10 000.

See [Case 53/2010/OV](#) above under 'Star cases'

Case 683/2010/OV: IT error leads to cancelled promotion. Commission agrees to reverse decision

This complaint concerned a staff dispute about a promotion. The complainant was *seconded* from the Council of the EU to the Commission in 2004. As a seconded official he would, for promotion purposes, remain under the responsibility of the Council. However, due to an IT error, the Commission treated him as a *transferred* official, falling under its own responsibility. In December 2008, the Commission promoted the complainant. However, when it realised that the promotion was based on promotion points accumulated by the complainant as a seconded official, it cancelled the promotion.

The Ombudsman proposed that the Commission reconsider the cancellation of the complainant's promotion. The Commission agreed that an IT mistake constituted the basis of the complaint and that it could have handled the complainant's request for a transfer more swiftly. Consequently, it proposed to promote the complainant. A friendly solution was thus achieved.



Case 141/2011/RT: Place of origin error by European Food Safety Authority

The complainant worked for various EU institutions and agencies. His first recruitment was by the Commission, which determined his place of origin to be Marseilles. Subsequently, the complainant joined the European Food Safety Authority ('EFSA'). EFSA erroneously determined his place of origin to be Brussels, not Marseilles. The complainant then started to work for an executive agency of the Commission. This time, the Commission considered that the complainant's place of origin was Brussels. In his complaint to the Ombudsman, the complainant alleged that the Commission wrongly determined his place of origin. He claimed that the Commission should change his place of origin to Marseilles instead of Brussels.

In its opinion, the Commission acknowledged that EFSA had made a mistake when it determined his place of origin to be Brussels instead of Marseilles. However, the complainant did not contest the above decision within the deadline provided for by the Staff Regulations. The Commission was, therefore, bound by EFSA's decision.

The Ombudsman found that it was not consistent for the Commission to acknowledge that EFSA's decision was wrong and, at the same time, to adopt it. He suggested that the Commission determine the complainant's place of origin anew. The Commission accepted this friendly solution proposal.

Case 292/2011/AN: Documents released by Commission in alleged infringement case

The complainant, an association of Spanish horse breeders, submitted an infringement complaint against Spain to the Commission. The complainant then requested that the Commission grant it access to certain documents related to its infringement complaint. The Commission considered that disclosure would undermine the protection of the purpose of its investigations and rejected the complainant's application on the basis of the third indent of Article 4(2) of Regulation 1049/2001 on public access to documents. The complainant did not receive the Commission's reply and submitted a confirmatory application. Since it did not receive a reply to the confirmatory application, the complainant turned to the Ombudsman.

The Ombudsman considered that the Commission had wrongly invoked the above-mentioned exception in order to reject the complainant's application. He proposed a friendly solution, suggesting that the Commission disclose the requested documents. The Commission agreed to disclose two of the three documents concerned. As regards the third, it stated that it needed to consult the Spanish authorities, since the document originated from them. Subsequently, the Commission informed the Ombudsman that it had disclosed the third document to the complainant.

Case 1451/2011/BEH: Commission commits to clarifying Union citizenship Directive guidelines

The complainant was a Nigerian, married to an Austrian citizen who had worked in Spain for some days. When the complainant applied for a residence card in 2009, the competent Austrian authorities refused his request. In reply to his infringement complaint, the Commission informed him that it did not intend to open an infringement procedure against Austria. In support of its



decision, the Commission referred to its Guidelines concerning the Union citizenship Directive (Directive 2004/38/EC). It explained that, in order for a citizen to invoke his or her right to free movement successfully, the Guidelines require residence in the host Member State from which the Union citizen and his or her family members return to be genuine and effective.

In his complaint to the Ombudsman, the complainant alleged that the relevant passage of the Guidelines is not in conformity with EU law, as interpreted by the Court of Justice in its judgment in *Akrich*³. The Ombudsman considered that it followed from the *Akrich* judgment that a citizen can rely the right to free movement where he or she either (i) actually pursued an effective and genuine activity in another Member State, or (ii) wished to pursue an effective and genuine activity in another Member State but, for whatever reason, this intention could not be realized. The Guidelines refer to cases where the exercise of the right to free movement "*was genuine and effective*". The Ombudsman considered it possible that this passage may be misunderstood as referring only to the first of the two situations outlined above. Given the risk that citizens might therefore be misled as to the precise scope of their rights under EU law, the Ombudsman suggested the Commission consider reviewing the relevant passage of the Guidelines.

In its reply, the Commission stated that it does not intend to modify the Guidelines at this stage, but will assess the added value of an update of the Guidelines on the basis of the results of its second report on the application of the Union citizenship Directive due in 2013. Noting the Commission's agreement that the relevant passage of the Guidelines could indeed be clearer, the Ombudsman concluded that the Commission had accepted his friendly solution proposal. At the same time, he asked the Commission to keep him informed of its relevant considerations, once it has adopted its second report on the application of the Directive in question. The Commission subsequently informed the Ombudsman that the second report on the application of the citizenship Directive is not likely to be adopted before 2014.

Case 1752/2011/RT: Ex-gratia reimbursement of family travel expenses on leaving troubled African country

The complainant, a Commission official, joined the EU Delegation in an African country. Given the difficult situation in the country, he decided to take his young children back to Europe shortly after his arrival. A few weeks later, the Commission declared a crisis situation and decided to evacuate the families of the entire staff working in the Delegation. In his complaint to the Ombudsman, the complainant alleged that the Commission wrongly refused to reimburse him for his children's travel expenses. The Commission explained that its refusal was based on the fact that the complainant's children left before the Commission declared a crisis situation. According to its procedure and rules on the reimbursement of transport costs in case of evacuation, the Commission bears the costs of evacuating officials and their families to their place of origin, to Brussels, or to another place of evacuation, only after a formal decision has been taken declaring a crisis situation. The mere existence of difficult conditions in a third country does not automatically authorise staff members of the Delegation to receive reimbursement of their families' travel expenses in the event of their departure.

³ Case C-109/01 *Akrich* [2003] ECR I-9607.



The Ombudsman asked the Commission whether the ages of the complainant's children and of any other children of staff members were taken into account in the timing of the decision to evacuate. The Commission was requested refer specifically to the provisions of Article 24 of the Charter of Fundamental Rights of the EU, particularly Article 24(2), when replying to this question. Finally the Ombudsman invited the Commission to consider whether it could not itself find a solution to the case by offering to pay, on an *ex gratia* basis, the complainant's travel costs. The Commission accepted the proposal.

2. European Medicines Agency

Case 2914/2009/DK: European Medicines Agency (EMA) releases completed audit reports

The complainant asked the European Medicines Agency for public access to two internal audit reports, one on access to information and another on selected administrative procedures relating to scientific evaluation of medicines. The Agency refused on the ground that public access would undermine the protection of the purpose of inspections, investigations, and audits.

The Ombudsman found that that the audit exercises in question had been concluded and that there was thus no risk that they would be undermined by disclosure. He asked the Agency to reconsider its refusal.

In response to the friendly solution proposal, the Agency provided the complainant with the two audit reports, as well as with an accompanying note on the implementation of the recommendations made in the reports.

In closing the inquiry, the Ombudsman underlined that the significant improvements that the Agency has made in rendering its work more transparent serve to ensure that citizens will have greater trust in the Agency, thus increasing its legitimacy and its effectiveness in carrying out its important public health tasks.



C. Draft recommendations accepted

1. European Commission

Case 2573/2007/VIK: Commission states reasons for failed tender

The Commission launched a call for tenders for the creation of a "*Website on Integration*". The complainant, a company active in the IT field, took part in this procurement procedure. Its bid was rejected by the evaluation committee on the ground that it failed to meet the qualitative award criteria.

In its complaint to the Ombudsman, the complainant (i) alleged that the evaluation committee had wrongly accepted a bid with variants, and (ii) disagreed with the appraisal of its own bid.

As regards point (i), the Ombudsman considered that one of the alternatives proposed by the winning tenderer was indeed a "*variant*". The Ombudsman then examined the question of whether, having concluded that one of the two proposals (the variant) was inadmissible, the Commission could examine the remaining proposal. The Ombudsman was not aware of any rule specifically requiring an entire tender to be considered inadmissible if a variant is proposed. Furthermore, the tender documentation did not indicate that if a variant were to be submitted together with a valid offer, the entire offer would be rejected. The Ombudsman thus concluded that there appeared to be no infringement of the public procurement legislation in this regard.

As for the appraisal of the complainant's bid, the Ombudsman considered that the Commission complied with its duty to state reasons and with the formal requirements concerning the right of the unsuccessful tenderer to receive information. The Ombudsman pointed out, however, that the complainant had contested the reasoning provided by the evaluation committee, and that the Commission refrained from addressing the specific arguments put forward, even though the Ombudsman asked it to do so, for reasons of good administration, on several occasions during the inquiry. Given that the Commission failed to provide an adequate reply to these requests, the Ombudsman made a draft recommendation calling on the Commission to address the complainant's arguments.

In response, the Commission clarified in sufficient detail the relevant issues raised by the complainant. The Ombudsman thus closed the case, concluding that the Commission had accepted the draft recommendation and taken satisfactory steps to implement it.

See [Case OI/3/2008/FOR](#) above under '*Star cases*'

Case 882/2009/VL: Commission apologises for inappropriate e-mail and pays compensation for moral damage

The complainant is divorced from her ex-husband, who was employed as a temporary agent of the Commission. The complainant and her ex-husband have two children, of whom the complainant has custody. The Commission paid the complainant the household allowance, dependent child allowance, and education allowance in the name and on behalf of her ex-husband.



In 2008, the complainant's ex-husband informed the Commission that his ex-wife and his children no longer lived in Germany, but had moved to Bulgaria over a year earlier. This meant that the Commission had paid higher sums in family allowances than were due, since the allowances were subject to a geographical weighting based on the cost of living. The complainant informed the Commission that she was still resident in Germany, as were her children. However, the institution was not convinced that this was so and initiated a recovery procedure against her for the allegedly overpaid allowances.

The complainant turned to the Ombudsman, who opened an inquiry. In the course of the inquiry, a Commission official inadvertently sent the ex-husband an e-mail containing language that was offensive and insulting not only to him but also to the complainant. The complainant submitted this issue to the Ombudsman who decided that the evident insult to the complainant merited being included in the inquiry.

In the course of the Ombudsman's investigations, the Commission acknowledged that it had wrongly applied the rules concerning the recovery of allegedly overpaid family allowances. Moreover, even though the Commission had apologised to the complainant for the insulting e-mail, the Ombudsman considered that its reaction, both in form and substance, was not commensurate with the maladministration that had occurred. He addressed a draft recommendation to the Commission, as regards the individual case and the possibility that the use of unacceptable language in the e-mail might be an indication of a wider problem within the Commission's services.

In response, the Commission presented a copy of a letter of apology sent to the complainant by the Director of the service concerned and offered to pay the complainant EUR 500 as compensation for moral damage. Moreover, the Commission organised a series of internal training sessions to emphasise the importance of ethics and of a culture of service towards EU citizens. The complainant chose not to accept the offer of compensation, but the Ombudsman considered that the Commission had taken adequate steps to implement his draft recommendation as regards both the individual case and to reduce the risk of similar problems occurring in the future.

Case 1972/2009/ANA: Commission acknowledges delay in handling access application and promises to do better in future

Greece communicated a revised draft technical regulation on recreational games to the Commission under the Technical Barriers to Trade Directive. A Greek internet services company requested the Commission to give it public access to this document. It complained to the Ombudsman that the Commission's refusal infringed the procedural and substantive rules of Regulation 1049/2001 on public access to documents.

As regards the procedural allegation, the Ombudsman made a draft recommendation that the Commission should acknowledge the unjustifiable delay that occurred in the handling of the complainant's confirmatory application and provide an undertaking that such delays would not occur in future. The Commission accepted the draft recommendation.

As regards the substantive aspect of the case, see below in the section on critical remarks.



Case 2482/2009/KM: Commission commits to review of staff Mission Guide following 'a day's rest' dispute

The complainant is a Commission official. Together with a colleague (who submitted complaint 2749/2009/KM – see below), he went on a mission to China. The mission order was approved by the authorising officer and the mission was carried out in line with the approved plan. The officials left Brussels on Friday 19 September 2008 and returned on Sunday 28 September 2008. The authorising officer also approved the expenses declaration.

The Commission's Office for the Administration and Payment of Individual Entitlements ('PMO') subsequently rejected some expenses. It held that the costs relating to the days before Monday, when official engagements started, could not be reimbursed. The officials could have left on Saturday, rather than Friday, it argued. That way, they would have arrived on Sunday at 06:25 and would still have had the day of rest accorded in case of tiring journeys. An extension of the mission was not justified by the needs of the service and, thus, the expenses relating to the extended period could not be reimbursed.

The complainant challenged this decision, in particular, the PMO's definition of "a day's rest" as a 24 hour rest period, and the fact that the expenses were not paid, even though the authorising officer had approved them. He noted that the Friday flight was considerably cheaper than the Saturday flight.

In its initial opinion, the Commission accepted that the travel agency would have, as was its duty, provided the cheapest rates including and excluding weekend stays. The authorising officer would have signed the mission order in full knowledge of the facts. Further, the PMO's definition of "a day's rest" as a 24 hour period was not borne out by the Mission Guide. Thus, the departure on Friday was justified. Finally, the PMO should have contacted the authorising officer if it had identified any issues with the execution of the mission, so as to avoid such problems from arising in future. It should not have penalised the official who went on mission.

The PMO thereupon disbursed the remainder of the payment that was due to the complainant, but without paying interest. It argued that the complainant only obtained a right to payment once the PMO decided to make such payment to him, after treating his case as an individual matter. In reply to the complainant's request to be informed of the guidance the Commission had issued to clarify the concept of "a day's rest" and the relationship between the authorising officer and the PMO, the latter stated that its practice was not affected and that no new guidance was necessary. The Ombudsman thus asked the Commission to explain the apparent contradiction between this statement and its own opinion.

Having found that the Commission's reply was not satisfactory, the Ombudsman made two draft recommendations to the effect that the Commission should (i) pay the complainant the interest due to him, and (ii) clarify both the notion of "a day's rest" and the consequences of the PMO's decision to challenge mission expenses agreed to by an authorising officer.

The Commission complied with the first draft recommendation. As regards the second draft recommendation, it stated that it was planning to review the Mission Guide in the course of the current year and that it would take account of the Ombudsman's recommendation when doing so. The Ombudsman had no reason to doubt that the Commission would do as planned. He therefore closed



the case, asking the Commission to inform him, by January 2013 at the latest, of the outcome of its review of the Mission Guide.

Case 2749/2009/KM

This complaint was very similar to that submitted by the complainant in case 2482/2009/KM above. In this case, the Ombudsman's draft recommendation focused solely on the issue of the payment of interest due to the complainant. The Commission replied that it would pay interest and the complainant subsequently confirmed that he received all he had asked for.

Case 1161/2010/BEH: Commission discloses infringement case documents

The complainant is a German Ph.D. student. In 2009, he turned to the Commission and, on the basis of Regulation 1049/2001 on public access to documents, requested access to certain documents relating to a number of infringement cases then pending before the Court of Justice. These cases related to certain customs issues regarding imports of armaments and dual-use goods. The complainant's request, in essence, covered the correspondence between the Commission and the Member States concerned. The Commission refused to grant access to the documents requested. After the Court of Justice handed down the judgments in the aforesaid cases in December 2009, the complainant submitted a fresh request for access. Again the Commission refused to grant access and the complainant submitted a confirmatory application. The Commission first extended the deadline for dealing with that application and later informed the complainant that it had been unable to conclude its internal consultations.

In his complaint to the Ombudsman, the complainant alleged that the Commission failed to process his confirmatory application for access to the aforesaid documents within the time-periods foreseen in Regulation 1049/2001. He also alleged that its decision not to grant access is not in conformity with the law. He claimed that the Commission should, taking into account the arguments raised in his confirmatory application for access, deal rapidly with his confirmatory application and grant access to the documents concerned.

In its opinion, the Commission pointed, among other things, to the great number of documents involved and to various changes in the scope of the complainant's requests which accounted for the delay in taking a decision. As to substance, the Commission underlined the highly sensitive nature of the infringement cases at issue. Moreover, it submitted that the fact that follow-up negotiations with a number of Member States subsequent to the Court's judgments were ongoing would prevent it from disclosing the documents requested.

Following an inspection of the Commission's file by his services, the Ombudsman made a draft recommendation to the Commission. Considering that it failed to deal with the complainant's confirmatory application within any reasonable time and did not provide a satisfactory explanation for its refusal to grant access, the Ombudsman called upon the Commission to deal rapidly with the complainant's confirmatory application by granting access to the documents concerned.

The Commission accepted the Ombudsman's draft recommendation and fully disclosed the documents requested by the complainant. While the Ombudsman



expressed concern about the length of time the Commission took to decide on the complainant's confirmatory application, he was pleased to note that the Commission itself acknowledged that this delay was indeed unjustifiable and applauded its constructive approach following his draft recommendation.

2. European Medicines Agency

See [Case 2493/2008/FOR](#) above under 'Star cases'



D. Draft recommendations partly accepted by institution

1. European Commission

Case 1260/2010/RT: Commission opens new infringement proceedings about parallel imports of veterinary medicinal products in France

The complainant, a French farmers' association, complained to the Commission that the French authorities failed to comply with the provisions of EU law concerning parallel imports of veterinary medicinal products (VMPs). It argued that France did not allow vets, farmers, pharmacists, and other retail distributors to have access to the simplified authorisation procedure for parallel imports of VMPs. In addition, the French authorities refused to grant access to the simplified procedure for parallel imports of VMPs to wholesale dealers authorised to distribute VMPs in other Member States.

The Commission opened infringement proceedings and sent a letter of formal notice to the French authorities. Subsequently, the French authorities modified the national legislation concerning the authorisation procedure for parallel imports of VMPs. The Commission therefore decided to close the case. The complainant alleged that the arguments provided by the Commission in its decision closing the infringement complaint were insufficient and unconvincing. It claimed that the Commission should either cancel its decision to close the infringement complaint, or open a new infringement proceeding.

In its opinion, the Commission first took the view that personal parallel imports of VMPs may not be authorised if the provisions of the relevant Directive are not complied with. The Commission noted, in sum, that parallel imports of VMPs are in general open to farmers, vets, and pharmacists or to wholesale dealers if they comply with specific provisions of that Directive relating to distribution, possession, and dispensing of VMPs and pharmacovigilance.

The Ombudsman considered that the Commission did not provide an appropriate justification for its decision to close the infringement complaint. He thus made a draft recommendation. Following his draft recommendation, the Commission decided to open new infringement proceedings concerning the obstacles met by wholesale dealers who attempt to make parallel imports of VMPs. The Ombudsman therefore considered that the Commission had taken adequate measures to implement his draft recommendation.



E. Follow-up to critical and further remarks by institution

1. European Parliament

Case 2501/2009/RT: Special leave for birth of twins. Parliament declines to double from 10 to 20 days

The complainant in this case considered that, given that the EU Staff Regulations provide for 10 days' special leave to be granted following the birth of a child, he should be entitled to 20 days' special leave for the birth of twins. He noted that the Court of Justice does so in similar cases.

After making a proposal for a friendly solution and a draft recommendation, both of which Parliament rejected, the Ombudsman closed the case with a critical remark, according to which Parliament had acted unfairly by refusing to replace its practice of granting officials who become fathers of twins a total of only 12 days' special leave with a new practice, entitling this category of fathers to 10 extra days of special leave.

In its reply, Parliament informed the Ombudsman that it did not envisage any changes to its current practice. It would, however, closely follow-up any developments in this area and would review its administrative practice in the light of any future agreement reached within the framework of inter-institutional cooperation. It would duly inform the Ombudsman of any change.

The Ombudsman regrets that Parliament does not envisage changing its current practice and that it has taken no measures to prevent similar maladministration in the future. The Ombudsman notes that the practice in question still differs from one institution to another. For instance, at the June 2012 meeting of the Preparatory Committee for Matters relating to the Staff Regulations (CPQS), the Commission also indicated that it would not grant 10 days of leave per child to fathers of twins.

Case 900/2010/RT: Parliament refuses to release audit report. Claims risk to decision-making process

The complainant in this case made a request for access to an audit report regarding the award of the compensatory allowance provided for under the EU Staff Regulations and the impact of withdrawing this allowance from some officials. He also asked for the opinion of Parliament's Legal Service on the matter. Parliament refused, arguing that disclosure of the requested documents would seriously undermine its ongoing decision-making process in respect of complaints submitted under Article 90(2) of the Staff Regulations.

The Ombudsman was not convinced by Parliament's explanation and made a proposal for a friendly solution, which Parliament rejected. The Ombudsman closed the case with a critical remark.

In its short reply, Parliament stated that it took note of the Ombudsman's position but, for the reasons explained in its previous correspondence, it did not share the Ombudsman's analysis.



The Ombudsman regrets that Parliament has merely confirmed the position it outlined during the inquiry, which the Ombudsman already found to be unconvincing. However, given that the issue concerns the application of the relevant provisions of Regulation 1049/2001 to the specific documents at issue in this case, rather than the interpretation and application of the Regulation in general, no conclusions can be drawn from Parliament's position about the risk of similar maladministration occurring in the future.

Case 1017/2010/MMN: Parliament commits to wider advertising of vacancies

This case concerned the recruitment procedure for the House of European History in Brussels. In response to the complainant's allegations, the Ombudsman agreed that Parliament had committed itself to publishing details of selection procedures for temporary and/or contract agents on EPSO's website, or at least had given that impression. Its failure to comply with that (actual or apparent) commitment in the present case constituted an instance of maladministration. The Ombudsman also identified aspects of Parliament's procedures that could be improved and made three further remarks, namely, that (i) Parliament could consider advertising on its website those vacancies which are not published in the Official Journal or through EPSO; (ii) Parliament could, if and when it uses 'indirect' means of publicity for vacancies, be particularly attentive to the need to allow for an adequate period of time for candidates to apply; (iii) in future calls for expression of interest, Parliament could inform potential candidates as to whether interviews will take place.

In reply to the Ombudsman's critical remark, Parliament explained that it has now amended the text of the relevant brochure so as to avoid giving the wrong impression that it will publish all information concerning staff recruited under fixed-term contracts on EPSO's website. As regards the first further remark, Parliament announced that it would consider the possibility of advertising on its website, among other means of publicity, those vacancies which are not published in the Official Journal or through EPSO. As regards the second further remark, Parliament restated its general commitment to provide potential candidates with a reasonable period of time to apply. Finally, as regards the third further remark, Parliament indicated that, should interviews be part of selection procedures, potential candidates would be informed through the relevant call for expression of interest.

Parliament has eliminated the likelihood of the maladministration identified in this case occurring again in the future. Moreover, it has taken measures, or at least committed itself to taking measures, to implement all of the Ombudsman's further remarks.

2. European Commission

Case 642/2008/MMN: Commission casts doubt on whether EU Financial Regulation is consistent with OECD Guidelines on conflicts of interest

This case concerned an alleged conflict of interest involving a technical advisor in a tender procedure. The complainant alleged that the Commission breached the principle of equal treatment because one of the advisors to the Evaluation Committee had been employed by the successful tenderer. The Ombudsman called on the Commission, in a draft recommendation, to reword the



Declaration of Impartiality and Confidentiality to be signed by members and observers of Evaluation Committees, to ensure that it clearly covers all possible conflicts of interest, namely, “*actual*”, “*potential*”, and “*apparent*” conflicts of interest.

The Commission replied that the relevant provision of the Financial Regulation solely covers “*actual*” and “*potential*” conflicts of interest and that “*apparent*” conflicts of interest are only relevant where, upon examination, it emerges that there is an “*actual*” or “*potential*” conflict of interest. The Ombudsman was not convinced. Considering that the principles of good administration may require the institutions to do more than what the law prescribes, the Ombudsman recalled the importance of good administration being seen to be done in the eyes of citizens. Given that the Commission had indicated that it would review the Declaration of Impartiality and Confidentiality, he concluded that no further inquiries were justified. At the same time, he asked the Commission to report, within a reasonable time, on the outcome of the announced review.

In its follow-up reply, the Commission argued that preventing situations of “*apparent conflicts of interest*” in the context of evaluation committees would be contrary to the principles of good administration because it would make it more difficult to find people to be part of these committees. It would even be contrary to the Financial Regulation, which defines the concept of conflict of interest, it said.

With regard to its amendment of the Declaration of Impartiality and Confidentiality, the Commission explained that, for the sake of legal clarity, it had deleted a sentence which could be interpreted as relating to “*apparent conflicts of interest*” insofar as it referred to “*circumstances which might call into question [the expert’s] independence in the eyes of any party.*” It further explained that the Declaration now quotes the relevant provision of the Financial Regulation concerning conflicts of interest, rather than merely referring to this provision as before. With a view to encouraging the disclosure of all relevant facts, references to specific elements have been deleted, it said, including financial or professional relationships and employment in the previous three years. The Commission announced, moreover, that it had re-drafted the relevant section of the Practical Guide to contract procedures for EU external actions ('PRAG') in line with the aforementioned considerations.

The Ombudsman is not convinced by the Commission's decision to amend the Declaration to make it clear that situations of apparent conflicts of interest will not be regarded as conflicts of interest by the Commission. In terms of the Commission's argument that taking into account situations of apparent conflict of interest would make it more difficult to find people to be part of evaluation committees, the Ombudsman's view is that, although this may be a valid reason in exceptional cases, for instance, in highly specialised fields in which few potential technical experts are available, it appears unlikely that this will happen as a general rule.

The Ombudsman regrets that the Declaration is now vaguer than before as regards the type of situation which may lead to a conflict of interest. Contrary to the Commission's suggestion, the new Declaration is likely to lead to even fewer relevant facts being disclosed.

More generally, the Commission has not made any attempt to explain the conceptual framework of the Financial Regulation in the light of the OECD Guidelines for Managing Conflict of Interest in the Public Service. In the



Ombudsman's view, it is doubtful that the Financial Regulation cannot be reconciled with the OECD Guidelines, contrary to what the Commission implicitly suggests.

In light of the Commission's negative reply, the Ombudsman will consider consulting the European Court of Auditors, whose expertise and experience may be valuable on the general question of how the relevant provisions of the Financial Regulation and the Implementing Regulation should be interpreted and applied, in particular in the light of the OECD Guidelines.

Case 1325/2008/VL: Commission makes systemic improvements to management of contracts

The Ombudsman criticised the Commission in this case for not having concluded an uncontroversial amendment to a contract within a reasonable timeframe, for not admitting that it was responsible for the delay in signing that amendment, and for failing to provide the complainant with sufficient assistance. With a view to improving its practices for the future, the Ombudsman also made the following further remarks:

"The Commission would be well advised to ensure that, insofar as it has not yet taken such steps, documents and/or items received by its services are handled in a way that allows one to establish in an easy and reliable manner when they were actually received and registered.

When a project manager in charge of a given file is about to leave his or her post or terminate his or her employment with the Commission, it would constitute good administrative practice to ensure that hand-over notes are prepared taking stock of all previous stages of the procedure (including any relevant correspondence exchanged) and of any pending actions that need to be taken within the context of ongoing projects.

The wording of the Commission's letter dated 12 July 2005 was unnecessarily vague and obscure. It would therefore be useful if, in the future, the Commission could ensure that applicants who find themselves in a situation similar to that of the complainant in the case at hand are informed in clear and unequivocal terms of the reasons why their project will not be funded."

In its follow-up reply to the critical remarks, the Commission submitted that important steps had been taken to ensure structural improvements in the management of grants. It referred, in particular, to the establishment of the Education, Audiovisual and Culture Executive Agency (EACEA), which is responsible, under the Commission's supervision, for the daily management of certain parts of the EU's programmes in this field, including the Culture Programme which is the successor of the one under which the complainant applied for funding. External independent evaluations and feedback from beneficiaries have confirmed that the management and follow-up of grant agreements have improved under the EACEA.

The Commission further explained that the Financial Regulation, which constitutes the legal framework for these contractual relationships, is now much stricter in terms of the arrangements governing grants, transparency of grant management, and time-limits for approving reports and payments. Moreover, information is now systematically provided to beneficiaries on means of redress.



With regard to the further remarks, the Commission informed the Ombudsman that it has (i) introduced electronic systems whereby documents and/or items received by its services are registered and deadlines for replies are regularly and closely followed up; (ii) ensured that when a project manager leaves his or her post, detailed hand-over notes are prepared; (iii) seen to it that applicants whose applications are not retained receive a letter with the score and detailed comments relating to the eligibility, non-exclusion, selection and award criteria set out in the call for proposals.

The Ombudsman welcomes the improvements in the Commission's structures and procedures, which should significantly reduce the risk of similar maladministration occurring in the future.

Case 1922/2008/GG: Winding up of European Agency for Reconstruction inhibits examination of consultant dismissal complaint

The Ombudsman closed this case with a critical remark, according to which the Commission had not been able to provide him with a coherent and reasonable account to show that the consent of the European Agency for Reconstruction ('EAR') to the relevant consultancy's proposal for the complainant's removal as project team leader was justified. Furthermore, the procedure that the EAR followed when examining the allegations made against the complainant was insufficient.

In its follow-up reply, the Commission pointed out that the EAR, the agency responsible for the procedures and decisions that were the subject of this complaint, was phased out in 2008. To answer the Ombudsman's questions, the Commission therefore had to rely on documentation in archives. It regretted that it was not able to provide the Ombudsman with a more detailed account of the EAR's decisions and procedures. Nevertheless, it pointed out that the EU Office in Pristina, which is now responsible for managing assistance in Kosovo, had made every effort to ensure that the lessons learned from this case are now being applied. In particular, the Office now undertakes very thorough and careful assessments of the performance of contracts. If the analysis reveals that a deficiency in project performance is linked to the performance of a key expert, the Office initiates a dialogue with the contractor and the expert(s) concerned to identify the best way forward. This has proven a useful method for enhancing performance while minimising the risk of conflict.

Given the objective difficulties caused by the winding-up of the EAR, the Commission's reply is encouragingly constructive and positive.

Case 2293/2008/TN: British opt-out from Charter of Fundamental Rights. Delayed access to documents

The Ombudsman found that the Commission had breached the Charter of Fundamental Rights of the EU by wrongfully refusing to give public access to documents concerning the UK opt-out from the Charter. Specifically, the Commission failed to give valid reasons for its refusal. In view of the importance of the documents concerned for the rights of EU citizens, and the fact that the Commission failed to engage constructively with the detailed analysis put forward by the Ombudsman, the latter concluded that such refusal constituted "*a most serious instance of maladministration*". He also found that, by categorising parts of the documents as irrelevant, the Commission had wrongly



disregarded the complainant's request to obtain access to the full documents and thereby evaded its obligation to give valid reasons for refusing full access.

The Commission informed the Ombudsman, in its reply, that on the basis of a new request for access made by the complainant, the Commission had decided to disclose the documents in full "*in the light of the circumstances of today*". It insisted, however, that the refusal to grant access was valid at the point in time when the decision was taken, that is, on 5 March 2008, given that the Lisbon Treaty was still subject to ratification and that it could not be ruled out that the Commission would have to take a further position in relation to the UK opt-out. With regard to the scope of the request, the Commission referred to the judgment of the General Court in case T-300/10 *Internationaler Hilfsfonds v Commission* (paragraphs 88 and 197), in which the Court held that the Commission was right to consider parts of documents as extraneous to the subject matter of the application.

In the Ombudsman's opinion, the fact that the Commission has decided to give access to the documents in full on the basis of a new request made by the complainant does not alter the Ombudsman's conclusions in the present case. The fact remains that the content of the documents concerned is innocuous and the Commission has not explained in what way their release would actually have caused harm, as argued at the point in time of the decision to refuse access. In respect of the Commission's argument as regards parts of documents, the case referred to by the Commission does not suggest that part of a document can fall outside the scope of a request. The Court's reasoning rather confirms the idea that an entire document is either inside or outside the scope of a request for access.

The Ombudsman maintains his reasoning in this case. However, given that the Commission has now given access to the documents in question, his view is that it is not necessary to pursue this issue further.

Case 2450/2008/BEH: Serious problems including fatal accident at Albanian building project. Commission commits to improved communication

This case concerned the Commission's supervisory role in a building project in Tirana. Specifically, the complainant alleged that the Commission's Delegation to Albania failed properly to support him (i) in his efforts to ensure that the project works were carried out in accordance with the contract and (ii) in his related conflicts with other parties involved in the project. Following an inspection of the file, the Ombudsman noted that the complainant, who held key responsibility for the project, reported to the Commission instances of threats and intimidation against him. The Commission recognised the seriousness of these issues, which were raised in two meetings. However, doing so was not commensurate with the acknowledged seriousness of the situation, in the face of which one would have expected decisive action. The Ombudsman also found that the Commission did not use the powers at its disposal to call for an investigation seeking reliably to establish the facts of a fatal accident in which one worker lost his life. As regards the complainant's allegation that the Commission failed to support him in his efforts to ensure compliance with the works contract, the Ombudsman's investigation revealed no maladministration. However, in view of its special expertise and responsibility in auditing the spending of EU funds, the Ombudsman invited the European Court of Auditors to consider certain aspects of the case that his inquiry had not covered.



The Commission disagreed with the Ombudsman's finding that it failed sufficiently to support the complainant in his conflicts with other parties involved in the project, insisting that it "*did facilitate as much as possible the mandate of the supervisor*". At the same time, the Commission acknowledged the sensitivity of the case and pointed out that, with a view to preventing similar issues from arising again, it had taken good note of the difficulties and misunderstandings experienced by the complainant. As regards ongoing infrastructure projects, it announced that it had further "*increased the focus on interaction among supervisors, works contractors, beneficiaries and institutional partners*". Referring to the methodology in place to monitor the implementation of works contracts – for instance, regular meetings, visits of the works site, and sharing minutes on substantial issues discussed – the Commission emphasised that it was ready to support supervisors in the accomplishment of their missions. It added that, with the aforesaid methodology in place, it had not had a similar experience to that evoked by the complainant. It concluded by saying that it is carefully monitoring the application of this methodology, which was the subject of discussions during its supervisory missions to Tirana, most recently in February 2013.

In response to the Ombudsman's finding that the Commission failed to take appropriate steps to seek reliably to establish the facts of the fatal accident at the construction site, the Commission insisted that it closely monitored safety on the site and instructed the contractor to follow recommendations issued by the supervisor. The Commission also submitted that the relevant Delegation "*did informally its own inquiry*" and liaised with the Albanian authorities in this regard. The Commission stated that it was fully committed to ensuring full compliance with safety standards in all infrastructure projects ongoing in Albania and added that the application of safety measures is one of the core tasks of supervisors. Officials based at its Delegation pay regular monitoring visits to the works sites and check, together with the supervisors, whether contractors fully implement safety measures and whether the relevant provision of the General Conditions is being fully complied with. The Commission concluded by saying that safety standards at works sites have also been the subject of discussions during its supervisory missions to Tirana, again, most recently in February 2013.

The Ombudsman welcomes the fact that the Commission has underlined its awareness of the problems at the core of his remarks and referred to certain concrete measures it has taken. The Commission also confirms that it has learned the necessary lessons in this case, by putting an emphasis on seeking to ensure that the channels of communication between the actors involved in ongoing infrastructure projects function.

Case 3177/2008/OV: EU Monitoring Mission contract dispute. Commission claims limited oversight role

The complainant worked for a European Union Monitoring Mission (EUMM) until the Head of Mission (Special Adviser) terminated his contract. The complainant submitted a complaint to the Ombudsman, arguing, among other things, that he had been dismissed because he had reported financial irregularities within the Mission. The Ombudsman closed the case, criticising the Commission for failing to handle the matter appropriately. More particularly, the Commission failed to open an inquiry into the alleged relationship between the complainant's reporting of irregularities and his dismissal, to hear the parties involved, to assess the relevant documents, and to



take any follow-up action that might have been necessary in light of the inquiry's outcome.

In its follow-up reply, the Commission reiterated that the Special Adviser in Monitoring Missions hires international contract personnel on his/her own behalf. Since it is not a party to the employment contract, the Commission cannot take on any role in the employment relationship, including on possible claims of unjust termination. The Commission also argued that, given that its oversight role is limited to financial matters, it had done everything in its power to address the matter raised by investigating the complainant's allegation of improper sale of vehicles by the EUMM. It further explained that it had reported to OLAF possible vehicle fuel fraud committed by EUMM local staff, which had not been identified by the complainant and which had cost the Mission over EUR 100 000.

The Commission added that the current contractual structure of Common Foreign and Security Policy (CFSP) missions, whereby a Head of Mission is hired by the Commission as a 'CFSP Special Adviser', is a response to the specific context of the CFSP. It takes into account the unique structure of CFSP missions, the precarious conditions in the field, the overall need for quick deployment and operability, and the limited duration of such operations. The system set out in successive Commission Communications describes the Special Adviser's responsibilities vis-à-vis the Commission, solely taking into account the Commission's role in implementing the CFSP budget, including basic rules for hiring international personnel. This is why the contract signed by the complainant contained basic provisions regarding conditions of employment, including remuneration and leave policy, conditions for termination, and basic mechanisms for addressing complaints. In particular, the complainant's contract stated that *"the contract can be terminated either by the Employer or the Employee giving one month's advance notice in writing"*.

The Commission argued that it could only play a supervisory role vis-à-vis its own staff, which CFSP personnel is not. It concluded that the matter had been properly dealt with by its services, given that, within its limited, purely financial, oversight role in CFSP matters, it had done everything in its power to address the matter. Notwithstanding this finding, the Commission pointed out that it was finalising a proposal, to be adopted by the Council, in order to clarify the status of staff employed in CFSP Missions. One of its objectives is to provide international staff serving in Missions with a clear and transparent system for addressing staff complaints.

While the Commission maintains its position and disagrees with the Ombudsman's finding of maladministration, it indicates that it is finalising a proposal to clarify the status of staff employed in CFSP missions, which includes a transparent staff complaints system. This should help ensure that the maladministration identified will not occur again.

See [Case 3373/2008/JF](#) above under 'Star cases'

OI/3/2008/FOR: Commission review of Early Warning System

A detailed account of the Ombudsman's decision in this case is given above in the 'Star cases' section



In response to this own-initiative inquiry, the Commission committed itself to reforming its Early Warning System (EWS) – a computerised information system which seeks to identify "threats" to the EU's financial interests and reputation. The Ombudsman insisted that the rights of persons included on the EWS, especially the fundamental rights of such persons as set out in the Charter of Fundamental Rights of the EU (for instance, the right to be heard and the right of access to the file), must be protected, including during the transitional period leading to the reform of the EWS. He made a further remark in this regard.

In its reply, the Commission stated that its services are currently working on the revision of the EWS decision to be presented in the course of 2013. In particular, a working group has been set up to discuss, among other concerns, issues related to the Ombudsman's findings.

The Commission further informed the Ombudsman that the new rules for the EWS would not be adopted before the Court of Justice's judgment on the Commission's appeal in the *Planet* case⁴. It explained that the judgment is expected to clarify the scope and nature of the EWS registration. The Commission will therefore assess the consequences for the fundamental right to be heard and to seek review of the registration in the EWS taking due account of the aforementioned judgment. The Commission promised to keep the Ombudsman informed of progress made in the revision process. It subsequently informed the Ombudsman that it intends to adopt an EWS Decision by the end of 2013.

The Ombudsman welcomes the statement that the Commission's services are working to revise the EWS Decision, which he intends to examine.

No follow-up reply was received by the Commission in [Case 914/2009/ER](#)

Case 1909/2009/BEH: Infringement complaint concerning assessment of public security threat posed by individual

The complainant in this case submitted an infringement complaint, alleging that, contrary to EU law, the Austrian authorities did not perform an individual assessment as to whether his client, Mr D., posed a threat to public security. The Commission considered that, on the basis of the information provided, it was not in a position to conclude that the Austrian authorities had infringed EU law. It decided not to open infringement proceedings. The Ombudsman considered that the Commission provided plausible reasons in support of its position that the Austrian authorities carried out the aforementioned individual assessment. However, it failed properly to address the complaint to the extent that it was directed at the decision by the Austrian authorities (i) not to allow Mr D. a period of time to leave Austrian territory and (ii) not to grant suspensory effect to his appeal against the expulsion decision which EU law allows for in cases of urgency only. The Ombudsman asked the Commission to re-examine the infringement complaint in this regard. The Commission maintained that the Austrian authorities had examined the urgency of the case and assumed such urgency to exist. Although the Ombudsman was not convinced by the Commission's reply, he closed the case with a critical remark given its isolated nature.

⁴ The Court of Justice handed down its judgment in Case C-314/11 P *Commission v Planet* on 19 December 2012.



In its follow-up reply, the Commission referred at length to the applicable law, as set out in the Ombudsman's decision, and put forward that this legal background obliges Member States to set up a system aimed at protecting EU citizens against unjustified expulsion decisions and to provide for certain procedural safeguards. The Commission insisted that, beyond putting in place these safeguards, Member States enjoy a certain margin of appreciation when carrying out assessments as to the urgency of an expulsion and the suspensory effect of an appeal against an expulsion decision. The Commission submitted that its role is to ensure that the aforementioned safeguards are in place. It went on to argue that the complaint did not suggest any structural deficit concerning Austrian legislation but instead aimed at obtaining an additional assessment of the case by the Commission, even though the case had already been assessed by national authorities and national courts, including the Austrian supreme courts, which are better placed to carry out an analysis of the specific characteristics of the case. The Commission further argued that it could not assess the findings of national authorities performing such a sensitive examination of interests and facts without interfering with the system set up by EU law and stated that it could not take on the role of a supervisory authority in this regard.

The Commission went on to state that it is undeniable that the urgency of the specific case in question was duly assessed, referring to the relevant decisions of Austrian authorities and courts. As regards the question of the suspensory effect of an appeal, the Commission submitted that it is not in dispute that such an effect may be ruled out in cases of urgency. Thus, the national authorities' assessment as to the urgency of the case was also decisive for the issue of suspensory effect. The Commission concluded by stating that it properly addressed all of the complainant's arguments.

The Ombudsman regrets that the Commission has essentially restated the arguments it submitted in the course of his inquiry, which he already found not to be convincing.

Case 1945/2009/ER: Alleged infringement. Commission disagreed with Ombudsman on when it could have acted

The complainant submitted an infringement complaint to the Commission concerning alleged irregularities in the Italian authorities' management of the quality premium scheme for durum wheat, which, in his view, violated the relevant EU rules. In his complaint to the Ombudsman, he alleged that the Commission failed to provide valid and adequate grounds for not yet having taken a decision on the infringement complaint.

In its opinion, the Commission pointed out that, on 19 January 2009, the EU legislator adopted Regulation (EC) 73/2009 which repealed the quality premium scheme for durum wheat as of 1 January 2010 and integrated it into a unified income support scheme for farmers. The Commission argued that, without having a complete picture of the new legal framework, it deemed it appropriate not to take a final decision on the infringement complaint, pending the adoption of detailed implementing rules for the new scheme. In March 2010, the Commission informed the complainant of its intention to close the case. The Commission finally decided to close the infringement procedure on 30 September 2010, on the ground that the premium scheme for durum wheat had been repealed.

In his decision, the Ombudsman pointed out that, as of 19 January 2009, the Commission knew that the existing premium scheme for durum wheat



producers would cease to apply on 1 January 2010. As a consequence, he saw no valid reason that could explain why the Commission would have had to wait for the adoption of the implementing provisions concerning the new scheme before deciding on the complainant's infringement complaint which concerned the old premium regime. He closed the case with a critical remark.

In its follow-up reply, the Commission expressed its disagreement with the Ombudsman's findings on a number of points. In particular, it insisted that the final decision to close the infringement complaint could not have been drafted in a satisfactory way at an earlier time.

The Commission disagrees with the Ombudsman's findings with the result that there is no guarantee that similar maladministration will not occur again.

Case 1972/2009/ANA: Public access to documents relating to Technical Barrier to Trade Directive. Ombudsman finds Commission approach reasonable

This case is also mentioned in the section on draft recommendations accepted as regards a procedural issue that was also raised.

The Commission refused to give public access to a revised draft technical regulation on recreational games communicated to it by the Greek authorities under the Technical Barriers to Trade (TBT) Directive. The Commission defended its refusal on the ground that it had to protect the dialogue it had entered into with the Greek authorities with an eye to bringing the relevant Greek legislation into conformity with EU law. The Ombudsman's view was that, because the case at hand concerned closed infringement proceedings, the Commission's reliance on the relevant exception in Regulation 1049/2001 on public access to documents, in the context of the notification procedure under the TBT Directive, was not convincing. The Commission subsequently granted access to the document and thus settled the complainant's claim. However, it did not accept the Ombudsman's reasoning. Given the systemic importance of the issues, the Ombudsman made a draft recommendation that, in principle, the Commission should give public access to revised draft technical regulations communicated under the TBT Directive, unless a Member State expressly asks for confidentiality and supports such a request with reasons that would be capable of rebutting the presumption of public access. As the Commission rejected this draft recommendation, the Ombudsman closed the case with a critical remark.

In its follow-up reply, the Commission maintained that its interpretation of the term "*investigations*" in the context of the procedure established under the TBT Directive, and the analogy drawn with infringement proceedings against Member States, was correct. In any event, the Commission pointed out that it publishes, as a general rule, the original and the final draft technical regulations communicated by the Member States under the TBT Directive. Applications for access to documents established or exchanged in the framework of the TBT notification procedure are assessed on their own merits and on a case-by-case basis. The present case concerned a very specific situation, where access to the revised draft technical regulations was refused at the time due to the specific circumstances of the case. In view of these circumstances and the fact that full access to the requested document was granted in the meantime, the Commission did not consider that any particular follow-up was required at present. The Commission, however, took note of the Ombudsman's findings



and drew his attention to pending case T-402/12 *Schlyter*⁵ which concerns the same issue.

The Ombudsman notes the Commission's practice of publishing original and final draft technical regulations on the Technical Regulations Information System database. As regards other documents emerging from its exchanges with Member States in the context of the notification procedure under the TBT Directive, the Ombudsman considers that it is reasonable for the Commission to await the judgment of the General Court and, meanwhile, to examine any requests for public access on a case-by-case basis.

Case 2365/2009/KM: Commission fails to engage with issues identified by Ombudsman

The Ombudsman closed the above case, which concerned the Commission's refusal to publish three letters⁶ on a discussion forum on its intranet, with the following critical remarks:

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

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

In its follow-up reply, the Commission did not comment on the publication of any articles written by the complainant. As regards investigating the potential impact of the rating system, the Commission stated that the legal basis for such an investigation would be Article 86 of the Staff Regulations, which requires "evidence of failure" by an official to comply with the Staff Regulations. It also cited case law to the effect that before OLAF can open an investigation or an institution can request it to do so, there must be "sufficiently serious suspicions". The Commission maintained that the information contained in the article to which the complainant had referred was very general and did not suggest any impact on the performance or loyalty of German officials. The Ombudsman had said so himself in the decision closing the inquiry. The Commission therefore did not consider the information it received as sufficient evidence of misconduct to open an inquiry under Article 86 of the Staff Regulations.

⁵Case T-402/12, *Schlyter v Commission*, action brought on 6 September 2012.

⁶ The first letter reported that a Commission official had met with, and provided confidential information to, journalists who had posed as representatives of Chinese businesses. The second stated, in this context, that the German government had put in place a system for evaluating German high-ranking Commission officials. The third criticised the fact that not all the Commission's press releases are available on its RAPID database. The complainant also asked the Commission to investigate these matters.



The Ombudsman regrets the Commission's failure to comment on the first critical remark. Presumably, this implies that it has done nothing to reduce the risk of similar maladministration occurring in the future.

It is also regrettable that the Commission failed to engage with the second critical remark, especially in light of the Commission's positive reaction to the Ombudsman's public service principles, the first of which is "*commitment to the European Union and its citizens*". The Ombudsman recalls that that remark did not aim to suggest an investigation of top German officials but rather of the rating system apparently operated by the German government, given the impact this might have on Commission officials of German nationality.

Case 2765/2009/VL: Alleged infringement of Directive on misleading advertising

This case is also mentioned in the section above on friendly solutions accepted.

The complainant lodged an infringement complaint with the Commission, in which he alleged that the Czech Republic failed to apply Directive 84/450/EEC (subsequently replaced by Directive 2006/114/EC) concerning misleading advertising. The Commission accepted the Ombudsman's friendly solution proposal to resume its investigation in order to examine the issues that still needed to be clarified, especially with regard to the impact that the information provided by Regional Trade Licensing Offices may have had on the practical effect of Directive 2006/114 in the Czech Republic. In a further remark, the Ombudsman considered that it would be citizen-friendly if the Commission were not only to inform him, but also the complainant, of (a) its assessment of the replies it received from the Czech authorities to its request for clarifications and (b) having taken into account the new elements provided by the complainant, its conclusions thereupon.

In its follow-up to the Ombudsman's further remark, the Commission stated that its letter to the Czech authorities emphasised that it was of the utmost importance that traders receive correct and complete information regarding their rights. The Commission asked the Czech authorities for information in this regard, in particular regarding the steps taken to rectify incorrect advice given by the Regional Trade Licensing Offices.

The Czech authorities replied that the Ministry of Trade and Industry had (a) issued methodological guidelines describing the approach to be applied in cases of suspected misleading behaviour by directory companies; (b) sent an opinion to the Regional Trade Licensing Offices regarding an assessment of direct mailing forms in the context of the Act on the regulation of advertising; and (c) organised regular seminars for staff of Trade Licensing Offices.

The Commission considered that the Czech authorities had taken the necessary steps to ensure correct information to traders about their rights under Directive 2006/114. It did not therefore see a need for further investigation.

The Commission also pointed out that it had taken steps to ensure enhanced protection of businesses against misleading marketing practices in Europe by publishing a Communication entitled 'Protecting businesses against misleading marketing practices and ensuring effective enforcement'. The Commission was also looking at the possibility of explicitly banning some clearly misleading practices, such as those of certain directory companies, so that traders would



instantly know that such practices are illegal. It was also considering establishing a cooperation procedure between enforcement authorities that would enable them to exchange information, request cross-border assistance from each other, and stop misleading practices affecting businesses.

The Ombudsman welcomes the Commission's constructive and detailed response to the critical remark. Its announcement that it will inform the complainant about the results of the assessment of the replies it has received from the Czech authorities is also to be applauded.

Case 2938/2009/EIS: Commission DG CONNECT takes steps to improve handling of access to documents

The Ombudsman noted that the Commission's handling of the complainant's application for public access to documents was clearly not in line with principles of good administration. The Commission apologised. In a further remark, the Ombudsman stressed that it would be useful if the Commission could take steps to prevent such shortcomings in the future.

In its reply, the Commission acknowledged unintentional errors in its handling of the complainant's confirmatory application. It also recognised that, in accordance with Article 41 of the Charter of Fundamental Rights of the EU, and point 4 of the Commission's Code of Good Administrative Behaviour, the Directorate-General in charge should have forwarded the confirmatory application to the competent service for further handling instead of asking the complainant to do so himself. In order to prevent such errors from occurring again, the competent service (DG CONNECT) has appointed a senior legal officer within its Compliance Unit to advise the services on the correct procedures to be followed to handle citizens' requests for access to documents.

The Ombudsman welcomes the Commission's helpful follow-up in this case.

Case 3098/2009/ANA: Commission apologises for poor handling of alleged infringement complaint and introduces systemic improvements

The Ombudsman closed his inquiry into the Commission's handling of an infringement complaint by issuing two critical remarks, as follows:

"It is good administrative practice to inform citizens in good time about the assessment of any complaints they may submit. In 2005, the complainant submitted a complaint to the Commission. The first aspect of that complaint concerned an alleged infringement of EU law by Greece, whereas the second aspect concerned an allegedly anti-competitive practice. The Commission took the view that it did not need to address the substance of the complaint. However, the complainant was only informed of this more than four years later, when he inquired about his complaint.

It is good administrative practice to handle complaints as rapidly as possible. The above-mentioned omission on the part of the Commission resulted in a serious delay in the assessment of the complainant's complaint."

The Commission reiterated its apology for the failure to inform the complainant about the assessment and non-registration of his complaint and the resulting delay of more than four years in handling. The Commission also underlined that it is striving to improve its procedures. It has, in this regard, improved and expanded the methods of registering and treating correspondence from



complainants concerning the application of Union law by the Member States. It emphasised its commitment to keep complainants informed about each procedural step of handling their complaints. Furthermore, the Commission informed the Ombudsman of its Notice on Best Practices⁷ for competition complaints and the objective set out therein to respond to such complaints within four months. This document constitutes a single source of reference for complainants and is drafted in accessible language.

The Ombudsman welcomes the fact that the Commission has drawn lessons from this case and introduced systemic improvements, which, if adhered to, are capable of raising the quality of its complaint handling in the future.

Case 104/2010/EIS: Commission acknowledges poor communication with complainant about alleged infringement

This case also concerned the Commission's handling of an infringement complaint. The Ombudsman criticised the Commission's failure to comply with some of the procedures set out in its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law⁸, namely to (i) give prior notice of its intention to close infringement complaints, and (ii) inform the person concerned of the closure of the case.

In its reply, the Commission "regretted" that it did not inform the complainant about its intention to close the case without opening an infringement procedure. It stated that it had taken measures to ensure that these mistakes are not repeated. In particular, it promised to provide training and clear guidance, via its revised manual put in place in September 2010, to ensure that the *Complaints Handling - Accueil des Plaignants* (CHAP) procedures are respected.

The Ombudsman welcomes the Commission's acknowledgement of its failure to inform the complainant and its explanation of the steps it will take to avoid such omissions in the future. The Ombudsman, notes that it would have been even more citizen-friendly if the Commission had *apologised* for failing to inform the complainant, or said that it was *sorry* it had not done so.

Case 535/2010/RT: Commission has no coercive powers as third party in contractual relations

The complainant worked as an expert on a project financed by the Commission. He did not receive full payment from the contractor. He asked the Commission to ensure that he received the payment due to him. The Commission failed to do so. After the Ombudsman intervened, the Commission asked the lead contractor to make the outstanding payment. The Ombudsman closed the case with the further remark that he trusted that, despite the negative replies it had received thus far, the Commission would continue to urge its lead contractor to make the outstanding payment, by using all the means at its disposal to convince the lead contractor to change its uncooperative position.

⁷ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 C 308, p. 6.

⁸ COM (2002) 141 final, OJ 2002 C 244 p. 5. This Communication was replaced in 2012 by COM (2012) 154 final: Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainant in respect of the application of Union law.



The Commission informed the Ombudsman of the efforts that it had made to try to convince the lead contractor to make the payment. Despite the contractor at first appearing to be willing to indemnify the complainant, it subsequently refused to pay or to reach any solution and refused to accept the Commission as an intermediary in the dispute. The Commission noted that, as a third party in the contractual relations, it has no coercive powers. It considered that it had done its utmost to settle the complainant's claim.

The Ombudsman commends the Commission for its efforts to assist the complainant and regrets that they proved unsuccessful.

Case 682/2010/TN: Commission handling of access to documents containing personal data

This case concerned a request for access to a report containing personal data. The Ombudsman found that the Commission was, in principle, entitled to refuse access because the complainant had not established why it was necessary to have the personal data transferred. The Ombudsman proposed, however, that the Commission reconsider granting access to other sections of the Report and subsequently made a critical remark to the effect that the Commission had not provided convincing arguments as to why partial access could not be granted. The Ombudsman also made a further remark aimed at providing better information on procedures to applicants requesting access to documents containing personal data.

In its follow-up to the critical remark, the Commission gave further explanations of its refusal to disclose the relevant section of the confidential part of its final report. Even if the names of the individuals in question were blanked out, it said, the complainant would still be able to identify the individuals concerned, as he is a former employee of the organisation in question.

In respect of the further remark, the Commission stated that it now systematically informs applicants requesting access to personal data of the requirement deriving from Article 8(b) of Regulation 45/2001⁹.

The Ombudsman notes that the Commission has provided, albeit belatedly, a satisfactory explanation of its refusal to provide partial access. The Ombudsman also welcomes the Commission's systematic provision of information to applicants concerning the conditions of access to personal data of other persons.

Case 814/2010/JF: Commission refusal to instigate independent external audit of the European Schools

The Ombudsman criticised the Commission's response to requests for an independent external audit of the European Schools, in particular on issues relating to school failure and governance.

The Commission provided an extensive follow-up, in which it outlined the measures adopted to fight failure in the European Schools. In particular, it provided: (i) information regarding two new studies into the Schools' system

⁹ Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data; OJ 2001 L 8, p. 1.



commissioned to the International Association for the Evaluation of Education Achievement (the 'IAEEA'); (ii) a copy of the Schools' Repeat Rates Working Group report of October 2010; and (iii) assurances that the Schools' Joint Teaching Committee will look into the issue of school failure in October 2012. The Commission will ask the latter Committee specifically to approach these issues in the French-speaking section by analysing and comparing the situation of school failure with science classes in France. The follow-up reply also emphasised that the European Baccalaureate is being reformed. Finally, the Commission recalled the Schools' governing structure and emphasised that it is not the system's decisional instance. It expressed the view that the Ombudsman's finding of maladministration was unjustified.

The Ombudsman welcomes the Commission's detailed explanation of the actions it is taking that are relevant to the complainant's substantive concerns. However, the follow-up does not address the key aspect of the critical remark, which is the Commission's failure directly to address the complainant's request for an independent external audit. The complainants are thus left, once again, to work out for themselves the Commission's reasons for not accepting such an audit.

Case 930/2010/CK: Commission communications with infringement complainants

This case concerned an alleged lack of diligence in handling an infringement complaint. With a view to assisting the Commission to improve its procedures, the Ombudsman made two further remarks. The first reminded the Commission that, whenever it cannot comply with the one-year time limit for deciding on how it should proceed following an infringement complaint, it should inform the complainant accordingly. The second encouraged the Commission to inform the complainant of each new step taken in relation to the ongoing infringement procedures, as well as of their final outcome.

In response to the first further remark, the Commission recalled that it has recently updated its 2002 Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law¹⁰. In line with the 2012 Communication, the Commission reiterated its commitment that, where no decision has been taken within a year from the date of registration of the complaint, it will inform the complainant in writing upon request¹¹.

With regard to the second further remark, the Commission informed the Ombudsman of its correspondence with the complainant in relation to the infringement proceedings relating to his complaint. It confirmed its commitment to continue informing the complainant about any further formal step undertaken in the context of those procedures.

The Ombudsman welcomes the positive follow-up to the second further remark. With regard to the first remark, the Commission's reply refers to its

¹⁰ COM (2002) 141 final, OJ 2002 C 244 p. 5. This Communication was replaced in 2012 by COM (2012) 154 final: Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainant in respect of the application of Union law.

¹¹ Point 8 of the 2012 Communication reads: "*Where this time limit is exceeded, the Commission will inform the complainant in writing upon his request*". Point 8 of the 2002 Communication stipulated: "*Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing.*"



2012 Communication, which modified some language versions of the 2002 Communication to state that complainants shall receive information only upon request, contrary to the Ombudsman's suggestion in the present case. The Ombudsman will take a view on the new version of Point 8 in the 2012 Communication in the framework of his own-initiative inquiry regarding the revision of the 2002 Communication (OI/2/2011/OV).

Case 1946/2010/VIK: Commission removes restriction on recruitment from CAST lists

The Commission rejected the complainant's application to become a contractual agent with European Research Council Executive Agency on the ground that she was not included in a certain CAST database. The Ombudsman made a critical remark, since such a requirement was not set out in clear and unambiguous terms in the relevant vacancy notice.

In its reply, the Commission informed the Ombudsman that *"as from 7 September 2012, the CAST lists reserved for EEAS and some Commission's services were opened to other services of the Commission, other European Institutions and the agencies. Thus, at present there are no restrictions for the agencies to recruit CAST laureates"*.

The Commission's response is satisfactory and should ensure that similar maladministration will not occur again.

Cases 2299/2010/ER and 388/2011/ER: Commission fails to justify access delay

The Ombudsman found that the Commission failed to provide a valid justification for the delay in dealing with the complainant's requests for access to documents and made a critical remark accordingly.

In its reply, the Commission expressed regret that it was not able to convince the Ombudsman of the reasons why processing the requests in question took longer than legally provided for. The Commission stressed that its services endeavoured to disclose a huge amount of documents with the purpose of satisfying citizens' requests by all possible means at their disposal and in accordance with Regulation 1049/2001 on public access to documents. Moreover, the Commission informed the complainant in this case that, according to Article 4(5) of Regulation 1049/2001, providing access to documents originating from the Member States requires their prior consultation and that, therefore, it would not be possible to meet the initial deadlines.

The Commission also emphasised its commitment to seeking a fair solution, as provided for in Article 6(3) of Regulation 1049/2001, in case of a request for access to a very large number of documents and stated that it showed its willingness to provide the requested documents in this case, taking into account the need to consult the relevant Member States. Indeed, with the exception of the two documents to which access was refused for duly justified reasons, the Commission granted access to all the documents the complainant asked for.

The Ombudsman notes that the Commission's capacity to meet the deadlines set out in Regulation 1049/2001 is the subject of an own-initiative inquiry.



Case 2635/2010/TN: Commission reviews Code of Conduct for EU Election Observers

This case concerned the Commission's alleged failure to notify the complainant of its finding that he had breached the Code of Conduct for EU Election Observation Missions. As the Ombudsman was not fully convinced that the complainant's rights as guaranteed by the Charter of Fundamental Rights of the EU, as well as the European Code of Good Administrative Behaviour (ECGAB), had been respected, he suggested measures that the Commission could take to put things right. The Commission provided assurances that the complainant remains a fully eligible candidate for future Observation Missions. As regards its general procedures for finding breaches of the Code of Conduct for EU Observers, The Commission that it was already implementing the Ombudsman's suggestion to carry out a review. The Ombudsman made a further remark, suggesting that the Commission's review take account of Article 41 of the Charter, as well as Articles 16 and 20 of the ECGAB.

In its reply, the Commission confirmed that it took the further remark into account in its review of the Evaluation Guidelines for Observers. The new Guidelines introduce clear procedures for evaluation (which allow the Observer to discuss his/her evaluation with the evaluators), clarify the criteria for the scores and underline the need for evaluators to duly substantiate and justify their possible negative remarks about the Observer's performance in writing. Moreover, they establish clear deadlines for the evaluation, the lodging of an appeal and for getting a response from the Deputy Chief Observers and the Commission. The Commission has also taken all the necessary measures to inform stakeholders (Observers, national Focal Points and Service Providers) about the new Guidelines. Finally, the Commission stated that it intends to carry out a review of the Observers' Code of Conduct.

The Ombudsman welcomes the Commission's response as a serious efforts to improve the rules and procedures in this area.

Case 105/2011/TN: Commission revises guide to EU contract procedures for external actions

The complainant company's bid was rejected when it emerged that its proposed team leader had committed himself to working full-time on another EU-funded project taking place at the same time. The Ombudsman found maladministration by the Commission because it advised the contracting authority to exclude the company's offer before it had been established that the proposed team leader would be unavailable for the project. However, the eventual decision to exclude the offer was appropriate. The Ombudsman also made a further remark aimed at reducing the risk that offers for carrying out EU-funded projects will be excluded due to the unavailability of key experts.

In its response to the remarks, the Commission stated that, as a result of changes to the Practical Guide to Contract procedures for EU external actions (PRAG) in January 2012, similar situations should not occur in the future. The new rules foresee alternatives in case of the unexpected unavailability of a key expert. The successful tenderer shall give due justification for the change of expert but acceptance by the contracting authority will not be limited to specific cases. The contracting authority will verify that the replacement's total score in relation to the evaluation criteria is at least the same as the scores given to the expert he/she is proposed to replace. Moreover, the minimum requirements for each evaluation criteria must be met by the replacement expert. Only one 15-



day period to propose replacements will be offered to the successful tenderer, during which it may propose several candidates for the same position. The contracting authority may choose between the candidates proposed.

The Ombudsman welcomes the Commission's action to address the systemic problem identified in this case by making practical changes to the rules and procedures. These changes should not only benefit tenderers and experts, but also help ensure that EU funded projects achieve their objectives.

Case 230/2011/EIS: Unwarranted delay by Commission in dealing with Finnish infringement complaint

An infringement complaint to the Commission against Finland concerned alleged discrimination against men in voluntary additional pension schemes. The Commission only closed the case more than seven years after it initiated infringement proceedings. The Ombudsman pointed out in this case that the Commission's handling of infringement complaints is not free from constraints flowing from fundamental rights and principles of good administration. He took the view that the complexity of the issues, which, did not justify the delay incurred. As regards the consistency issue raised as an argument by the Commission, the Ombudsman declared that pursuing a "*consistent approach*" must not lead to unnecessary delays.

In its follow up reply to the Ombudsman's critical remark, the Commission acknowledged that a final decision was taken very late and regretted any inconvenience for the complainants. It reiterated, however, that this case was extremely difficult legally and factually and was also, as regards the final decision to refer the case to the Court of Justice or not, dependent on the outcome of a series of other cases (approximately 20) in which comparable issues were raised.

The Commission admitted that not many measures had been taken in the Finnish case between 2008 and 2011. However, this had to be seen against the background of the action taken in other relevant cases, it said. The leading case in this respect was the French one, in which action was taken in the years between 2008 and 2011. The decision on how to deal with the French case was decisive for the Finnish one. The actions taken in the Finnish case could not, in the Commission's view, be seen independently from what was done in the French case. Therefore, when finally a decision was taken in the French case, this led to a decision in the Finnish case in 2011.

The Ombudsman notes that the Commission has essentially reiterated the arguments put forward in its opinion, with the addition of a few more details about cases raising comparable issues. There is no indication that the Commission has learned any lessons from the present case.

Case 319/2011/TN: Role of Commission in resolving financial dispute between partners in EU funded project

The complainant in this case, a British local authority, participated as a partner in an EU-funded project on waste management in India. It alleged that the Commission failed to ensure that the Greek company which coordinated the project paid the complainant's legitimate costs in full. The Ombudsman found that the Commission had used all the leverage available to it to assist the complainant. He made a further remark, according to which the Commission



should tell the coordinator to take all the necessary measures to resolve its differences with the complainant. The Commission should, moreover, continue to monitor closely the developments in this case, with a view to determining whether the attempts to resolve the dispute fail. In such an event, the Commission should issue a recovery order against the coordinator.

In its follow up reply, the Commission explained that despite an additional letter it sent to the coordinator, the latter was not willing to pay the outstanding amount. As the Commission has no contractual or other legal means to enforce compliance of the coordinator's obligations, it suggested to the complainant that it proceed with legal action as the only remedy available to it. The Commission underlined that a recovery order would not solve the problem but, rather, further complicate any possibility for the complainant to recover its outstanding amount through the suggested legal action. In order, therefore, to improve the chances for the complainant to achieve full satisfaction of its claim, the Commission said that it would postpone further actions against the coordinator until it is established that the legal remedies available to the complainant have not borne the expected results.

The Ombudsman welcomes the Commission's explanations and actions, which include explaining the situation to the complainant. The latter seems to be in agreement with the Commission's approach.

Case 640/2011/AN: Commission's restrictive language policy in public consultations

The Commission regularly consults citizens, associations, and other stakeholders in order to enable them to participate in EU decision-making. In 2010, a Spanish lawyer complained to the Ombudsman that the Commission publishes the documents for many such consultations only in English, and alleged that its language policy is arbitrary and contrary to the principles of openness, good administration, and non-discrimination. The Ombudsman shared the complainant's view that citizens cannot be expected to participate in a consultation which they are unable to understand. In his opinion, multilingualism is essential for citizens to exercise their right to participate in the EU's democratic life, which the Treaty of Lisbon guarantees. He thus concluded that the Commission's restrictive language policy constitutes maladministration and called on the Commission to publish its public consultation documents in all 23 EU languages, or to provide translations upon request. The Commission rejected the Ombudsman's recommendations, arguing that time constraints and available resources govern the principle of multilingualism, and that citizens are not legally entitled to consultation documents in all EU languages.

In making a critical remark, the Ombudsman noted that in 2012, following a procedure not related to the complaint to the Ombudsman, the Parliament adopted a resolution urging the Commission to review its restrictive language policy for public consultations.

In its follow-up reply, the Commission referred to its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Regulatory Fitness¹² and to the Commission Staff Working Paper accompanying the Communication and

¹² COM(2012) 746 final of 12 December 2012



detailing the results of a review of the Commission's consultation policy¹³. That review, while confirming the validity of the Commission's consultation policy and tools, pointed to areas where further improvements in implementation could be made, including how to better reach those directly affected. The Commission considered that language accessibility may be a factor in this regard. As a follow-up to these findings, the Commission announced planned measures to further strengthen consultations and improve their reach. Such measures include the publication of a rolling calendar of planned consultations on the 'Your Voice in Europe' website, the possible use of new consultation tools and Member States' communication channels, and improved quality of feedback. In this context, the Commission also committed itself to examining whether consultation documents and summaries could be more widely translated within existing budgetary limits. The Commission thus announced that its services would explore all available means to ensure wider language accessibility to public consultation documents and summaries, such as a more coherent provision of links to available translations of relevant documents in all languages whenever they exist, as well as measures to overcome non-financial obstacles to the provision of several language versions. These measures include (i) striking the right balance between clarity and conciseness of consultation documents on the one hand and the need to include all necessary information on the other and (ii) developing planning tools and streamlining procedures, which should help to better factor in translation needs for the different consultations.

The Ombudsman welcomes the fact that the Commission's approach is now more positive and constructive than it was during the course of his inquiry. The Commission is now clearly committed to finding a fair solution to the language barrier, albeit within the existing limitations. It refers, for the first time, to concrete steps it has taken to tackle the issue of citizens' involvement in its public consultations.

Case 695/2011/DK: Commission delay in dealing with request for environmental information under Aarhus Convention

The Ombudsman criticised the Commission's failure to acknowledge receipt of the complainant's correspondence within the two-week time limit required by Article 14 of the European Code of Good Administrative Behaviour. He also criticised its failure to send its substantive reply to the complainant's request for review until well after the expiry of the 18-week time limit imposed by Article 10 of Regulation 1367/2006¹⁴.

In its follow-up reply, the Commission (which had already apologised to the complainant for the delays) explained that it strives to answer all correspondence without unnecessary delays and within the deadlines specified in the legislation and in its code of good administrative behaviour. The reason for non-compliance with the deadline imposed by Regulation 1367/2006 in this case was due to four factors: (i) voluminous correspondence and annexes had to be translated from Hungarian into English; (ii) a large number of documents had to be analysed; (iii) the Commission had to coordinate its different services

¹³ SWD(2012) 422 final 'Review of the Commission Consultation Policy'

¹⁴ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264, p. 13.



in preparing its reply to the complainant; and (iv) the reply had to be translated into Hungarian.

The Commission undertook to make additional efforts to meet the deadlines specified in its code and in other relevant legislation. In cases where the Commission cannot respect the deadlines for sending a substantive reply, it will endeavour to send a holding reply to the person concerned, explaining the reasons for non-compliance with the initial deadline.

The Ombudsman welcomes the Commission's commitment to make additional efforts to meet deadlines and to send holding letters when it is unable to do so. The Ombudsman reminds the Commission that such holding letters should be sent before the expiry of the deadline, explain the reason for the delay and specify a new date by which a substantive reply will be sent.

Case 829/2011/VIK: Commission acts to improve staff training on contract procedures

The complainant led a consortium which took part in a tender procedure organised by the Commission's Liaison Office to Kosovo ('ECLO') for which the Commission was also the contracting authority. The complainant alleged that the Commission breached the applicable rules by awarding the contract to another consortium after having cancelled the tender procedure twice and without first publishing a procurement notice in the Official Journal. The Ombudsman made a critical remark, as follows:

"When organising tender procedures in the field of EU external relations, the administration must follow the provisions laid down in the Practical Guide to Contract Procedures for EU External Relations. The Ombudsman considers that, by adopting a contract award decision without first publishing a new contract notice in the Official Journal, and after having cancelled the two tender procedures in question, the Commission failed to comply with Sections 2.4.13 and 3.3.14 of PRAG."

In its reply, the Commission explained that it aims to provide regular training on PRAG for all staff involved in tender procedures and contract management. It added that the experience and lessons learnt from this case have been shared with other delegations and units within the Commission so as to avoid such cases happening again.

The Commission has acknowledged the importance of respecting the PRAG and taken concrete measures in order to avoid similar problems from arising in the future.

Case 1007/2011/ELB: Delay in Commission's recovery of overpaid salary

The complainant, a Commission official, was appointed Head of a Commission Representation. The Civil Service Tribunal subsequently annulled the appointment. The Commission then appointed him as acting Head of the Representation. He was erroneously paid the salary of a Head of Representation for a certain period of time after the Tribunal's ruling. When this was discovered, the Commission asked him to refund the money that had been unduly paid to him. The complainant challenged this recovery and turned to the Ombudsman. The Ombudsman found no maladministration by the Commission as regards the recovery of the monies unduly paid to the complainant. He made a further remark concerning the length of time it had



taken the Commission to align the complainant's administrative situation with the judgment of the Tribunal and encouraged the Commission to endeavour in the future to deal with such situations within a reasonable time.

The Commission's follow-up reply explained that the delay in dealing with the complainant's case was due to the complexity of the problem, the need to examine the various options and the fact that the interests of other persons as well as the complainant were at stake.

The Ombudsman notes the Commission's explanation that the circumstances of the case were exceptional.

Case 1015/2011/AN: Commission explains why it closed an infringement process

The Ombudsman found that the Commission's statement of reasons for closing the relevant aspect of a certain infringement procedure appeared reasonable. He made a further remark to the effect that the Commission could undertake the reform it announced as soon and as transparently as possible, closely involving stakeholders. The Ombudsman also asked the Commission to inform him of any action taken in relation to his findings.

In its follow-up reply, the Commission confirmed its intention to amend Commission Decision 92/353/EEC¹⁵. However, it was not able to indicate a timetable because the scope of the reform remains to be determined. The Commission assured the Ombudsman that he would be informed of the outcome of the review process and the Commission's consultation with relevant stakeholders.

The Ombudsman welcomes the Commission's confirmation that it intends to modify the relevant text, consult stakeholders and keep the Ombudsman informed.

Case 1045/2011/RT: Need to follow fair procedure where Commission proposes to recover funds paid

Following an OLAF investigation, the Commission decided to recover the entire amount it had paid for two projects. The complainant argued that the Commission failed to hear it in relation to the allegations brought against it. The Ombudsman considered that the complainant had, de facto, the possibility to be heard because it could submit its comments before and during the recovery process, and thus change the outcome in its favour. However, the pre-information letter indicating the reasons for recovery did not contain an explicit invitation to submit comments on the intended recovery nor a clear indication of the deadline for doing so. The Ombudsman therefore made a further remark, inviting the Commission to consider introducing the corresponding changes in the pre-information letters to be sent in recovery proceedings in the future.

The Commission welcomed the remark and observed that it already complies with it. It referred, in this regard, to a note reminding the Commission services that the authorising officer must ensure that the debtor has been given a

¹⁵ Commission Decision of 11 June 1992 laying down the criteria for the approval or recognition of organizations and associations which maintain or establish stud-books for registered equidae; OJ 1992 L 192, p. 63.



reasonable amount of time to present comments before the recovery order is drawn up. The preliminary information letter drafted in the language or languages of the potential debtor or of the contract/agreement with him must mention explicitly the reasons for the planned recovery (for example, failure to present the final report or any other contractual omission) and the deadline for the potential debtor to present comments. The Commission further stated that the currently used standard pre-information letter (the objective of which is to hear the debtor and to enable him/her to present comments) reflects the above.

The Ombudsman notes that the Commission's procedure, if followed correctly, appears to provide adequate guarantees of the debtor's rights, including the right to be heard.

Case 1472/2011/MMN: Failure of Commission to respect time limits in access to documents request

The complainant asked the Commission for access to the replies given by France and Spain to a questionnaire. The Commission's response was substantially delayed and it apologised to the complainant. However, the Commission appeared to consider that the need to consult Member States, in accordance with Article 4(5) of Regulation 1049/2001 on public access to documents, entitles it to exceed the deadlines set out in the Regulation. The Ombudsman noted that the Union courts have made it clear that the fact that the institution has initiated a dialogue, under Article 4(5), with the Member State from which the document requested originates, does not entitle it to exceed the time limits established in the Regulation.

In its reply, the Commission stated that it endeavours to handle applications within the time-limits set by Regulation 1049/2001. In cases where the Commission is not in a position to take a decision within these time-limits, it proposes a fair solution to the applicant in accordance with Article 6(3) of the Regulation.

The Ombudsman notes that it is not at all clear what the Commission envisages by proposing a "*fair solution*" to the applicant in accordance with Article 6(3) of Regulation 1049/2001. Article 6(3) concerns applications relating to a very long document or to a very large number of documents held by an EU institution. That being said, one could argue that when a very long document or a very large number of documents held by an EU institution emanate from a Member State, it may be reasonable for the Commission to seek a fair solution, applying by analogy Article 6(3). However, in the case at hand, the application for access to documents did not relate to a very long document or a very large number of documents. It should also be noted that the Commission merely stated that it "*endeavours*" to handle applications within the deadlines set by Regulation 1049/2001. The Commission's most recent annual report on the application of Regulation 1049/2001 does not contain any specific information on the time taken for handling such applications. This should be compared, for instance, to the corresponding report drawn up by the Council, which contains data concerning the average time taken for handling such requests.

In view of the foregoing, the Ombudsman opened an own-initiative inquiry into the time taken by the Commission to handle requests for public access to documents.



Case 1480/2011/MHZ: Commission could have explained earlier why it dealt slowly with infringement case

The Commission took seven months to assess the Polish authorities' reply to its reasoned opinion in this infringement case, which concerned obstacles to the registration of right-hand drive vehicles in Poland. The Ombudsman criticised the Commission's failure to justify this length of time in a clear and convincing manner.

In reply the Commission provided further explanation of the time it took to deal with the case: (i) it could only start working on the case after it had received the official position from Poland (ii) it was necessary to translate accurately Polish texts, which required extensive analysis in collaboration with a number of Commission services, including the Legal Service; (iii) not all the services consulted were familiar with road safety issues; and (iv) in order to maintain consistency and equal treatment, it was decided to await the outcome of a similar case concerning Lithuania before deciding on the Polish case.

The Commission also stated that although the case appeared simple to the complainant, it concerned very complex, complicated and sensitive issues. The Court of Justice has not yet issued clear guidance as to the right balance to be struck between the need to protect the safety of road users in the Member States and enabling a certain number of citizens to register their vehicle in that State without having to change the steering wheel's position.

The principle of free movement of goods is not an absolute freedom and Member States can derogate from it on a number of grounds, including road safety. The Commission further stated that it attributes no less importance to road safety than it does to the free movement of goods. The need for a careful approach, as advocated by the Commission, was confirmed by the Court of Justice in its judgment of 10 February 2009, in case C110/05 *Commission v Italy*. In that case, the Commission's action was dismissed because the prohibition of the towing of trailers behind motorcycles specially designed for this purpose was considered justified on road safety grounds.

In the light of the foregoing, taking into account the specificity and the complexity of the case, the Commission considered that it had taken a reasonable amount of time to ensure that all conflicting interests were thoroughly investigated and analysed. The Commission emphasised that it always aims to take decisions as quickly possible without, however, compromising the quality of those decisions, especially in areas where the health and safety of citizens is at stake.

The Ombudsman considers that the Commission's detailed explanation of the length of time taken to deal with the case is reasonable. It is regrettable that it did not provide such explanations earlier.

Case 1864/2011/TN: Commission changes guidelines on information for unsuccessful tenderers

The complaint concerned the evaluation of a grant application for a EuropeAid call for proposals. The Ombudsman made two critical remarks, as follows:

"By failing to provide the complainant with further information about the evaluation of its application at a point in time when the decision to reject the application had already been made, the Commission committed an instance of maladministration.



When responding to the complainant's e-mail of 8 August 2011, the Commission failed to act in accordance with principles of good administration and particularly with Article 12(1) of the European Code of Good Administrative Behaviour. Article 12(1) provides that, when responding to correspondence such as e-mails, the official shall reply as completely and accurately as possible to questions which have been asked."

In its reply, the Commission stated that it shares the Ombudsman's concern that unsuccessful applicants should be informed as completely and accurately as possible. The Commission therefore modified its Practical Guide to Contract Procedures for EU external actions (PRAG). The new version of the PRAG, which entered into force on 1 January 2013, takes into account the 2012 revision of the Financial Regulation and the new Rules of Application.

Specifically, the Commission has clarified, in Section 2.8.2. of the PRAG, that the confidential evaluation process ends with the approval of the evaluation report. Whereas the previous version of the PRAG prohibited the disclosure of information until the signature of the contract, the amended version foresees that *"no information about the examination, clarification, or evaluation of tenders or proposals, or decisions about the award of a contract, may be disclosed before the approval of the evaluation report"*. Moreover, the Commission has modified the standard letters sent to unsuccessful applicants put on the reserve list. The new version reads as follows: *"At this stage, your full application has not been recommended by the evaluation committee for award of a grant"*.

The Ombudsman welcomes the fact that the Commission has changed the PRAG in line with the Ombudsman's understanding of the applicable rules.

Case 2017/2011/RT: Unwarranted delay by Commission in publishing results of a selection competition

This case concerned the Commission's failure to provide an adequate explanation for delaying the publication of the results of a selection competition. The Ombudsman considered that ten months it took the Commission to publish the results of the admission tests was excessive. Moreover, at no time during this ten-month period did the Commission provide candidates with any information concerning the date on which it expected to publish the results and the reasons for the delay.

In its reply, the Commission acknowledged that significant delays occurred in the organisation of Open Competition COM/AD/17/10, for which it strived to provide an explanation in its opinion on the complaint. The Commission regretted that the circumstances in which the competition took place led to such delays. It also acknowledged that its communication with candidates could have been better. It will take measures in the future to remedy this shortcoming.

The Ombudsman welcomes the Commission's announcement of measures to reduce the risk of similar problems occurring in the future.

Case 2056/2011/KM: Six-year delay by Commission in producing a revised staff report following Court judgment

The Ombudsman closed this case with the following critical remark:



"Where a staff report has been annulled by a court decision, it is good administration to adopt a new staff report within a reasonable period of time. In the present case, it took the Commission until March 2012 to establish a new staff report for the complainant after the initial report was annulled by the then Court of First Instance in December 2005. This is clearly excessive."

The Commission underlined that it had never dealt with such an exceptional case as the present one where all the members of the relevant committee had left the institution or died. This meant that it had to go through a number of consultations in order to find a legally correct solution. It underlined that the complainant himself acknowledged that the situation was particularly difficult. The Commission explained that it had now found a solution to these kinds of problems. If such an issue arose again, it would, therefore, be dealt with within a reasonable timeframe.

The Ombudsman accepts that the complainant's case was unusual and that the risk of similar maladministration occurring in the future is low.

Case 2225/2011/AN: Commission failure to deal with infringement complaint in timely and correct manner

The Ombudsman criticised the Commission's handling of an infringement complaint in that it did not respect the time limit for sending an acknowledgement of receipt, laid down in its 2002 and 2012 Communications¹⁶ and in the European Code of Good Administrative Behaviour. Furthermore, the Commission failed to deal with the complainant's infringement complaint, once it was registered as such, in accordance with the procedure laid down in its 2002 Communication.

The Commission's reply first provided a general overview of (i) infringement-complaint management between 2009, when its *Complaints Handling - Accueil des Plaignants* (CHAP) procedure was introduced, and 2012, when it issued the new Communication, and (ii) the changes brought about by the new Communication.

The Commission also stated that, following the critical remarks in this case, the Commission's Secretariat-General has reminded all services of the importance of rapid acceptance by them of competence for complaints, and drawn attention once again to the applicable deadlines.

The Commission also agreed that the guarantees in favour of citizens cannot be unilaterally withdrawn once their correspondence has been registered as an infringement complaint. Correspondence should continue to be managed as an infringement complaint once this status has been confirmed. The Commission has also reminded its services of this.

The Ombudsman accepts that issuing a reminder to its services of the correct procedures constitutes appropriate follow-up action by the Commission in order to reduce the risk of similar maladministration occurring in the future.

¹⁶ Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law; COM (2002) 141 final, OJ 2002 C 244 p. 5. This Communication was replaced in 2012 by COM (2012) 154 final: Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainant in respect of the application of Union law.



Case 2466/2011/ER: Commission failure to respect time limits in access to documents case

The complainant alleged that the Commission unlawfully extended the deadline for deciding on his confirmatory application for public access to documents. The Ombudsman closed the case with the following critical remark:

"Article 8(2) of Regulation 1049/2001 stipulates that the deadline for replying to a confirmatory application for access to documents can be extended by a further 15 working days in exceptional cases and on condition that detailed reasons are given. In the present case, the Commission simply stated that it did not yet have all the information it needed. In so acting, it manifestly failed to comply with the said rule."

The Commission's follow-up reply provided further explanations: in particular: (i) the draft decision had to be translated after the internal consultations and (ii) the confirmatory application had to be assessed in light of the large volume of correspondence that the complainant addressed to it and that was partially repetitive and abusive, thereby hindering the proper treatment of the request. The Commission also pointed out that the final decision on the confirmatory application was taken within the extended deadline.

While the need for translation cannot be considered as an exceptional occurrence capable of justifying an extension of the deadline, the Ombudsman considers that the second explanation, namely, the amount of correspondence sent by the complainant, could have some merit.

Case 76/2012/GG: Easy access to e-mail addresses of Commission services

In a further remark, the Ombudsman explained that he shared the complainant's view that it would be desirable if the e-mail addresses of the Commission's services could be found more easily on its website.

The Commission's reply explained that DG INFSO was replaced by the Directorate-General for Communications Networks, Content and Technology (DG CONNECT) as from 1 July 2012. DG CONNECT's website, which was in place as of that day, contains a clearly labelled 'Contact' point in the usual place for such indicators on websites, i.e., on the top right, next to the legal notice, search and 'About' facilities. The 'Contact' page gives all contact possibilities, including a central e-mail address. In addition, the 'Who's who' page gives contact details for all management staff in the DG.

The Ombudsman considers that the Commission has taken appropriate systemic action in response to the further remark.

Case 173/2012/VL: Improvements needed in Commission's handling of access to documents cases

The Ombudsman made three further remarks suggesting improvements in the Commission's handling of requests for access to documents.

The first further remark was that *"it would be useful if the Commission could do its utmost to ensure the rapid registration of requests for access even during [holiday] periods"*. The Commission's reply did not mention any specific measures in this respect.



The second further remark suggested that the Commission could consider taking steps to ensure that requests for access are properly registered and that it would be more citizen-friendly if requests for access made in the appropriate form were registered, rather than instructing applicants to re-submit these requests to a specific mailbox. The Commission's reply focused on the facts of the specific case rather than addressing the systemic issues

The third further remark suggested that "*[t]he Commission would be well advised to ensure that when its services reject an initial application for access to documents, the applicant is properly informed about his or her right to make a confirmatory application*". The Commission's reply that the services of the Employment, Social Affairs and Inclusion Directorate-General have been reminded accordingly. Whilst such a reminder is welcome, the application in question was rejected by the Commission Representation in Ljubljana.

The Ombudsman believes that the Commission could have done more to follow up constructively on the further remarks in this case.

See [case 1291/2012/OV](#) above under 'Star cases'

OI/2/2012/VL: Commission communication regarding infringement complaints now published in all official EU languages

The Commission's Communication on relations with the complainant in respect of infringements of Community law¹⁷ (the 'Communication'), which was adopted and published in 2002, informed EU citizens of their rights as regards the submission of a complaint to the Commission alleging the infringement of EU law by a Member State. The Ombudsman noted that the Communication was not available in the official languages of the Member States which acceded to the EU in 2004 and 2007. Nor did it appear to be available in Irish. Given that that state of affairs suggested that citizens of the Member States concerned were not as well informed about their rights as they ought to be, the Ombudsman decided to open an own- initiative inquiry.

During the inquiry, the Commission informed the Ombudsman that it had, in the meantime, adopted an updated version of the Communication, which was to be published in all the official languages. In these circumstances, the Ombudsman considered that further inquiries were no longer justified. He made a further remark suggesting the Commission examine whether there are any other communications or similar publications concerning citizens' rights that have not yet been translated into all the official languages of the Union.

In its reply, the Commission underlined that citizens are always at the centre of its work when it monitors the correct application of EU law. It stated that it was not aware of any act adopted at EU level that could violate citizens' rights due to an absence of a translation into all official languages.

The Ombudsman welcomes the Commission's assurance and notes, in particular, that it has published its code of good administrative behaviour in all the EU official languages.

¹⁷ COM (2002) 141 final, OJ 2002 C 244 p. 5.



3. European Anti-Fraud Office (OLAF)

Case 3136/2008/EIS: OLAF improves procedures for informing the subject of an investigation of its outcome

The complainant, who was the subject of an OLAF investigation, requested access to (i) the documents on the basis of which OLAF decided to carry out that investigation; and (ii) information about the result of the investigation. OLAF refused. After inspecting OLAF's file and consulting the European Data Protection Supervisor, the Ombudsman concluded that the reasons given by OLAF for refusing access were valid and adequate. The Ombudsman noted, however, that the fundamental right to good administration laid down in Article 41 of the Charter of Fundamental Rights of the EU requires that a person who has been the subject of an investigation be informed, within a reasonable time, of the results of that investigation once it has been closed. In the present case, OLAF failed to do so and the Ombudsman issued a critical remark.

In its reply, OLAF first pointed out that the complainant was ultimately informed of the result of the investigation. It went on to state that the OLAF Manual in force when the issues here concerned took place foresaw that persons concerned would be informed of the result of the investigation. However, that Manual has now been replaced by the 'OLAF Instructions to Staff on Investigative Procedures'. According to the OLAF Instructions, persons concerned have to be informed of the closure of a case. OLAF has also introduced a new work form, which gives more detailed information to persons concerned regarding the closure of a case. Finally, OLAF pointed out that the proposal in the final compromise text for the reform of Regulation 1073/99 on OLAF investigations, foresees that, if no evidence has been found against the person concerned, the latter shall be informed within 10 working days of the closure of the case¹⁸.

The administrative action taken by OLAF appears to be appropriate to reduce the risk of similar maladministration occurring in the future.

Case 2674/2009/ER: OLAF improves procedures for dealing with complainants

This case concerned a complaint to OLAF about alleged mismanagement of the quality premium made available by the EU for special varieties of durum wheat in Italy. In his complaint to the Ombudsman, the complainant alleged that OLAF failed (i) to provide adequate reasons for its decision to classify the matter as a "non-case" and (ii) to inform him of the appeal possibilities available for challenging its decision. The Ombudsman issued a critical remark in relation to this second aspect, as follows:

"It is good administrative practice to indicate the possibilities of appeal against decisions taken by an EU institution, body, office or agency. In the present case, OLAF failed to do so."

OLAF's primary concern in its response to the critical remark appeared to be to protect the discretion of its Director to open, or not to open, investigations. To

¹⁸ See now Article 11 (7) of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), 2013 OJ L 248, p.1.



this end, it put forward arguments concerning (i) the scope and purpose of the duty to give reasons under Article 41 of the Charter of Fundamental Rights of the EU and Article 18 of the European Code of Good Administrative Behaviour; (ii) the scope and purpose of judicial review for failure to give reasons; and (iii) the meaning of the word "*appeal*" in Article 19 of the Code. These arguments led OLAF to conclude, in summary, that an exchange of correspondence leading to the classification of a complaint as a "*non case*" is purely an exchange of "*information*" within the scope of Article 22 of the Code, and not a decision *adversely affecting* a person. Thus, in its view, it is not possible to appeal OLAF's classification of correspondence as a "*non case*", contrary to what the Ombudsman found in his decision.

As regards (i), the Ombudsman has consistently taken the view that good administration requires more than merely not breaking the law. There is, therefore, no need to discuss OLAF's views concerning the scope of the legal duty to give reasons, because the issue in the present case was the requirements of good administration as regards reasoning.

As regards (ii), OLAF understands the critical remark as referring to judicial review (Article 47 of the Charter). The Ombudsman, however, meant the remark to refer to Article 43 (the right to complain to the Ombudsman). As the case law mentioned by OLAF¹⁹ makes clear, "*(t)he institution of the Ombudsman gives citizens of the Union an alternative non-judicial remedy to protect their interests. That alternative remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings.*"

As regards (iii), the meaning of the word "*appeal*" in Article 19 of the Code is somewhat unclear. In the Ombudsman's understanding, when the European Parliament adopted the Code, it did not intend to refer only to administrative or judicial appeals in the strict sense, but also to judicial review and to the right to complain to the Ombudsman. This understanding is confirmed by the fact that Article 19(2) explicitly states that the "*possibilities of appeal*" include complaints to the Ombudsman. Furthermore, OLAF itself accepts that this latter possibility is also available when a person is not, in the legal sense, *adversely affected*, which necessarily implies a broader interpretation of Article 19(1).

For the reasons explained above, therefore, much of OLAF's follow-up is not useful. OLAF concludes, however, by offering to discuss the underlying topic of how best to inform citizens turning to it of appeal possibilities, including the Ombudsman. In order to avoid any possible misunderstanding for informants, it said, it intends to present general information on the possibility to submit complaints to the Ombudsman on its website or may include such information in the standard acknowledgement of receipt sent to every informant following receipt of the initial information.

The Ombudsman welcomes this constructive suggestion and is ready to help OLAF find the best way to inform citizens who are potentially affected of the appropriate appeal possibilities. It also seems useful to make clear in this context that Article 19 of the Code concerns only the existence of a relevant remedy, not its scope. In particular, the existence of an "*appeal*" does not imply that the appeal body is entitled to substitute its judgment for that of the body appealed against.

¹⁹ Case T-209/00 *Frank Lamberts v European Ombudsman* [2002] ECR II-2203, at paragraph 65.



The Ombudsman welcomes OLAF's constructive suggestion to discuss how best to inform citizens who provide information to OLAF of their potential remedies, including the Ombudsman.

Case 2676/2009/ANA: OLAF procedures for on-the-spot checks

The complainant, a consultancy firm, complained about the way that OLAF carried out an on-the-spot check at its premises. In closing the case, the Ombudsman criticised two aspects of OLAF's conduct.

1. OLAF failed to ensure that the rights and procedural guarantees of those involved were sufficiently clarified. Specifically, the complainant's employees were not informed (a) that their cooperation was voluntary, nor (b) in what capacity - witnesses, suspects, or any other status - they were to be interviewed.
2. OLAF did not provide a satisfactory explanation in response to the complainant's accusations concerning the behaviour of the persons carrying out the on-the-spot check on its behalf.

As regards 1 (a), OLAF said in its follow-up reply that, in the framework of the ongoing revision of its investigative forms, it is seeking the most appropriate balance between investigative efficacy and effective communication of procedural guarantees to the persons involved. OLAF undertook to keep the Ombudsman informed of the outcome of this revision. As regards 1 (b), the current OLAF instructions to Staff on Investigative Procedures, adopted in February 2012, ensure that potential interviewees are informed of their status.

As regards 2, OLAF insisted that the conduct of the OLAF investigator did not constitute an infringement of the fundamental right of an economic operator to be assisted by legal counsel. If this had been the case, OLAF would not have hesitated to adopt a prompt and appropriate remedy. Moreover, OLAF assured the Ombudsman that its investigators are required to respect the European Code of Good Administrative Behaviour.

The Ombudsman welcomes OLAF's response to the first critical remark. As regards the status of interviewees in external investigations, OLAF has addressed the problem adequately. As regards ensuring that it informs those interviewed in external investigations that their cooperation is voluntary, the Ombudsman notes OLAF's undertaking to inform the Ombudsman of the outcome of the ongoing revision of its procedures.

As regards the second critical remark, OLAF merely maintains the position it expressed in the course of the inquiry. It does not appear to have considered whether there may be any useful lessons to learn from the case.

4. European External Action Service (EEAS)

OI/1/2011/AN: EEAS improves its oversight of financial transactions of EU delegations

This own-initiative inquiry concerned the practice of the Delegation to Bosnia and Herzegovina to pay local staff's share of social security contributions, even though these contributions were supposed to be deducted from salaries. The Ombudsman made a critical remark concerning the incapacity of Headquarters



(first, the Commission, and then the EEAS) to detect, over a period of about five years, an erroneous accountancy practice with significant budgetary implications. Furthermore, a further remark invited the EEAS to consider taking, if it has not yet done so, concrete measures in order to improve budgetary control over the EU Delegations.

In its follow-up reply, the EEAS informed the Ombudsman that, in 2008, the Commission fully implemented an extension of its Accrual Based Accounting system (ABAC) which records all financial transactions for EU delegations. The same year, the review of control procedures for delegations' legal obligations in the area of social security became a priority for the Unit responsible for local agents. The review led to the allocation of additional human resources to this function. This ensured improvements in the instructions given to delegations and in operational and budgetary control.

The EEAS provided a detailed explanation of the measures put in place as follows:

- a) The delegations have been issued with 'Guidelines for the affiliation of local staff to the local social security schemes'. The Guidelines explain the general principles and legal basis governing this affiliation. They also contain practical guidance on (i) which staff are covered, (ii) the action to take depending on whether the local scheme is mandatory or not, and (iii) book-keeping instructions with respect to employer and employee contributions. The Guidelines were updated when the EEAS took over responsibility from the Commission for delegations outside the EU. The EEAS regularly reminds delegations, formally and informally, of their obligations in terms of social security contributions and of the need to inform local agents of their own obligations.
- b) The dedicated EEAS unit uses reference databases on the different national social security legislation and works to keep itself informed on the latest legal developments and to ensure the correct interpretation of the rules in force. When necessary, the delegations are asked to consult local law firms specialised in this area to seek additional clarifications. In countries where there is no social security coverage, a periodic monitoring of the development of relevant local legislation is undertaken.
- c) The EEAS has deployed a new electronic payroll system to facilitate both operational and budgetary control. In addition, the EEAS uses a checklist to verify that pay slips comply with the relevant rules, also as regards social security. This reduces the risk of misinterpretation of the national social security legislation.
- d) An ex post check is performed to verify that the social security amounts have been entered on the correct budget line and extra-budgetary account. In 2008, the administration discovered that it was difficult to distinguish which amounts paid by the delegations to local authorities corresponded to employer contributions and which to employee contributions. Therefore, the administration created, in 2009, a new budget sub-item, which allows the correct amount to be checked and to verify whether or not employee contributions are withheld from the local agent's basic salary. This also facilitates ex-post controls, which are carried out as regards one Delegation per week. On the basis of these controls, the EEAS monitors those delegations where a problem has been identified.



e) In addition to the internal administrative procedures, an ex post Control Division carries out regular and sample checks of salary payments and related matters and conducts on-site inspections of delegations on a rotating system.

All of the above elements ensure a very high degree of traceability of employee and employer contributions, which was not available before 2008, when the events subject to this own-initiative inquiry occurred.

The Ombudsman welcomes the clear and detailed explanations provided by the EEAS as to the measures it has taken to reduce the risk of similar maladministration occurring in the future.

5. European Personnel Selection Office (EPSO)

Case 18/2010/IP: Failure of EPSO to give candidates details of marks achieved in selection competitions

(See also cases 1863/2010/VIK and 2050/2011/RT below)

In the framework of the Ombudsman's own-initiative inquiry on transparency in EU recruitment procedures (OI/5/2005/PB), EPSO gave an commitment that that it would encourage selection boards to provide candidates with an evaluation sheet containing a breakdown of their marks in the light of the evaluation criteria and sub-criteria it uses.

In the present case, the Ombudsman concluded that EPSO did not respect this commitment and made a critical remark.

In its reply, EPSO asked the Ombudsman to reconsider the critical remark. It explained how, in its view, it fulfilled the above-mentioned commitment in (a) the open competition that gave rise to the present complaint and (b) open competitions launched since 2010, following the adoption of EPSO's Development Plan.

As regards (a), EPSO expressed the view that the commitment it gave in OI/5/2005/PB is of relevance only in cases in which the selection board *"has decided to award such partial marks, and where it is legal for the selection board to do so. It should not be inferred that EPSO would encourage the selection boards to award partial marks in cases where an obligation to do so does not stem directly from the competition notice, or where it can reasonably be deemed to be incompatible or inappropriate with regard to the test in question"*. In the present case, because of the nature of the written test in question, the Selection Board decided not to award partial marks per assessment criterion. EPSO insisted that this decision was within the limits of the Board's wide discretionary powers and fully in line with the provisions of the competition notice. Since no partial marks were awarded for the written test in question, it was not possible for EPSO to propose that the Board indicate such marks in the evaluation sheet.

As regards (b), EPSO explained that all competitions launched since 2010 have been based on the assessment of competencies. Each competition notice contains clear information as to which competencies are assessed and how they are scored. EPSO recalled that candidates' results are now communicated, in a detailed fashion, through the "competency passport". In addition to the total mark obtained and a global overview of the candidate's main strengths and weaknesses, the passport provides the partial marks awarded by the Selection



Board for each assessed competency, and a description of the Board's main conclusions on the candidate's performance. EPSO further stated that it is foreseen "to incorporate in the competency passport a detailed description of the scoring method applied by the selection boards, in addition to the information already contained in the competition notices." In EPSO's view, this constitutes an important step in enhancing transparency in open competitions.

As regards (a), the Ombudsman is not convinced by EPSO's arguments about the limitations on its ability to ensure that selection boards work properly. Given that EPSO writes the competition notices, it cannot avoid responsibility by invoking the fact that a notice does not oblige a selection board to act in a particular way.

As regards EPSO's response (b), the Ombudsman welcomes the introduction of the competency passport, which appears to provide helpful and constructive feedback to candidates. The Ombudsman notes that EPSO foresees that, in the future, the competency passport will provide detailed information about the scoring method applied by the selection board.

Case 1370/2010/BEH: EPSO written tests not in line with Notice of Competition

This case concerned an open competition aimed at drawing up reserve lists for assistants in the buildings sector. The complainant alleged that the written test he sat did not comply with the Notice of Competition. The Ombudsman made a critical remark and further remark, as follows:

"Principles of good administration require that notices of competition indicate as clearly as possible the requirements and conditions applicable to open competitions. The Notice of Competition in Open Competition EPSO/AST/94/09 did not indicate in a sufficiently clear manner that candidates had to be specialists in all of the areas listed in profile 1. This constitutes an instance of maladministration in EPSO's activities."

"In deciding on the subjects for written tests assessing a given profile covered by an Open Competition, Selection Boards could consider selecting a representative number of areas falling under that profile, so as to render possible an actual assessment of candidates' knowledge in the areas covered by the profile."

In its reply, EPSO expressed disagreement with the Ombudsman's finding and, referring to the Ombudsman's working definition of 'maladministration', stated that it is not clear to it in which way it might have failed to respect a rule or principle binding upon it. EPSO submitted that the case-law requires notices of competition to be drafted in a clear and concise manner so as to enable interested applicants to judge whether they should apply for the competition (EPSO's emphasis). EPSO pointed out that the complainant understood the Notice of Competition exactly in the sense it was intended and was never in doubt as to whether or not he should apply for the competition.

EPSO, moreover, recalled that recruitment through open competitions aims at ensuring the highest standard of ability, efficiency and integrity in officials to be recruited. Therefore, in basing a finding of maladministration on "*what an average reader might conclude after reading the Notice the Ombudsman is undervaluing the competencies and ability of the target group of this notice of competition*". EPSO added that the complainant only raised the argument at issue when he wanted to contest the conformity of the written test with the



Notice. He therefore implicitly admitted that the Notice had been clear enough to decide whether or not to apply.

EPSO concluded its comments on the critical remark by saying that it considered that it had complied with the requirement of clarity. In the event that the Ombudsman remained convinced of his findings, *"EPSO would be most grateful if the Ombudsman could clearly indicate which rule/principle it has not respected and in what manner"*.

With regard to the further remark, EPSO stated that it had taken no further action. In support of its position, EPSO argued that Selection Boards have considerable discretion as regards the arrangements for, and the detailed contents of, the tests in a competition. Referring to the relevant case-law, EPSO recalled that it is not for the Court (nor for the Appointing Authority) to review the detailed content of a test, unless the content is not consonant with the Notice of Competition or the purpose of the competition. Therefore, EPSO only gives instructions to Selection Boards as regards the need to respect the Notice of Competition and the need for the test to be consonant with the purpose of the competition. It is up to Selection Boards to decide whether the content of a test renders possible the actual assessment of candidates' knowledge in a certain field.

In view of the above considerations, EPSO asked the Ombudsman to reconsider his findings. *"Failing this, EPSO would appreciate it, if reference could be made to the reasons for EPSO's disagreement with this instance of maladministration and the subsequent critical remark."*

The Ombudsman's analysis of EPSO's follow up reply

As regards the critical remark, EPSO's position appears to be that the case-law requires notices of competition to be drafted in a clear and concise manner only so as to enable interested applicants to judge whether they should apply for a competition. While there could be doubts about EPSO's interpretation of the case-law, the Ombudsman's findings were based on principles of good administration, which require more than merely not breaking the law. EPSO appears to contest the application of these principles to the case at hand, essentially arguing that (i) the EO's reference to an *"average reader"* is not appropriate in the context of a competition and (ii) the complainant did not understand the Notice of Competition.

As regards (i), it should first be noted that, contrary to EPSO's view, the reference to *"average reader"* in the Ombudsman's decision did not imply any assessment of candidates' standards. While EPSO is clearly correct in pointing out that open competitions aim at ensuring the highest standard of ability, efficiency and integrity in officials to be recruited, it is hard to see how this argument could be relevant in the present case. In particular, highly qualified candidates might find it difficult to understand texts which are not sufficiently clear and could be interpreted one way or another. They too can expect to be informed in a clear and concise manner about the purpose of a competition. It should be added that, in its reply to the further remark, EPSO underscored the importance of the purpose of the competition.

As regards (ii), the fact that the complainant acknowledged that he understood the Notice of Competition in the way it had been intended by EPSO does not call into doubt the Ombudsman's position that the Notice of Competition was not sufficiently clear.



As regards EPSO's reply to the further remark, the Ombudsman did not imply that it would be for EPSO to review the detailed content of a test. The further remark is fully consonant with EPSO's role, given that EPSO itself highlighted the importance of the test conforming to the purpose of the competition. It therefore follows that tests should be commensurate to that purpose.

The Ombudsman regrets that EPSO has done nothing to prevent such maladministration from occurring again.

Case 1656/2010/VIK: Need for EPSO to clarify which qualifications are relevant in a competition notice

The case concerned EPSO's reply to the complainant's question as to what university-level degrees were considered relevant to the secretarial duties mentioned in a competition notice. Reiterating the further remark made in the decision in case 1993/2007/RT, the Ombudsman suggested that, in order to avoid possible misunderstandings, EPSO could consider including in the information provided to candidates examples of relevant fields of studies relating to the post of assistant in the secretarial field.

In its reply, EPSO stated that it had foreseen including in the next edition of the Guide to Open Competitions an indicative list of the various types of diplomas issued in the EU Member States that correspond, in principle, to the levels required by competition notices. As regards the suggestion to provide examples of relevant fields of studies, EPSO informed the Ombudsman that it is currently assessing the feasibility of the project.

The Ombudsman notes that EPSO is planning to take appropriate measures and looks forward to being informed of them in due course.

Case 1863/2010/VIK: Failure of EPSO to give candidates details of marks achieved in selection competitions

(See also cases 18/2010/IP above and 2050/2011/RT below)

This is the second of three cases dealt with in this report in which the Ombudsman criticised EPSO's failure to ensure that the Selection Board provided the complainant with sufficient information regarding her performance in the form of a breakdown of the marks on the evaluation sheets for the written tests.

EPSO's follow-up reply essentially reiterated the arguments it put forward in response to the critical remark in case 18/2010/IP. As well as explaining the post-2010 developments, including the competency passport, EPSO responded in relation to the particular case. It stated that it believed that it had done its utmost to comply with the Ombudsman's findings under the current circumstances. Since no partial marks had been established for the written tests, it was not possible for EPSO to propose that the Selection Board indicate such marks in the evaluation sheet. EPSO therefore felt that it was unjust to reproach it for an instance of maladministration and asked the Ombudsman to reconsider the critical remark.

As explained in relation to case 18/2010/IP above, EPSO's arguments about the limitations that constrain its ability to ensure that selection boards take into account any advice it gives are not convincing, because EPSO itself sets the rules that guide the work of the selection board for each competition. It was



EPSO's own failure to propose a proper evaluation sheet that led to the instance of maladministration revealed by this inquiry.

On the other hand, the Ombudsman welcomes the post-2010 developments mentioned by EPSO and notes that EPSO foresees that, in the future, the competency passport will provide detailed information about the scoring method applied by the selection board.

Case 862/2011/AN: EPSO refuses to accept a late complaint where the delay was not the fault of the complainant

The complainant took part unsuccessfully in a certification procedure. He made a complaint under Article 90(2) of the Staff Regulations to the Commission, which forwarded the complaint to EPSO, as the competent body to deal with it. EPSO did not receive the complaint and only became aware of it five months later, when it considered that, due to the expiration of the statutory time limits, it had been tacitly rejected. The Ombudsman took the view that EPSO's position was contrary to the spirit of Article 90(2). He made a draft recommendation to the effect that the time-limit for dealing with the complaint (and hence for bringing judicial proceedings against a tacit rejection), should run only from the date when EPSO actually received the complaint. A second draft recommendation encouraged EPSO to raise awareness among the institutions of the need for prompt transmission to it of Article 90 (2) complaints in such circumstances. EPSO accepted the second draft recommendation, but not the first. It considered that the case law of the Court of Justice supported its position. Unconvinced by EPSO's arguments, the Ombudsman closed the case with critical remarks.

EPSO's reply expressed sympathy for the complainant's situation and apologised for not having given an explicit reply within the deadline for a judicial appeal. However, EPSO said that it was unable to identify any alternative interpretation that would allow it to reconcile the Ombudsman's finding with the Court's clear prohibition, in paragraph 26 of *Lacroix v Commission*²⁰, to take two different dates into account in determining the date upon which a complaint was lodged. EPSO therefore asked the Ombudsman to reconsider his critical remark.

The Ombudsman's analysis of EPSO's follow up reply

Paragraph 29 of the judgment mentioned by EPSO (*Lacroix v Commission*) contains the following: "*the date upon which the administration is able to be apprised of the complaint is the only date which may be taken into consideration*". EPSO relies on this passage to insist that the complaint in the present case was lodged when it was received by the Commission, not when it was received the body competent to deal with it (EPSO).

However, in paragraph 30 of the same judgment, the Court regarded it as self-evident that "*no official should suffer on account of factors beyond his control which may delay the transmission of his letter of complaint. In particular, he cannot be held responsible for any deficiencies or delays in the transmission of communications from one department to another within the institution to which they are addressed.*"

In the present case, by insisting that the complaint was lodged when it reached the Commission, EPSO has brought about the unfair result that the Court sought to exclude. Moreover, in so doing, it has impliedly adopted the position

²⁰ Case T-54/90 *Max Lacroix v Commission* ECR [1991] II-749.



that an institution that is not competent to deal with an Article 90(2) complaint may nonetheless validly reject that complaint tacitly by failing to transmit it to the competent authority.

The Ombudsman regrets that EPSO has not taken the opportunity of the Ombudsman's inquiry to revise its position.

Case 989/2011/ER: Need for EPSO to deal more positively with candidates encountering difficulties with computer-based tests

This case concerned computer-based admission tests (CBT) in open competitions. The Ombudsman found that EPSO had properly informed the complainant of the consequences of missing the deadline to book the CBT and replied promptly to the complainant's requests. Moreover, the complainant did not provide any specific reason as to why he was not able to access the internet during the booking period.

In closing the case, the Ombudsman made two further remarks. The first suggested that EPSO could, in the future, proactively consider the specific situation of candidates who state that they have been unable to book their CBTs, for instance, by asking them to provide evidence of the alleged impossibility to access the internet. The second encouraged EPSO to consider specifying in the Guide to Open Competitions the consequences of missing the deadline for booking CBTs.

In reply to the first further remark, EPSO informed the Ombudsman that all letters concerning CBT bookings include a reference to toll-free numbers and e-mail addresses that candidates can contact in case of technical problems during the booking. EPSO underlined that the way internet services are provided within the EU Member States may vary and each Member State may even have different levels of internet coverage within their territory. EPSO pointed out that it does not have the technical capacity to analyse *a posteriori* the information provided by candidates from 27 Member States concerning the alleged impossibility to access the internet. The implementation of such a system could represent a disproportionate burden for EPSO. EPSO also emphasised that candidates are primarily responsible for taking all reasonable steps to make sure that they will be able to book their CBT within the deadline.

In reply to the second further remark, EPSO informed the Ombudsman that it is currently reviewing the Guide to Open Competitions and will take the second remark into account in this framework.

In relation to the first further remark, the Ombudsman notes that EPSO's current practice addresses only *technical problems* that candidates may have during the booking. It does not appear to be applicable to situations in which an impossibility to book the CBT might arise from other exceptional circumstances (e.g. a situation of *force majeure* preventing a candidate from having access to the internet). Moreover, such exceptional circumstances are likely to occur rarely. EPSO's argument concerning its limited resources is therefore unpersuasive.

The Ombudsman welcomes EPSO's positive reply to the second further remark.



Case 1147/2011/VL: EPSO to provide better information to candidates

The Ombudsman took the opportunity in this case to invite EPSO to review the manner in which it informs candidates of the period during which they must book a date for the computer-based tests (CBTs), so as to avoid possible misunderstandings. In the case at hand, the complainant, a United Kingdom resident, unsuccessfully tried to book his CBT on 26 April 2011 at 11:25 am local time, when the deadline was 12 o'clock. He argued that EPSO failed to specify that the applicable time zone for the booking deadline was CET. EPSO explained that a letter specifying the time, including the time zone (CET), and date of the deadline for booking the examination had been added to the complainant's EPSO account on the day he validated his application.

EPSO welcomed the constructive tone of the Ombudsman's further remark. It informed him that it was implementing a project aimed at improving the quality of information provided to candidates. The Ombudsman's further remark would be taken into account in the framework of that project. Specifically, the news feeds informing candidates about the CBT booking deadline will be updated to indicate the applicable time zone.

The Ombudsman welcomes EPSO's helpful reply in this case.

Case 2050/2011/RT: Failure of EPSO to give candidates details of marks achieved in selection competitions

(See also cases 18/2010/IP and 1863/2010/VIK above)

As in cases 18/2010/IP and 1863/2010/VIK above, the Ombudsman closed this case with a critical remark concerning EPSO's failure to provide the candidate with an evaluation sheet indicating the breakdown of marks in relation to each evaluation criterion, in line with its commitment in own-initiative inquiry OI/5/005/PB.

EPSO's follow-up reply again referred to the changes in selection procedures since 2010 and underlined that the competition in which the complainant participated was one of the last to use evaluation sheets, which have now been replaced by the competency passport.

EPSO also stated that its commitment in OI/5/005/PB was to propose to selection boards an evaluation sheet setting out the partial marks awarded for particular assessment criteria. This evaluation sheet still needed to be approved and accepted by each selection board. EPSO could not force selection boards to disclose partial marks in cases where an obligation to do so did not stem directly from the competition notice, or where a selection board, for reasons of its own, does not want to attribute such final partial marks.

EPSO therefore considered that, in the circumstances, it had fully complied with its commitment by proposing an evaluation sheet indicating the assessment criteria applied by the relevant Selection Board, the performance level of the candidate, and the total mark awarded. Despite the best efforts of EPSO's staff, that Selection Board was not willing to attribute final partial marks. Therefore, although partial marks could be deduced from the marker's corrections, EPSO could not disclose them because the Selection Board had not confirmed them.



EPSO concluded its reply by emphasising that, due to the overhaul in methodology and the complete and comprehensive feedback that is currently given to candidates, similar complaints should no longer occur.

The Ombudsman notes with concern that there appears to have been a dysfunctional relationship between EPSO and the relevant Selection Board.

Case 2172/2011/ER: Failure of EPSO to align selection tests with the terms of the competition notice

The Ombudsman closed this case with the following critical remark:

"Principles of good administration require that Selection Boards respect the provisions of the Notice of Competition and of the instructions to candidates when marking candidates' tests. In the present case, the Selection Board decided not to mark the complainant's written test a) on the grounds that he did not complete one of the two tasks that test consisted of, even though such an eventuality was not provided for in the Notice of Competition or in the instructions to candidates."

In its reply, EPSO stressed that Selection Boards enjoy a wide margin of discretion in assessing candidates' tests and that EPSO is bound to respect their independence and cannot interfere with their work. In EPSO's view, the Ombudsman's finding of maladministration and critical remark took no account of these limitations. EPSO also emphasised that the Selection Board remained within the limits of its discretionary powers since its decision not to mark the complainant's written test a) was fully in line with the Notice of Competition. In particular, EPSO recalled that the Selection Board has the power to determine that a candidate has infringed the rules of the competition, in particular the provisions of the competition notice, and to exclude him from the competition on this ground.

EPSO essentially repeats the arguments the Ombudsman already considered and rejected in his decision leading to the critical remark. EPSO has done nothing to reduce the risk of similar maladministration occurring again.

Case 2477/2011/RT: EPSO deals with concern that "prior knowledge" may give an unfair advantage in test

The complainant in this case argued that EPSO infringed the principle of equal treatment between candidates. He argued that some candidates, who were his colleagues and who sat the assessment centre tests after the first day, knew the questions in those tests beforehand. The Ombudsman found EPSO's explanations to be reasonable and did not find a breach of the principle of equal treatment. However, he suggested in a further remark that EPSO could take measures to avoid similar complaints. Specifically, EPSO could seek to avoid creating the impression that some candidates have an advantage because they have more information about the content of the assessment centre tests than others. In situations where EPSO can anticipate that a certain number of candidates are colleagues and/or know each other, and might, therefore, share information, EPSO could, if possible, invite these candidates to sit the test on the same day.

As regards the first part of the further remark, EPSO shared the Ombudsman's view concerning the usefulness of the type of measures he suggested putting in place. EPSO stated that it would therefore assess how it could further



emphasize, in its communication materials, that there is no benefit in having any prior knowledge about the content of the assessment centre tests.

Regarding the second suggestion, EPSO explained that it has no reliable means of finding out which candidates know each other, or of otherwise assessing the risk of information sharing between them. EPSO acknowledged that candidates had to provide information in their applications about work experience, which might suggest some possible professional connections between them. However, the information in the application forms reflects the situation at the time of the candidates' applications, which will have necessarily evolved by the time the assessment centre takes place. Moreover, candidates may also get to know each other in social contexts, about which EPSO cannot obtain any information. Information sharing may also occur on the internet.

EPSO also explained the principles and criteria it applies when drawing up the schedule of the assessment centre tests, and the organisational limitations resulting therefrom. There are, it said, normally three criteria for assigning test dates to candidates: (i) declarations of conflict of interest by individual Selection Board members, and their availability on particular test dates, must be taken into account; (ii) the scheduling must take account of the testing language selected by candidates. Assessment centre tests are taken in the candidates' second language chosen from among English, French and German. For reasons of good organization and cost efficiency, interpretation during tests must be limited to the strict minimum. Therefore, the Selection Board members who conduct the assessment need to be proficient in the testing language chosen by candidates. Also, in the framework of the group exercise, candidates have to communicate with each other. For these reasons, EPSO normally organises assessment centre days per language in order to avoid the need for interpretation; (iii) in cases where the assessment centre tests take longer than one day, the scheduling takes account of the distance between the candidates' place of residence and the test centre. Priority is given to candidates who have to travel long distances, with a view to avoiding unnecessary costs resulting from a prolonged stay in Brussels or the need to travel twice to attend the tests. To conclude, EPSO stated that it did not see a realistic possibility of implementing the Ombudsman's second suggestion.

The Ombudsman welcomes EPSO agreement to implement the first part of the further remark. Its detailed explanation of why it is not feasible to implement the second part of the remark is convincing.

Case 1163/2012/RA: EPSO to improve communication with candidates when there are technical problems with tests

This case concerned EPSO's alleged failure to provide the complainant with a suitable date to re-sit her preselection test. After a thorough examination of EPSO's reply, the Ombudsman concluded that no further inquiries were justified. Nevertheless, the facts of the case (specifically, the initial delay incurred by EPSO in this time-sensitive case and the short notice periods provided to the candidate) justified a general reflection by EPSO on how to deal with situations where serious technical problems prevent a candidate in a preselection test from completing the test. The Ombudsman therefore made a further remark stating that it would be useful for EPSO to have a policy for dealing with such situations. Such a policy could include an indication of deadlines for EPSO's response and the minimum notice period to be given to candidates for rescheduled tests.



In its follow-up reply, EPSO stated that it fully shared the Ombudsman's view with regard to the usefulness of the type of policy suggested and that it is currently implementing a project aimed at improving the quality of communication between EPSO and candidates. This involves establishing clear and public policy guidelines for, amongst others, cases such as that which was the subject of the present complaint. The Ombudsman's further remark will be taken into account in the framework of this project.

The Ombudsman welcomes EPSO's commitment to take the further remark into account in its project to improve the quality of communication between EPSO and candidates. The Ombudsman looks forward to learning of the concrete outcomes of that project in due course.

6. European Economic and Social Committee (EESC)

Case 2744/2009/JF: European Economic and Social Committee to cooperate more fully with Ombudsman in future

In this case, the complainant alleged that a staff member at the European Economic and Social Committee (EESC) had been promoted as a result of political pressure. The Ombudsman's inquiry revealed that the EESC indeed promoted the official in question in breach of its own internal rules. In addition, he found evidence of undue interference in the promotion exercise. The EESC acknowledged that it acted wrongly and reversed the irregular decision. It also took appropriate measures to prevent similar situations from occurring in the future. However, the Ombudsman criticised the fact that the EESC failed to respond to his draft recommendation correctly when it produced statements which clearly contradicted the facts as documented in its file. In light of the particularly serious irregularities uncovered, and considering that such behaviour jeopardises transparency and the public image of EU institutions, the Ombudsman forwarded his decision to the President of the European Parliament who could consider assigning it to the relevant committee of Parliament dealing with the EESC.

The follow-up from the EESC undertook to develop a new internal procedure to deal with the Ombudsman's inquiries that will guarantee complete cooperation, rapid and full replies, and speedy and complete compliance with any recommendations arising out of such inquiries. Such a procedure should also guarantee a greater consistency of approach.

The Ombudsman welcomes the guarantees offered in this case that the EESC will cooperate fully with the Ombudsman's inquiries in the future.

7. European Central Bank (ECB)

See [case 2016/2011/AN](#) above under 'Star cases'.

Case 2161/2011/ER: ECB tries to be helpful to people who apply for access to documents

The Ombudsman found that the ECB had provided the complainant with an appropriate statement of reasons for not disclosing the letter he had requested



in this case. A further remark encouraged the Bank to continue to regard the disclosure of documents to the public and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as opportunities to demonstrate its commitment to the principle of transparency and thereby to enhance its legitimacy in the eyes of citizens.

In its follow-up reply, the ECB recalled the reply already provided to the Ombudsman in case 2016/2011/AN. In particular, the ECB President informed the Ombudsman that he has personally instructed the Director General for Secretariat and Language Services, who is in charge of access to documents issues, to be as helpful as possible to applicants and to explain the reasons leading to refusal of access.

The ECB now systematically provides applicants with as much detail as possible concerning any documents to which it denies access, in order to allow them to understand the sensitivity of the document's content. This approach is followed with due regard to the ECB's responsibility to protect sensitive documents from disclosure. Moreover, in case of unclear requests, ECB staff have instructions to interact closely with applicants and to be as helpful as possible.

The ECB explained the concrete steps it has taken to be helpful to people who apply for access to documents. The approach is citizen-friendly and goes in the direction suggested by the Ombudsman.

8. European Aviation Safety Agency (EASA)

Case 3419/2008/KM: European Aviation Safety Agency fails to ensure consultation documents published in all of the official EU languages

The rulemaking procedures of the European Aviation Safety Agency (EASA) involve the publication of consultation documents known as 'Notices of Proposed Amendment' - 'NPAs'. The Ombudsman made a draft recommendation that EASA should translate at least summaries of NPAs into all the EU official languages. After receiving EASA's detailed opinion, the Ombudsman noted that it was taking useful steps in the right direction. Specifically, it promised to make it clear on its website that translations of summaries of NPAs could be requested and to publish any translations already made, as well as to extend the time limit for consultations where necessary. The Ombudsman, however, maintained that it was of fundamental importance that consultation documents should be available in all official languages, and that the recommendation he had made took due account of the need to spend public funds carefully. He criticised EASA's refusal to translate the NPAs, or at least summaries of them.

In its follow-up reply, EASA stated that, by the end of July 2013, it would adopt "*a work instruction concerning rule development*" which would allow it to translate the titles of all NPAs into all official languages, as well as the Executive summaries upon request. Additionally, EASA will raise awareness, on its website, of the possibility of requesting translations and of extending the consultation period. Finally, it will continue to work with national aviation authorities to hold workshops and seminars to reach out to citizens.

The Ombudsman notes that while the measures described in EASA's follow-up are useful, they fall short of compliance with the draft recommendation to



translate at least summaries of NPAs into all EU official languages. Furthermore, the measures do not seem to have been fully implemented²¹.

9. European Centre for Disease Prevention and Control (ECDC)

See [case 328/2011/TN](#) above under 'Star cases'

10. FRONTEX

Case 1810/2011/BEH: Frontex delay in dealing with request for internal mobility

This case concerned the handling of the complainant's requests for internal mobility and assistance at Frontex, the European Agency for the Management of Operational Cooperation at the EU's External Borders. The Ombudsman criticised Frontex's failure to reply to the complainant's request for internal mobility in a timely manner.

Frontex's reply explained that Article 24 of its Staff Code of Conduct, adopted in 2012, states that its administration is required to reply to all requests for internal mobility without delay, and in any case not later than two months.

The Ombudsman recalls that, in the case at hand, the urgency and delicacy of the matter required Frontex to react much more rapidly than it did. By referring to the need to deal with requests "without delay", Article 24 of Frontex's Staff Code of Conduct appears to recognise the urgency potentially involved in a request for internal mobility. The Ombudsman therefore, considers that the adoption of the Code provides a framework in which similar problems are much less likely to occur in the future.

11. EUROPOL

Case 249/2012/DK: Europol improves its communication with job applicants

The complaint came from an unsuccessful candidate for a post at the European Police Office (Europol). In closing the case, the Ombudsman made a further remark concerning the way that Europol should inform unsuccessful candidates of the outcome. Specifically, such communications should be personalised.

In reply, Europol pointed out that, in the case at hand, candidates did in fact receive personalised letters informing them of the outcome of their

²¹ The Ombudsman's services examined the EASA website shortly after the follow-up was sent. The NPA section contained the following statement: "It may be requested to have the executive summary of the NPAs translated by sending an email to RPS@easa.europa.eu within three weeks from the publication of the NPA. This request has to be motivated and is subject to availability of budget resources. The translation process may take from 4 to 6 weeks." While EASA's home page (the first overview) was available in languages other than English, it was not possible to find translations of NPA titles into German, French or indeed any other language.



applications. Non-personalised e-mails were used only as an additional method of communication. The Director took note of the Ombudsman's assessment that the non-personalised e-mail may have led to confusion on the part of candidates and outlined the measures taken by Europol to change its practice for the future. Europol now sends all candidates a personalised letter acknowledging receipt of their application. It also informs them of which week the short-listing of candidates is scheduled to take place. At the same time, candidates are informed that only short-listed candidates will be further contacted. In addition, candidates can consult the precise date of the short-listing on the recruitment section of Europol's website. From this date on, candidates can also request feedback on the outcome of their application and receive personalised information in this regard. Finally, all short-listed candidates receive a personalised letter informing them of the outcome of their application.

The Ombudsman welcomes the steps that Europol has taken to improve its practices.

12. Education, Audiovisual and Culture Executive Agency (EACEA)

Case 2903/2009/KM: Education, Audiovisual and Culture Executive Agency improves information to grant applicants

The question at issue in this concerned the supporting documents needed to justify additional staff costs submitted by a university under a grant agreement. The university argued that it could not know that a Convention was required for co-financed staff costs as this was not obvious from the grant agreement. The Ombudsman agreed that the grant agreement lacked clarity. In the interest of good administration, the EACEA was invited to amend the template in the standard grant agreement so as to make clear that Conventions are required for all staff costs.

In its reply, EACEA informed the Ombudsman that the proposed change was introduced in the rules for templates in the 2008-2013 Tempus grant agreements. These now clearly state that "*this agreement...has been established solely for the purpose of justifying the staff costs that the institution will pay from the Tempus grant or will co-finance*". EACEA also provided the table to be filled out by the beneficiary, which is headed "*the cost to be borne by the Tempus grant and/or co-financed is calculated as follows...:*" and marks the total cost clearly as being the sum of costs paid from the grant and co-financed costs, with beneficiaries being instructed to specify, in the Final Report, the amount paid from the grant and the amount co-financed.

The Ombudsman welcomes the fact that EACEA has amended the template that gave rise to the present complaint.



13. Research Executive Agency (REA)

Case 2339/2010/RA: Research Executive Agency to improve its redress procedures

This case concerned an allegedly inadequate redress procedure following the rejection by the Research Executive Agency of the complainant's scientific proposal. The Ombudsman made a further remark, according to which the redress committee should endeavour to provide more detailed reasons to explain why a request for review does not lead to a re-evaluation. The Ombudsman also made two further remarks concerning delay.

With regard to the first remark, the Agency agreed that the redress committee should endeavour to give detailed explanations for its opinion in each case. This point has been emphasised again to redress committee members in view of the cases to be handled in 2013. With regard to the second remark, the Agency explained that there was a significant improvement in the time taken to send out acknowledgments of receipt from 2010 to 2013. In fact, this was reduced from 24 days for the 2010 call to two days for 2012. Finally, the Agency pointed to an improvement in the duration of its redress procedures and announced that it will try to further improve and shorten the time taken for replies.

The Ombudsman welcomes the Agency's constructive follow-up.



F. Other

1. European Commission

Case 475/2012/KM: Commission pays arrears of pay to transferred employee

The complainant was a Commission official until May 2010, when she was transferred to the Council of the EU. In December 2010, the Commission informed the Council that the complainant qualified for promotion from grade AST3 to grade AST4 in the 2010 promotion exercise but that it was for the Council, where she now worked, to decide whether to promote her. The Council decided to promote her, with retroactive effect from 1 January 2010. It asked the Commission to pay the arrears due to the complainant for the period between her promotion and her transfer.

The Commission refused to do so. It argued that, since it had been the Appointing Authority for the period between 1 January and 31 May 2010, the Council's decision to promote the complainant was irregular and could not give rise to any rights during that period.

The Ombudsman opened an inquiry and invited the Commission to consider settling the matter as fairness seemed to require that the complainant should be paid.

The complainant subsequently informed the Ombudsman that the Commission had promoted her as of 1 January 2010 and paid the resulting arrears.

The Ombudsman noted that the Commission had changed its position in light of recent case-law of the Civil Service Tribunal holding that, when an official is transferred from one institution to another, it is for the institution of origin (rather than, as was the practice prior to that judgment, the receiving institution) to promote that official. The Ombudsman welcomed the fact that the Commission decided to remedy the situation by promoting the complainant and paying her the arrears. He concluded that the Commission had taken steps to settle the matter to the complainant's satisfaction.

Case 512/2012/BEH: Commission's action on use of certain insecticides and their impact on bee population

The Commission authorised the use of a number of neonicotinoids (a form of insecticide) for plant protection. In March 2012, the Austrian Ombudsman Board explained to the European Ombudsman that new scientific evidence suggested that certain insecticides had led to increased bee mortality. The Board alleged that the Commission had failed to take into account this new evidence, which argued in favour of restricting the use of these insecticides. The relevant EU regulation provided for a review of the authorisation of substances where new scientific evidence indicates that they no longer fulfil the approval criteria, for example, because they pose a threat to animal health.

During the European Ombudsman's investigation, the Commission submitted a list of the measures it had taken to address increased bee mortality. For example, it had designated an EU reference laboratory for bee health and commissioned a study on the extent of the problem. Additionally, it asked the



European Food Safety Authority (EFSA) to review the risk assessment of all neonicotinoids and their effect on bees. These measures satisfied the complainant. The Ombudsman pointed out, however, that the review concerning the neonicotinoids here at issue was ongoing, with EFSA's evaluation to be completed by December 2012. The Ombudsman therefore asked the Commission to inform him of the outcome of this review.

In its follow-up reply, the Commission informed the Ombudsman that EFSA had published its conclusions as regards the risk assessment for bees from the three active substances in question. Immediately thereafter, the Commission proposed significantly to restrict the use of the three neonicotinoids. It considered, however, that a complete ban was not proportionate, given that EFSA had identified safe uses for some crops, including sugar beet and other crops not attractive to bees.

The Commission discussed these proposed measures with Member State experts in January 2013. Industry, NGOs and other concerned stakeholders were also consulted. Specifically, the producers of these substances were asked to send comments on EFSA's conclusions. The issue was further discussed twice in the Agriculture and Fisheries Council and three times in Parliament. Commission Implementing Regulation (EU) No 485/20135 was finally adopted on 24 May 2013.



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