



European Ombudsman

Report

**on responses
to proposals for
friendly solutions and
draft recommendations**

**How the EU institutions
complied with the Ombudsman's
suggestions in 2011**

November 2012

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Foreword

For five years now, the European Ombudsman has been producing an annual study of the follow-up given by the EU institutions¹ to critical and further remarks made in the preceding year. The follow-up study provides a partial picture of compliance with the Ombudsman's suggestions. It includes cases in which the Ombudsman made a critical remark, following rejection by the institution concerned of a proposal for a friendly solution, a draft recommendation, or both. The purpose of the present report is to complete the picture. Like the follow-up study, it covers the preceding calendar year. It focuses on cases closed during 2011 because the institution in question **accepted** a friendly solution proposal or a draft recommendation, thus complementing the follow-up study. Together, the study and report aim to provide a comprehensive account of the extent to which the EU institutions comply with the Ombudsman's suggestions².

I am pleased to report that the overall compliance figure for 2011 is 82%: in other words, out of the 120 instances in which the Ombudsman was called upon to make remarks and recommendations in the context of cases closed in 2011, the institutions provided 98 positive replies³. These replies came in the form of friendly solutions achieved, draft recommendations accepted, or constructive follow-up responses to critical and further remarks. As outlined above, the responses to critical and further remarks are covered in the follow-up study, while this report deals with friendly solutions and draft recommendations accepted. While the report and the study are being produced separately this year, which covers 2011, the study covering the year 2012 will combine both publications.

Friendly solution proposals and draft recommendations are made in the course of the Ombudsman's inquiries. A proposal for a friendly solution is made after the Ombudsman has identified possible maladministration and sees an opportunity to put it right and thereby satisfy the complainant. Where an institution refuses to accept a friendly solution proposal without adequate justification, the Ombudsman may make a draft recommendation.

The impact of the Ombudsman's work designed to achieve a positive outcome to his inquiries should not be underestimated. In the words of one complainant, quoted in this report, the Ombudsman's way of proceeding "(...) *restored its faith in the EU's administrative action*". The cooperation of the institutions is, of course, essential for success in achieving such outcomes, which help enhance relations between the institutions and citizens. Moreover, by reacting constructively to the Ombudsman's suggestions, the institution sets an important precedent that should help it avoid problems down the road.

The fact that, in the course of the Ombudsman's inquiries into complaints, the EU institutions do not limit themselves merely to asking "*What are the legal rights of the parties?*" often provides the necessary space for the Ombudsman to seek redress and obtain a win-win outcome. This report contains, by way of example, cases involving (i) an individual who was not paid for work she

¹ For brevity, this report uses the term "*institution*" to refer to all the EU Institutions, bodies, offices, and agencies.

² Cases closed as "*settled by the institution*" are, in principle, not included in this report. Although they represent a positive result stemming from the Ombudsman's intervention, they do not normally result from a suggestion made by the Ombudsman and thus fall outside the concept of compliance.

³ Further explanations as to how exactly this figure is calculated are provided in section 5 below.



carried out for the European Police College because she had not signed a contract; (ii) a lady who found out, too late, that she was given wrong information by the Commission about the wages she would earn in an EU delegation; (iii) the Commission's refusal to review a recovery order, on the grounds that the complainant submitted the relevant documents belatedly. The complainants in each of these cases acted in good faith but, because of possible maladministration by the institution in question, faced real problems that needed solving. The fact that the institutions engaged with the Ombudsman to deliver a satisfactory outcome confirms that there is a growing culture of service within the institutions. The nine star cases identified in this report, which largely mirror the star cases identified in my *Annual Report 2011*, constitute exemplary instances of the institutions' endorsement of a service culture.

There is, to be sure, room for improvement. While this report contains friendly solution proposals and draft recommendations that the institutions accepted, wholly or partially, there are naturally — as the 82% compliance figure reveals — suggestions which have not been accepted⁴. Moreover, it is, at times, not entirely clear why an institution rejects a proposal for a friendly solution, only to accept a (largely identical) draft recommendation shortly thereafter⁵. What this report has also revealed is that there appear to be areas in which the institutions are more disposed to accepting the Ombudsman's suggestions. Specifically, most of the cases in this report concern access to documents, grants, and staff issues. On the other hand, I note with concern that this report contains only one infringement case, in which the Commission partially accepted the Ombudsman's draft recommendation. By way of contrast, the Ombudsman's follow-up study tends to contain many infringement cases in which a critical remark has been made.

Rest assured that the Ombudsman will continue in his efforts to obtain win-win outcomes and to make constructive suggestions, both in the public interest and in order to help complainants obtain their right to good administration. At this time of crisis, any work that can be done to resolve problems quickly and effectively, to improve the administration for the benefit of all, and to enhance citizens' trust in the Union, must be done with energy, commitment, and determination. I hope that the institutions will continue to engage with me in this endeavour.

P. Nikiforos Diamandouros

27 November 2012

⁴ The Ombudsman concluded that there was maladministration in 15% of the cases closed in 2011. He closed 35 such cases with critical remarks to the institution concerned. In addition, he closed 13 cases when the institution complained against accepted a draft recommendation from him. These latter cases are included in this report, while the former are covered in the follow-up study.

⁵ See, for example, cases **3196/2007/(BEH)VL**, **1181/2008/(BEH)KM**, and **2273/2008/MF** in this report.



Report

1. Introduction

The present report begins with a foreword by the Ombudsman. This introduction is followed by a description of the purpose of proposals for friendly solutions and draft recommendations, the different kinds of circumstance which give rise to them, and what happens when they are rejected. The report then provides an overview of the proposals for friendly solutions and draft recommendations accepted in 2011, followed by cases that are particularly significant for the Ombudsman's key objectives. Finally, conclusions are drawn as regards the main lessons of the report for the future. The first annex to the report contains summaries of the relevant cases in 2011, starting with the nine star cases that have been identified for the year in question. The second annex contains a list of the cases in which a friendly solution proposal was accepted, while the third and fourth annexes, respectively, contain a list of the draft recommendations that were accepted or partly accepted. The fifth annex contains a list of other cases mentioned in the report.

One of the key functions of the European Ombudsman is to provide the Union's citizens and residents with an alternative remedy to protect their interests⁶. That remedy is complementary to protection by the EU Courts and does not necessarily have the same objective as judicial proceedings. The logic of judicial procedures leads to an adjudication, in which the court determines authoritatively the legal rights of the parties. The logic of the Ombudsman's procedures, on the other hand, is different and involves a flexible approach allowing two modes of operation. On the one hand, there is a dispute-resolution mode, which focuses on problem-solving, conflict-reduction, possibilities for compromise, and win-win outcomes. On the other hand, there is an adjudicative mode, in which the Ombudsman finds either that there is maladministration, or that there is no maladministration. That mode is governed by a logic analogous to that of the Court, in which one party usually sees itself as the winner and the other as the loser. The appropriate balance between the two modes depends on the case and some cases may involve switching between them more than once.

The 11 friendly solution proposals and 13 draft recommendations included in this report show the Ombudsman in both the adjudicative and the dispute resolution modes. In general, cases closed as "*settled by the institution*" are not included in the report. Although they represent a positive result flowing from the Ombudsman's intervention, they do not normally result from a suggestion made by the Ombudsman and thus fall outside the concept of compliance. The report does, however, include a small number of cases⁷ that were closed as settled by the institution, but which did involve the Ombudsman making a suggestion to which the institution reacted positively. These cases are included so as to give a comprehensive picture of compliance with the Ombudsman's suggestions and recommendations.

⁶ Article 228 of the Treaty on the Functioning of the European Union empowers the Ombudsman to inquire into maladministration in the activities of the "*Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role*". See also the note in page 3 above for the use of the term "*institutions*" in the present report.

⁷ Cases 2533/2009/VIK, 2609/2009/BEH, 1711/2010/BEH, and 899/2011/TN.



2. Proposals for friendly solutions and draft recommendations

If the Ombudsman finds maladministration, his Statute⁸ requires him to seek, as far as possible, a solution to eliminate it, and satisfy the complainant. Where there is maladministration for which the complainant should receive redress, the normal procedure is, therefore, to propose a friendly solution. If the institution rejects such a proposal without good reason, the next step is usually a draft recommendation.

In proposing a friendly solution, the Ombudsman aims to achieve agreement between the institution concerned and the individual complainant. If the maladministration that should be remedied primarily affects the public interest, the Ombudsman may consider it more appropriate to make a draft recommendation outright than to seek a friendly solution⁹. Similarly, in cases where the Ombudsman considers that the institution is unlikely to accept a friendly solution, or that a friendly solution would not be appropriate (for example, where the complainant does not seek redress or where redress for the complainant is no longer possible), he may proceed directly to a draft recommendation¹⁰.

The institution's acceptance of a friendly solution proposal or draft recommendation normally leads to closure of the case on that ground.

Friendly solutions

Article 3(5) of the Ombudsman's Statute provides as follows:

"As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."

Any proposal to seek a friendly solution under Article 3(5) is therefore premised on the existence of maladministration. The Ombudsman often presents his finding in the form of a provisional conclusion that an aspect of the institution's behaviour could constitute an instance of maladministration and indicates how the proposed friendly solution would eliminate it. In some cases, however, the Ombudsman considers it more constructive to avoid stating, even provisionally, that there could be an instance of maladministration. Rather, the Ombudsman identifies a problem or shortcoming in the institution's behaviour that could be solved to the complainant's satisfaction if the institution adopted a certain measure which he proposes in a friendly solution.

⁸ European Parliament Decision 2008/587 of 18 June 2008, amending Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 2008 L 189, p. 25.

⁹ For example, in systemic own-initiative inquiries, the Ombudsman will normally proceed directly to a draft recommendation, if necessary. See own-initiative inquiry **OI/4/2009/PB** in this report concerning officials' fundamental right to be heard regarding recovery orders.

¹⁰ The Ombudsman proceeded directly to a draft recommendation in the following cases in 2011: **715/2009/ANA**, **2755/2009/JF**, **1786/2010/PB**, **856/2008/BEH**, **3106/2007/(TS)FOR**, **703/2010/MHZ**, and **2403/2008/OV**. By way of example, in case **2755/2009/JF**, it was not possible to seek a friendly solution because the complainant's claims could not be sustained — the Ombudsman concluded that it was not possible to establish with certainty whether the complainant suffered damage as a result of the instance of maladministration identified. The Ombudsman nevertheless took the view that his findings had general implications for staff in the body in question, and made a draft recommendation.



Even in cases that are handled publicly, the Ombudsman does not make proposals for friendly solutions publicly accessible until the outcome of the proposal is known, so as to facilitate discussion with the complainant and the institution.

A case is closed as a "*friendly solution achieved*" if (i) the Ombudsman launched the procedure to look for a solution under Article 3(5) of the Statute and (ii) the complainant is satisfied as regards the allegation or claim concerned¹¹. In some cases, a friendly solution can be achieved if the institution concerned offers compensation to the complainant. Any such offer is made *ex gratia*: that is, without admission of legal liability and without creating a precedent. Apology as a form of redress also deserves special mention. In order to be effective, an apology must be sincere. An apology that is perceived as insincere only makes matters worse. The complainant is more likely to accept that an apology is sincere if it is offered by the institution on its own initiative, rather than in response to a formal suggestion from the Ombudsman. For this reason, the Ombudsman often considers that it would not be useful to propose a friendly solution consisting of an apology. A draft recommendation to apologise is even less likely to be useful.

Draft recommendations

If a proposal for a friendly solution is rejected by an institution, the Ombudsman normally proceeds to make a draft recommendation. The legal basis for draft recommendations can be found in Article 3(6) of the Ombudsman's Statute, together with Article 8 of the implementing provisions¹².

Article 3(6) of the Statute provides that if the Ombudsman finds there has been maladministration, he shall send a report to the institution concerned, making draft recommendations where appropriate. The institution must send a detailed opinion within three months. The Ombudsman's letter to the institution specifically refers to the requirement of a detailed opinion and points out that the detailed opinion could accept the Ombudsman's decision and describe the measures taken to implement it.

Unlike friendly solution proposals, draft recommendations addressed to the institutions are published on the Ombudsman's website. The Ombudsman may also choose to draw public attention to the case and to his efforts to obtain a solution, by issuing a press release at this stage on the maladministration identified. With a view to avoiding such publicity, institutions should seriously consider the added benefit, for their own work and for the image of the Union more generally, of accepting a friendly solution proposal rather than waiting for the Ombudsman to make a draft recommendation.

When the institution's detailed opinion is received, it is forwarded to the complainant for possible observations. If the Ombudsman considers that the detailed opinion constitutes a satisfactory response, he closes the case with a decision accordingly. When appropriate, the case is considered as closed with partial acceptance of the draft recommendation. This conclusion is only used when the institution has genuinely responded to central points in the draft recommendation in a constructive and cooperative manner.

¹¹ If the **complainant** rejects a proposed friendly solution without good reason, the Ombudsman normally considers that no further inquiries into the case are justified.

¹² See the Decision of the European Ombudsman adopting implementing provisions, which is available at: <http://www.ombudsman.europa.eu/resources/provisions.faces>



3. The purpose of proposals for friendly solutions and draft recommendations

Against this background, **friendly solution proposals** have a single purpose: to obtain redress for the complainant, leading, ideally, to a win-win outcome, with which the institution and the complainant are satisfied. Where redress should be provided, it is best if the institution concerned takes the initiative, when it receives the complaint, to acknowledge the maladministration and offer suitable redress. By taking such action, the institution demonstrates its commitment to improving relations with citizens. It also shows that it is aware of what it did wrong and can thus avoid similar maladministration in the future¹³. If, however, there is a suspicion that the individual case may be the result of an underlying systemic problem, the Ombudsman may decide to open an own-initiative inquiry, even though the specific case has been resolved to the complainant's satisfaction.

In contrast, a **draft recommendation** normally has more than one purpose. Like a friendly solution proposal, it may be aimed at obtaining redress for the complainant. There are, indeed, cases where the institution rejects a friendly solution proposal but subsequently accepts a draft recommendation. It is, of course, better if the institution accepts a friendly solution than if it first rejects a friendly solution proposal and then accepts a draft recommendation¹⁴. A draft recommendation may also, or only, be made in the public interest, in order to help the institution concerned to raise the quality of its administration in the future. In this way, even though it may not be possible to resolve the case for the complainant, the Ombudsman can seek to improve the situation for the future.

4. When friendly solution proposals and draft recommendations are rejected

The institution's rejection of a friendly solution proposal or draft recommendation may lead to a number of possible outcomes.

First, the Ombudsman may take the view, after considering the institution's response, that his earlier finding of maladministration should be revised. The institution may succeed in persuading the Ombudsman that its position is correct, or he may find that his proposal for a friendly solution or draft recommendation is no longer appropriate. These cases are normally closed with a finding either of no maladministration, or that no further inquiries are justified.

Second, if the institution's detailed opinion on a draft recommendation is not satisfactory, the Ombudsman might consider making a special report to the European Parliament. However, in his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to Parliament is of inestimable value to his work. He added that special reports should therefore not be presented too frequently, but only in relation to important

¹³ The four cases highlighted in part E of Annex 1 constitute good examples in this regard.

¹⁴ There are examples in this report where it is not entirely clear why the institution first rejected a friendly solution proposal, only to accept thereafter a draft recommendation. See, for example, cases **3196/2007/(BEH)VL**, **1181/2008/(BEH)KM**, and **2273/2008/MF**.



matters where the Parliament is able to take action in order to assist the Ombudsman¹⁵.

Finally, the Ombudsman may decide to close the case with a critical remark, either at the stage when the institution rejects a friendly solution, or if the institution's detailed opinion on a draft recommendation is not satisfactory¹⁶. In some cases, the case may be closed with a critical remark because the Ombudsman takes the view that the institution has convincingly shown that, although there is maladministration, the remedy proposed in the friendly solution or draft recommendation is unsuitable and no other solution or redress is possible. In such cases, the critical remark is essentially similar in nature to that which would have been made if the case had been closed without a friendly solution or draft recommendation.

Unfortunately, there are also cases in which the institution refuses the Ombudsman's suggestions for reasons that are not convincing. Indeed, there are even a few cases in which the institution refuses to accept the Ombudsman's finding of maladministration.

Such cases risk undermining the moral authority of the Ombudsman and weakening the trust of citizens in the European Union and its institutions. International experience shows that the ombudsman institution functions most effectively where the rule of law is well established and where there are well-functioning democratic institutions. In such contexts, the public authorities usually follow an ombudsman's recommendations, despite the fact that they are not legally binding, even if they disagree with them¹⁷.

5. Friendly solution proposals and draft recommendations accepted in 2011

In 2011, the EU institutions accepted a total of 11 proposals for friendly solutions, while 13 draft recommendations were accepted wholly or partially¹⁸. Table 1 shows the distribution of friendly solutions and draft recommendations accepted by institution.

¹⁵ See *Annual Report 1998*, pages 27-28.

¹⁶ Given that this report covers friendly solutions and draft recommendations that have been accepted, there should, in theory, be no critical remarks. There is, however, one in case **715/2009/ANA** where the institution in question partly accepted the draft recommendation. The report also contains some further remarks that are identified at the end of the relevant cases using italics.

¹⁷ The Ombudsman is pleased to note that there are examples of such cases in this report, notably, case **1170/2009/KM** concerning the Council of the EU and case **266/2010/VL** concerning the European Aviation Safety Agency.

¹⁸ Three draft recommendations were partially accepted.



Table 1 - Distribution of friendly solutions and draft recommendations accepted by institution.

| Institution | Number of friendly solutions | Number of draft recommendations | Other |
|--|------------------------------|---------------------------------|----------|
| European Parliament | 1 | | |
| European Commission | 6 | 11 | 3 |
| Council of the EU | 1 | | |
| European Personnel Selection Office (EPSO) | | | 1 |
| European Medicines Agency | | 1 | |
| European Aviation Safety Agency (EASA) | 1 | | |
| Office for Harmonisation in the Internal Market (OHIM) | 1 | | |
| European Police Office (CEPOL) | 1 | | |
| Education, Audiovisual and Culture Executive Agency | | 1 | |
| Total | 11 | 13 | 4 |

Annex I contains a detailed analysis of each of the cases in which a friendly solution proposal or a draft recommendation was accepted. Nine of the cases warrant special mention as "*star cases*", which should serve as a model for other institutions of how best to react to the Ombudsman's suggestions. The "*star cases*" are listed first. Other cases are organised by institution and complaint reference.

Annex II contains a list of the cases in which a friendly solution proposal was accepted, while Annexes III and IV, respectively, contain a list of the cases in which a draft recommendation was accepted or partially accepted. Annex V contains a list of the other cases dealt with in this report. In their on-line versions, these Annexes include links to the text of the relevant closing decision on the Ombudsman's website (in English and, if different, the language of the complaint).

It is of course important to mention that some friendly solution proposals and draft recommendations were rejected in 2011. As noted in the foreword, the overall figure in terms of compliance with the Ombudsman's suggestions in 2011 is 82%. This figure has been calculated on the basis of cases closed in 2011, in which a friendly solution proposal or a draft recommendation was made, as well as cases in which a critical remark or further remark was made¹⁹. The rate of compliance is based on the number of positive replies to these remarks and recommendations. All in all, out of the 120 instances in which the Ombudsman was called upon to make friendly solution proposals, draft recommendations,

¹⁹ The figure is based on the cases included in this report and in the follow-up study. It is possible that a number of other cases closed in 2011 contained friendly solution proposals and draft recommendations that were not accepted, but which did not lead to a critical remark.



critical or further remarks in the context of cases closed in 2011, the institutions provided 98 positive replies²⁰.

6. Cases that are particularly significant for the Ombudsman's key objectives

The Ombudsman's strategy for the 2009-2014 mandate²¹ makes clear that the Ombudsman aims to help the Union to deliver on the promises it has made to citizens in the Treaty of Lisbon concerning fundamental rights, enhanced transparency, and greater opportunities for participation in the Union's policy-making. Some of the responses to friendly solution proposals and draft recommendations made in 2011 are particularly relevant to this aim.

- Cases **1804/2009/MHZ** and **899/2011/TN** concerned two provisions of the Charter of Fundamental Rights of the EU, namely, the integration of persons with disabilities and the principle of fairness²². Specifically, the cases concerned a provision in the EU Staff Regulations, whereby a staff member's dependent child allowance may be doubled if his/her child suffers from a serious illness which involves heavy expenditure. In the former case, Parliament agreed to take into account its staff members' decisions to work part-time, when deciding on cases where the official concerned finds it difficult to prove the existence of heavy expenditure resulting from his/her child's disability. In the latter case, the Commission agreed that it should have paid the complainant the double allowance from the date on which he commenced working as an EU official and not from the date on which he applied for it. This case was closed quickly after the Commission responded positively to preliminary analysis and questions contained in the Ombudsman's letter opening the inquiry.

A further fundamental right at issue in the Ombudsman's inquiries in 2011 was the right to be heard. During his handling of a complaint, the Ombudsman became aware of possible shortcomings in the Commission's handling of recovery measures under Article 85 of the Staff Regulations. He opened an own-initiative inquiry, **OI/4/2009/PB**, into the fundamental right of officials to be heard when the Commission decides to recover undue payments. The Commission fully agreed that the right to be heard must be respected in this context and referred to measures it was taking to that end. The Ombudsman noted that the procedural changes implemented by the Commission constituted a compromise. He concluded, however, that, in light of the specific context and the relevant procedural safeguards, this was an acceptable compromise.

- Many cases in the present report concern the fundamental right of public access to documents²³. The European Medicines Agency agreed to provide public access to suspected serious adverse reaction reports relating to a

²⁰ It should be noted that in five cases, the institutions refused a friendly solution proposal but accepted the subsequent draft recommendation. In a further three cases, the institutions refused both the friendly solution proposal and the draft recommendation. In order to avoid double counting, these cases are only counted once (in other words, the figure of 120 includes only the draft recommendations and not the friendly solutions in these cases).

²¹ The strategy document is available in 23 languages on the Ombudsman's website at:

<http://www.ombudsman.europa.eu/resources/strategy.faces>

²² Articles 26 and 41(1) respectively of the Charter.

²³ Article 42 of the Charter of Fundamental Rights and Article 15(3) TFEU.



pharmaceutical product in response to a draft recommendation by the Ombudsman. In closing case **3106/2007/FOR**, the Ombudsman recognised the important progress that the Agency has made in rendering its work more transparent. In case **1633/2008/DK**, which concerned a request from a civil society organisation for the minutes of a meeting held between the then Commissioner for Trade with representatives of a business organisation, the Commission provided revised grounds for its decision to refuse access to certain parts of the document and granted access to the part which it had previously deleted. In case **1581/2010/GG**, the Commission referred to the exception in Regulation 1049/2001 on public access to documents²⁴ concerning the protection of the purpose of inspections, investigations, and audits, when refusing to grant access to replies that Member States and professional organisations had sent it in the context of its inquiry into an infringement complaint. After inspecting the documents, the Ombudsman was not convinced that the exception invoked by the Commission allowed it to refuse to grant access to those parts of the documents that contain purely factual information. The Commission replied that it would reconsider the complainant's request, with a view to granting full or partial access after having consulted the Member States concerned. In case **715/2009/(VIK)ANA**, which concerned the Commission's reports under the Cooperation and Verification Mechanism (CVM), the Commission granted access to the minutes of the relevant meeting, despite initially refusing access on the grounds of protecting its decision-making process. Finally, in case **1170/2009/KM**, a German citizen requested that the Council grant him access to an opinion by its Legal Service discussing the legal basis for a regulation on genetically modified food and feed. The Council granted access only to the introductory paragraphs of the opinion, arguing that the body of the document fell within the exception in Regulation 1049/2001 relating to the protection of legal advice. Having inspected the document, the Ombudsman came to the preliminary conclusion, based on the *Turco* judgment²⁵, that the Council had not shown that access had to be denied in order to protect its interest in receiving useful legal advice from its Legal Service. He suggested that the Council grant full access to the document in question. He also made suggestions in relation to the procedural points raised by the complainant. The Council did not accept the Ombudsman's analysis but, given the time which had meanwhile elapsed, agreed nonetheless to grant access to the document.

- More generally on transparency, case **3072/2009/MHZ** concerned the Commission's failure to deal diligently with a complaint about its Register of Interest Representatives (the "*transparency register*"). An NGO complained about the data concerning the lobbying budget of a specific interest group, which the Commission had included in its Register. The Ombudsman made a proposal for a friendly solution, stating that the Commission could ask the interest group in question to explain its lobbying costs. He also suggested that the Commission could establish, and make public, general rules concerning

²⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

²⁵ Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* [2008] ECR I-4723.



(i) its procedures for dealing with Register complaints, (ii) how interest groups should calculate their lobbying budgets, and (iii) how these groups should report their eligible activities for the purposes of the Register. The Commission accepted all of these proposals. Similarly, the Office for Harmonisation in the Internal Market (OHIM) agreed to change its language policy in response to the Ombudsman's inquiry in case **2413/2010/MHZ**. The Ombudsman argued that good administrative practice requires that, as far as possible, the institutions, bodies, offices, and agencies of the EU provide information to citizens in their own language. As a result, OHIM agreed to accept written queries from any citizen of the Union, in any one of the languages mentioned in Article 55(1) TEU, and to provide an answer in the same language. It also announced that it would make the homepage of its website available in all EU languages and explain its language policy thereon. Finally, a good example of useful cooperation between the Ombudsman, the complainant, and the institution is case **2533/2009/VIK**, which concerned alleged language discrimination on the EPSO website. The complainant contested EPSO's statement on its website that, for operational reasons, it was only able to respond to questions submitted in English, French, or German. EPSO explained that its website addressed two different audiences, namely, (i) candidates in competition and selection procedures, and (ii) the general public. As regards the first group, EPSO explained its reasons for considering that correspondence with candidates in selection procedures could be limited to English, French, and German. The complainant did not object to this. As regards the second group, EPSO pointed out that it treated all requests for information from citizens equally, the only difference being that, given the possible need for translation, it may take longer to provide a reply to a request made in a language other than English, French, or German. The complainant accepted EPSO's explanations, but considered that this information should be published on EPSO's website. He made precise and constructive proposals in this regard, to which EPSO responded positively.

- For citizens who want to participate in, or to scrutinise, the application of EU law, the infringement procedure (through which the Commission fulfils its duties as guardian of the Treaties) is a natural focus of interest. Many cases in this area concern procedure and the Commission's application of its own Communication on relations with the complainant in respect of infringements of Community law ('the Communication')²⁶. Case **2403/2008/OV** constitutes one such case in which the Commission failed to abide by the provisions of its 2002 Communication. While it acknowledged that it failed to respect certain points, including point 3 on registration, and apologised for this, it did not explicitly acknowledge that it failed to respect point 10 of the Communication, which provides that the complainant should be heard before a complaint is rejected. The Ombudsman closed his inquiry, noting that he had, in the meantime, opened an own-initiative inquiry into the relationship between the new EU Pilot and the procedural guarantees set out in the Communication.

²⁶ 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.



- Finally, the Ombudsman welcomed the steps taken by the Commission in case **1786/2010/PB**, with an eye to making EU research funding less bureaucratic. The case concerned the so-called 'pre-financing' funds paid by the Commission in the framework of the EU's 7th Research Framework Programme. The complainant objected to the requirement that recipients of EU funding ensure that the funds received generate interest for the benefit of the EU budget. It stated that this requirement is bureaucratic and disproportionate. The Ombudsman found that the relevant provisions in the Financial Regulation and the related implementing provisions could be interpreted in a way that supported the complainant's position, notably in light of the general principle of fairness. He further took the view that it was not consistent with the principle of sound financial management to impose obligations that create disproportionate burdens for beneficiaries. In reply, the Commission announced new rules and practices intended to implement the Ombudsman's draft recommendation in this case. These changes were introduced with immediate effect.

7. Conclusions

The examples given above, coupled with the star cases and the remainder of the cases in Annex I of this report, show that the Ombudsman's efforts to reach out to the institutions and to promote a culture of service to citizens are continuing to bear fruit. The constructive replies from the institutions to the Ombudsman's suggestions underscore their willingness to work with the Ombudsman to resolve problems. The Ombudsman is keen to build on this good cooperation.

With this in mind, and on the basis of the analysis carried out in this report, the Ombudsman will reflect on the possibility of expanding the concept of the *"friendly solution"*, which, up to now, has been limited to proposals made on the basis of Article 3(5) of the Ombudsman's Statute. It has become clear during the preparation of this report that there may be other cases that also deserve to be called *"friendly solutions"*. The common denominator in these cases is that the Ombudsman acts in the problem-solving mode and the institution engages constructively with him to address the issue raised by the complainant. In deciding in the future whether cases can be classified as friendly solutions accepted, the key question could be: has the institution resolved a problem for the complainant as a result of a suggestion made by the Ombudsman? The Ombudsman will reflect on this possibility in the coming months.

As stated in the Ombudsman's foreword, the reason for producing this report is to help provide a comprehensive account of the extent to which the EU institutions comply with the Ombudsman's suggestions. With a view to providing an overall picture of compliance, and to drawing the necessary lessons therefrom, the Ombudsman intends to publish, in November 2013, a report combining the study of the follow-up of critical and further remarks made in 2012, with the report on the cases closed in 2012, in which the institutions accepted a friendly solution proposal or draft recommendation. That report will henceforth be seen as the main study examining the extent to which the EU's institutions, bodies, offices and agencies respond constructively to suggestions made by the Ombudsman in a given year.



Annexes

I. Detailed analysis of cases

A. Star cases

Case 3106/2007/(TS)FOR

Access to adverse drug reaction reports

The complainant, who works for a Greek law firm, requested that the European Medicines Agency give him public access to certain documents, namely, suspected serious adverse reaction reports relating to Septrin, a pharmaceutical product. The Agency refused his request for access. It based its decision on the need to protect commercial interests.

After examining the arguments put forward by the complainant and the Agency, the Ombudsman made a draft recommendation to the Agency. He considered that the EU rules on public access to documents do apply to documents held by the Agency. He found that it was not evident that the requested reports contain commercially confidential information or other information which would damage any legitimate business interests of a third party. He noted, however, that the Agency added a new argument to the effect that personal data (such as the personal data of patients and reporting doctors) contained in the requested documents would need to be redacted.

In its response to the draft recommendation, the Agency acknowledged the fundamental principles of openness and transparency, and agreed to provide the complainant with access to the requested data, after removing personal data.

The complainant thanked the Ombudsman for his efforts to help him.

In closing the case, the Ombudsman recognised the important progress that the Agency has made in rendering its work more transparent. He went on to point out that such significant improvements serve to ensure that citizens will have greater trust in the Agency, thus increasing both its legitimacy and its effectiveness in carrying out its important tasks.

Case 3264/2008/(WP)GG

Communication of assumptions liable to affect the interests of the person concerned to the latter's employer

The complainant worked for a German company (the "*Company*"). His wife worked for a consulting company (the "*Consultancy*") that supported businesses such as the Company in co-operation projects co-funded by the EU.

In 2008, the Commission's Directorate-General Information Society and Media ("*DG INFSO*") carried out an audit on the Consultancy. It subsequently contacted the audit service of the Company.

According to the complainant, they communicated the following three assumptions to the Company on that occasion: (i) the choice of the Consultancy as an administrative project partner had not been made on the basis of qualitative and economic criteria but was due to his influence; (ii) the services



billed by his wife had not been performed by her; and (iii) he had intervened in support of the hourly rates charged by the Consultancy in a specific project with a view to protecting his wife's job.

In his complaint to the Ombudsman, the complainant alleged that the Commission acted incorrectly when transmitting these assumptions, in particular since the assumptions lacked any factual basis.

In its opinion, the Commission basically submitted that it had merely informed the Company of its view that there might be a conflict of interest concerning the complainant.

The Ombudsman considered that it was not unreasonable for the Commission to take the view that there might have been a conflict of interest and to contact the Company to clarify the matter. However, the available evidence strongly suggested that the Commission had gone beyond merely communicating facts and the assumption that there might be a conflict of interest. In the Ombudsman's view, there had been no valid reason for doing so.

The Ombudsman therefore made a proposal for a friendly solution, under which the Commission could (i) acknowledge that it acted incorrectly when it communicated to the Company assumptions concerning the complainant and his wife that went beyond the mere assumption that there might be a conflict of interest, (ii) acknowledge that these assumptions were unfounded and (iii) inform the Company accordingly.

In its reply, the Commission stressed that it had not intended to communicate any assumptions other than that concerning the potential existence of a conflict of interest. It submitted a draft letter that it intended to send to the Company in order to clarify matters.

Following further contacts between the complainant, the Ombudsman, and the Commission, the latter accepted to modify the said letter. In the letter that was finally sent to the Company, the Commission acknowledged that it went further than its duties strictly required when it communicated to the Company assumptions concerning both the complainant and his wife. The Commission further stated that these assumptions subsequently proved to be unfounded.

The complainant informed the Ombudsman that he was happy with the revised wording of the relevant letter.

The Ombudsman concluded that a friendly solution satisfying the complainant had been achieved. He considered that the Commission in general, and DG INFSO in particular, deserved to be commended for the constructive and co-operative approach they had manifested throughout this inquiry. This made it possible for him to find, also thanks to the helpful and co-operative attitude of the complainant, a solution that satisfied both parties.

Case 1804/2009/(JMA)MHZ

Part-time work taken into consideration for the purposes of the payment of the double dependent child allowance

The Staff Regulations for EU civil servants provide that the dependent child allowance awarded to civil servants may be doubled if it is established that the child is suffering from a handicap which has caused the civil servant to incur heavy expenditure. The European Parliament refused to grant the complainant



the double dependent child allowance because she had not submitted documents to show her real expenses resulting from the care of her disabled child. It refused to consider the loss of income which she incurred as a result of her decision to work part-time as financial expenditure resulting from her child's disability.

The Ombudsman made a friendly solution proposal for Parliament to grant the complainant the double allowance on the basis of cost estimates of external carers that the complainant would submit. He considered it obvious that if a parent is caring for a disabled child, the same pecuniary value should be attached to that activity as if it were being provided by another carer. Moreover, he pointed out that the relevant provisions on the double dependent child allowance do not distinguish between cases where the parents concerned care for the children themselves after deciding to reduce their working hours, and cases where, in order to remain in full-time work, they decide to pay somebody else for doing so.

Parliament replied that, in future, it would take into account its staff's decisions to work part-time, when deciding on cases where the official concerned finds it difficult to prove the existence of heavy expenditure resulting from the handicap of his/her child. Parliament also stated that it would review the complainant's file.

The Ombudsman closed the case as settled by the institution.

Case 2533/2009/VIK

Alleged language discrimination on the website of the European Personnel Selection Office (EPSO)

The complainant, a Bulgarian national, objected to EPSO's statement on its website that, for operational reasons, it was only able to respond to questions submitted in English, French, or German. According to the complainant, by limiting the languages for contacting EPSO to English, French, and German, the Office was in breach of Article 20(2)(d) of the Treaty on the Functioning of the European Union, which gives EU citizens the right to address the institutions and bodies of the EU in any of the Treaty languages, and to obtain a reply in the same language.

The Ombudsman opened an inquiry and asked EPSO for an opinion.

In its opinion, EPSO explained that its website addressed two different audiences, namely, (i) candidates in competition and selection procedures, and (ii) the general public, which means any EU citizen who may be interested in learning about the possibilities of a career in the EU institutions.

As regards the first group, EPSO explained its reasons for considering that correspondence with candidates in competition and selection procedures could be limited to English, French, and German. The complainant did not object to EPSO's approach, or to its reasoning.

As regards the second group, EPSO pointed out that it treated all requests for information from citizens equally, the only difference being that it may take longer to provide a reply to a request made in a language other than English, French, or German, given the possible need for translation.



The complainant accepted EPSO's explanations, but considered that this information should be published on EPSO's website. The Ombudsman therefore asked EPSO how it proposed to proceed. In its reply, EPSO stated that it would make sure that its website provided complete and accurate information concerning languages which could be used for correspondence. In his observations, the complainant expressed certain reservations regarding the wording EPSO proposed to use on its website, and suggested that the above information should be presented in neutral language.

EPSO responded positively to the complainant's suggestions. The complainant was satisfied with the new wording proposed by EPSO.

EPSO subsequently amended the information provided on its website accordingly.

The Ombudsman concluded that EPSO had taken steps to settle the matter, and in so doing, had satisfied the complainant. The Ombudsman thanked the complainant for his precise and constructive proposals in this case, which had made it possible to bring about tangible improvements. He congratulated EPSO for responding positively to the complainant's suggestions, and for amending its website accordingly.

Case 3072/2009/MHZ

Failure to deal diligently with a complaint concerning the Register of lobbying groups

The complainant, an NGO, complained to the Commission that the data concerning the lobbying budget of a specific interest group, which the Commission included in its Register of Interest Representatives (the 'Register'), were not correct. The complainant insisted that the costs of the group's major lobbying events were not reflected in this budget. Following a short investigation, the Commission rejected the complaint as unfounded. The complainant then turned to the Ombudsman and alleged that the rejection of its Register complaint was wrong and unjustified. It claimed that the Commission should reconsider its decision on the lobbying budget in question, give reasons for its decisions on complaints submitted in the context of the Register, and urgently provide more guidance on its definition of eligible activities and lobbying budget calculations, in order to avoid widely diverging methods and criteria from being applied by interest groups.

On the basis of his inspection of the Commission's documents, the Ombudsman concluded that, by failing to ask the interest group for explanations regarding its lobbying costs relating to the organisation of major lobbying events, the Commission did not handle the complainant's Register complaint with sufficient diligence. He made a proposal for a friendly solution stating that the Commission could ask the interest group in question to explain its aforementioned lobbying costs. He also suggested that the Commission could establish and make public general rules concerning (i) its procedures for dealing with Register complaints, (ii) how interest groups should calculate their lobbying budgets, and (iii) how these groups should report their eligible activities for the purposes of the Register.

The Commission accepted all of these proposals, and the case was closed as settled by the institution. The Ombudsman stated that he trusted that the Commission would (i) inform the complainant of the results of its review as regards the registration of the interest group in question and (ii) make public,



as soon as possible, its procedure for investigating and treating complaints concerning the Register.

Case 1786/2010/PB

Unreasonably bureaucratic obligations imposed by the Commission on recipients of EU funding

The complainant, the University of Copenhagen, objected to the fact that the Commission required recipients of EU funding to ensure that the funds received generate interest for the benefit of the EU budget. To comply with this obligation, beneficiaries either had to set up bank accounts, or manage/operate existing accounts for that purpose. In the complainant's view, the Commission thus imposed an unreasonably bureaucratic and disproportionate obligation.

The case concerned the so-called 'pre-financing' paid by the Commission in the framework of the EU's 7th Research Framework Programme. This kind of payment is paid up-front to enable the beneficiary to start working on a project.

The complainant acknowledged that any interest that arises belongs to the EU. However, it considered that there was no legal requirement to ensure, in the first place, that such interest was created. It moreover argued that setting up and managing such interest-yielding accounts imposes an unreasonable and disproportionate administrative burden on the recipients of pre-financing.

The Ombudsman found that the relevant provisions in the Financial Regulation and the related implementing provisions could be interpreted as supporting the complainant's position, notably in light of the general principle of fairness. He further took the view that it was not consistent with the principle of sound financial management to impose obligations that create disproportionate burdens for beneficiaries. The Ombudsman therefore made a draft recommendation to the Commission.

In its reply, the Commission announced new rules and practices intended to implement the Ombudsman's draft recommendation. The Commission accepted that requiring a beneficiary to open an interest-yielding account would not be appropriate if this were to constitute a disproportionate burden (or if the beneficiary was prevented from opening such an account by national law). In such cases, beneficiaries can now declare that the opening and/or operating of an interest-bearing account would not be in line with the principle of sound financial management. This will exempt them from the obligation that the complainant disputed in the present case. The Commission introduced these changes with immediate effect.

More generally, the Commission expressed its agreement with the Ombudsman that the principle of sound financial management should be contextually applied in light of the policies pursued and of their context. It expressed its intention to also pursue this approach at the legislative level.

The complainant expressed its full satisfaction with the outcome of the Ombudsman's inquiry.

Case 2413/2010/MHZ

The Office for Harmonisation in the Internal Market's language policy regarding its website and its correspondence with citizens



The complainant, a Polish citizen, alleged that the Office for Harmonisation in the Internal Market (OHIM) replied in English to his letter which was written in Polish, and that the OHIM website was only available in OHIM's working languages (English, French, German, Spanish, and Italian). He considered this to be unlawful and turned to the Ombudsman.

The Ombudsman opened an inquiry and succeeded in convincing OHIM to change its language policy. He did not agree with OHIM's initial view that the OHIM Basic Regulation²⁷, together with the judgment in *Kik*²⁸, constitutes the legal basis for its practice of using only English, French, German, Spanish, and Italian on its website. Moreover, he could not exclude that this practice would put legal and natural persons coming from Member States other than Germany, France, the United Kingdom, Italy, and Spain at a disadvantage when compared to persons originating from those countries. He emphasised that, when a citizen first visits the OHIM website, he would find it much easier to navigate it if all the language versions were available. He argued that good administrative practice requires that, as far as possible, the institutions, bodies, offices, and agencies of the EU provide information to citizens in their own language. He further stated that administrative convenience is not a valid argument for an EU administration well equipped in terms of technical and human resources not to make its websites available in all EU languages.

As a result of the Ombudsman's inquiry, OHIM introduced important changes. First, it decided to accept written queries from any citizen of the Union, in any one of the languages mentioned in Article 55(1) TEU²⁹, and to provide an answer in the same language. Second, it accepted the Ombudsman's proposal for a friendly solution. It thus made the homepage of its website available in all EU languages and explained its language policy thereon. The Ombudsman applauded this commendable stance.

Case 2609/2010/BEH

Alleged failure to grant public access to certain preparatory documents

The complainant is a German citizen. In August 2010, he turned to the Commission and requested, in line with Regulation 1049/2001 on public access to documents³⁰, copies of certain preparatory documents concerning the Commission's 'Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement'. The Commission refused access and argued that the entirety of the requested documents fell within the scope of the exception provided for in Article 4(1)(a) of Regulation 1049/2001 ("*defence and military matters*"). It went on to say that, for the same reason, partial access could not be granted either. The complainant subsequently submitted a confirmatory application for access. After extending the time limit for processing his confirmatory application by 15 working days, the Commission informed the complainant that, in spite of the extended time period, it had not been able to finalise its decision.

²⁷ Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark; OJ 2009 L 78 p.1.

²⁸ Case T-120/99 *Kik v OHIM* [2001] ECR II-2235, paragraph 64. The Court of Justice upheld this judgment on appeal: Case C-361/01, *Kik v OHIM* [2003] ECR I-8283, paragraph 83.

²⁹ Article 55(1) TEU refers to Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish.

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



In his complaint to the Ombudsman, the complainant alleged that the Commission failed to process his confirmatory application for access to certain documents within the time limits foreseen in Regulation 1049/2001. He claimed that the Commission should (i) deal rapidly with his confirmatory application and (ii) grant access to the documents concerned.

On 17 December 2010, the complaint was forwarded to the President of the Commission for an opinion. On 23 December 2010, the complainant informed the Ombudsman's services that the Commission, to his surprise and great joy, had granted him unlimited access to all the documents he requested. He pointed out that his request for access had been satisfied and that he considered the matter settled.

The Ombudsman thus closed the case as settled by the institution.

Case 899/2011/TN

The right of an EU civil servant to receive the double dependent child allowance for his severely disabled child

The complainant's child has a severe congenital handicap. The Commission decided to grant the complainant the double dependent child allowance as from the date on which he applied for the double dependent child allowance, that is, almost two years after he took up his duties. The complainant argued that, when he started working for the EU administration, he provided a medical certificate confirming that his child has been 100% disabled since birth. However, due to a misunderstanding within the administration, a considerable amount of time elapsed before he was informed of the possibility to apply for the double allowance. The complainant considered that the Commission was wrong to deny him the double allowance as from the date on which he took up his duties.

In his letter to the Commission opening the inquiry, the Ombudsman noted that while the double allowance may only be granted upon application, he was not convinced that the Staff Regulations established that the right to family allowances must take effect as of the date on which an application is made. The Ombudsman also noted that the implementing rules for double dependent child allowance had been modified in December 2007, so that if the handicap is greater than or equal to 50%, the double allowance will be granted automatically, without the civil servant having to prove any heavy expenditure. The Ombudsman was not convinced that it was a fair or consistent practice to base the right to a double allowance on the date of application in cases where it is possible to establish a precise date, such as the date of birth, from which the child suffers from a handicap greater than or equal to 50%.

In its opinion to the Ombudsman, the Commission concluded that, in view of the modification of the rules in December 2007, it should have paid the complainant the double dependent child allowance retroactively, that is, from the date on which the complainant commenced work as an EU official. The Commission assured the Ombudsman that it would take the necessary steps to pay these allowances as of December 2007, and to re-examine the complainant's file for the period prior to December 2007.

The complainant thanked the Ombudsman for his efforts, which he believes produced a very satisfactory result. The Ombudsman closed the case as settled by the Commission.



B. Friendly solutions accepted by institution

1. The European Parliament

See case **1804/2009/(JMA)MHZ** above under "Star cases"

2. The European Commission

Case 1633/2008/DK

Alleged failure to grant full access to a document

In January 2008, the complainant, a civil society organisation called Corporate Europe Observatory, requested access to the Minutes of a meeting, held in January 2008, between Mr Peter Mandelson, the then Commissioner responsible for Trade, and representatives of the business organisation BusinessEurope. When the Commission granted only partial access, the complainant turned to the Ombudsman to complain about the Commission's refusal to grant full access. The complainant argued specifically that if, during the above meeting, information was shared with the representatives of a business organisation, the same information should be available to other members of the public as well.

During his inquiry, the Ombudsman found that the Commission did not provide adequate and appropriate reasoning for its decision to refuse access to certain parts of the document concerned, and to delete a section of it on the grounds that it did not fall within the scope of the complainant's request. The Ombudsman therefore made a proposal for a friendly solution, in which he asked the Commission to reconsider its reasoning as regards the above issues. He also asked the Commission to provide information on its relevant practices and rules regarding the issue of allegedly granting business organisations privileged access to documents and information.

In its reply to the Ombudsman's friendly solution proposal, the Commission provided revised grounds for its decision to refuse access to certain parts of the document concerned. It also granted access to the part which it had previously deleted. With regard to allegedly granting business organisations privileged access to documents, the Commission stated that it does not employ such rules or practices and pointed out, in this respect, that its own Code of Good Administrative Behaviour contains the principles of non-discrimination and equal treatment.

In view of the Commission's reply to the Ombudsman's friendly solution proposal, and in light of the complainant's reactions to those statements, the Ombudsman closed his inquiry with a finding that the outcome of his friendly solution proposal was satisfactory, with the exception of the Commission's reply to the allegation that it grants certain persons privileged access to documents. However, since this allegation is being dealt with in a case which the complainant recently lodged with the General Court, the Ombudsman took the view that there was no need for him to consider this aspect of the case any further.

The Ombudsman also made a further remark to the effect that, in the framework of Regulation 1049/2001 regarding public access to documents, the Institutions cannot decide that a certain part of an existing document constitutes a 'sub-document' or another document simply because it contains a different kind, or type of information. Furthermore, references to attachments should be treated as forming part of the



document concerned, and should, therefore, not be excluded from an Institution's analysis when dealing with a request for access to the document.

Case 1944/2009/(JMA)MHZ

Incorrect information concerning the conditions of employment in an EU delegation

The complainant, an experienced secretary working at the Commission, was wrongly informed by the Commission's competent services about the wages she would earn in an EU delegation. Consequently, she accepted the post in the delegation. By the time she realised that the amount she would earn was a lot less than she thought, it was too late for her not to take up the post. She therefore turned to the Ombudsman.

The Ombudsman found that, even if the complainant could not rely on the principle of legitimate expectations as regards the information in question, it would be unfair if the Commission did not accept any responsibility for the serious consequences caused by the administrative mistake. In addition to the financial implications, the complainant stressed that the location of her new post also had a detrimental impact on her husband's health.

The Ombudsman therefore made a proposal for a friendly solution for the complainant to be transferred to another country. At the same time, the complainant contacted the Commission's services in this respect. As a result, the complainant was transferred to Brussels.

The Ombudsman thus concluded that a friendly solution had been successfully achieved.

Case 2605/2009/MF

Unfair recovery of a grant

The Commission awarded the complainant, a non-profit NGO located in Brussels, a grant to carry out a project. The Commission then audited the project. On the basis of the audit findings, the Commission asked the complainant to reimburse part of the grant. The Commission made this request because the complainant had failed to provide, within the set deadline, supporting documents regarding certain costs. Despite the fact that the complainant provided the relevant documents, the Commission refused to review the recovery order, on the grounds that it submitted them belatedly.

The Ombudsman made a proposal for a friendly solution, inviting the Commission to explain why it could not modify the conclusions it had drawn from the audit report, by taking into account the documents which the complainant had submitted, despite the fact that they were submitted late.

The Commission accepted the proposal for a friendly solution. It stated that it was prepared to carry out a complete analysis of the documents in question, and review the sum originally claimed in its recovery order.

The Ombudsman therefore closed the case as settled by the Commission.

He also made a further remark to the Commission, suggesting that it could consider informing the complainant directly of the date on which it expected that its assessment



of the further documentation would be finalised, and that such a date should preferably be within two months of the Ombudsman's decision to close the complaint.

Case 1581/2010/(FS)GG

Refusal to grant access to documents concerning recognition of ski instructors

In 2009, the complainant, an association of ski instructors, complained to the Commission about the conditions for the recognition of ski instructors in certain Member States, including France. In 2000, the Commission authorised France to require ski instructors from other Member States to undergo a test before being allowed to provide their services in France. The relevant decision comprised a clause obliging France to submit, at the latest by August 2002, a report on the recognition of ski instructors' diplomas in the seasons 2000 and 2001. No such report was submitted, however.

In November 2009, the complainant asked the Commission to provide it with copies of the replies that it had received to the requests for information it had addressed to Member States and professional organisations within the framework of its inquiry into the complainant's infringement complaint. This request was based on Regulation 1049/2001 on public access to documents³¹. The Commission rejected the complainant's request, arguing that its refusal was justified by the exception concerning the protection of the purpose of inspections, investigations, and audits set out in Regulation 1049/2001.

The complainant thereupon turned to the Ombudsman, who opened an inquiry. This inquiry concerned (i) the Commission's alleged failure to insist that France provide the report foreseen in the 2000 decision and (ii) the handling of the request for access to documents.

As regards the first issue, the Commission put forward detailed explanations to show that its failure to ask for the said report to be submitted did not have any negative consequences and that it is no longer necessary to insist on this report. The Ombudsman found these explanations convincing.

As regards the second issue, the Ombudsman proceeded to an inspection of the relevant documents which showed that they also contained information of a purely factual nature. The Ombudsman was not convinced that the exception invoked by the Commission allowed it to refuse to grant access to those parts of the documents concerned that contain purely factual information of the type referred to above. He therefore made a proposal for a friendly solution, calling on the Commission to reconsider the complainant's request for access.

The Commission welcomed the Ombudsman's proposal. It explained that it would reconsider the complainant's request for access with a view to granting full or partial access after having consulted the Member States concerned. The complainant informed the Ombudsman that it was satisfied, but that it reserved the possibility of turning to the Ombudsman again in case the steps taken by the Commission did not lead to a solution acceptable to it.

³¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



The Ombudsman concluded that his proposal for a friendly solution had thus been successful and that the Commission had settled the case to the complainant's satisfaction.

3. Council of the European Union

Case 1170/2009/KM

Access to an opinion of the Council's Legal Service

In January 2009, a German citizen requested that the Council grant him access to an opinion by the Council's Legal Service discussing the legal basis for a regulation on genetically modified food and feed. This request was based on Regulation 1049/2001 on public access to documents³². The Council granted access only to the introductory paragraphs of the opinion, arguing that the body of the document fell within the exception relating to the protection of legal advice.

The complainant turned to the Ombudsman, arguing that the Council had misinterpreted the judgment of the Court of Justice of the EU in *Sweden and Turco v Council*³³ and that it should give access to the entire document. From a procedural point of view, he noted that, while not strictly required by Regulation 1049/2001, it would be better if the Council indicated the actual date on which the time limit for its reply to requests for access expired. Also, in case of rejection of the application for access, it should not wait until its final rejection letter to inform applicants of the remedies available to them. This is because informing applicants at an earlier stage would ensure that they can use the legal remedies open to them once the time limit for the institution's reply has expired.

The Ombudsman opened an inquiry. The Council argued that the opinion was very sensitive and that the possibility of internal legal advice being published might undermine the usefulness of legal opinions. It further put forward that applicants are able to calculate the end of the time limit themselves and that informing them of the remedies available to them before the end of the time limit could lead to confusion.

The Ombudsman, having inspected the document, came to the preliminary conclusion that, on a proper reading of the *Turco* judgment, the Council had not shown that access had to be denied in order to protect its interest in receiving useful legal advice from its Legal Service. He therefore made a proposal for a friendly solution, suggesting that the Council grant full access to the document in question. In relation to the procedural points, he proposed that the Council inform applicants of the date on which a decision is due and of the remedies available to them before that date.

In its reply, the Council disagreed with the Ombudsman's analysis but decided nonetheless to grant access to the document, given the time which had passed. It also agreed to inform applicants of the date by which it must decide on their application. However, it rejected the proposal to inform applicants of the remedies available to them in advance.

³² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

³³ Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723.



The complainant confirmed that he had received the document and that he was satisfied with this outcome. The Ombudsman therefore considered that the case had largely been settled by the Council and that there were no grounds for further inquiries into the remaining issue in the present case. He therefore closed the case.

4. The European Aviation Safety Agency (EASA)

Case 266/2010/(BEH)VL

EASA settles dispute concerning the reimbursement of travel costs incurred by a candidate for a vacant post

The complainant applied for a vacancy at EASA. She travelled, from California, where she resides, to Cologne, the Agency's seat and the place where the job interview was to be held, via Copenhagen. On her way to Cologne, the complainant also made a stop-over in Sweden for some days. When she asked EASA for the reimbursement of her travel expenses, the Agency reimbursed the cost of her return flight from Copenhagen to Cologne. However, it refused to reimburse the cost of the return flight from Los Angeles to Copenhagen on the ground that the complainant had not submitted any price comparisons for such a flight as required by EASA's Financial Contribution Rules. The complainant considered that EASA failed to apply its own rules correctly and that it provided her with vague information concerning the reimbursement of her travel expenses. Thus, she turned to the Ombudsman.

After having carefully analysed the submissions of both parties, the Ombudsman took the preliminary view that the Agency had not correctly applied its own rules and that the information provided to the complainant was not as precise and as clear as it should have been. The Ombudsman therefore made a proposal for a friendly solution to EASA, suggesting that the Agency reimburse the cost of the return ticket from Los Angeles to Copenhagen. He also suggested that EASA apologise for having wrongly applied its rules and for having provided the complainant with insufficiently precise and clear information.

Whilst EASA agreed to reimburse the cost of the return ticket from Los Angeles to Copenhagen, it took the view that there had been no maladministration. It nevertheless apologised for what it referred to as a misunderstanding on its part. The Ombudsman pointed out that he maintained his view as regards the incorrect application of the relevant rules and the insufficiently precise and clear information. However, considering that the complainant had informed him that she was happy to accept the reimbursement, he took the view that EASA had taken appropriate steps to settle the complaint.

The Ombudsman also addressed a further remark to EASA in which he strongly encouraged EASA to review the information provided to candidates with a view to ensuring that it is as precise and as helpful as possible.

5. The Office for Harmonisation in the Internal Market (OHIM)

See case 2413/2010/MHZ above under "Star cases"



6. The European Police College (CEPOL)

Case 784/2009/(GP)IP

Failure to pay for the work carried out by a freelance consultant

The complainant is an Italian citizen who worked as an Educational Expert consultant for the European Police College (CEPOL) between April and August 2008. During this period, the complainant participated in three meetings and carried out preparatory and follow-up work relating thereto. Due to several administrative problems, the complainant carried out her work without having signed a contract with CEPOL. In August 2008, CEPOL asked her to stop working because, contrary to its previous belief, the relevant rules did not allow it to sign a contract with her. CEPOL nevertheless offered EUR 1 000 to the complainant as compensation for her participation in the two meetings in which it explicitly authorised her to participate. CEPOL also apologised to her for the inconvenience caused. The complainant was not satisfied with the offer and turned to the Ombudsman. She claimed that CEPOL should pay her a total sum of EUR 2 500, which covered all the work she carried out in relation to the above meetings.

After assessing the information provided by the complainant and by CEPOL, it emerged that, according to CEPOL, the payment to the complainant for her preparation and follow-up work could not be made for the sole reason that there was no written contract. The Ombudsman noted, however, that CEPOL had already offered to pay the complainant for other related activities that were not covered by a written contract.

The Ombudsman believed that it would be consistent with the principles of good administration for CEPOL to take an extra step. In this regard, he made a proposal for a friendly solution inviting CEPOL to consider paying the complainant, in addition to the sum of EUR 1 000 already offered, the sum of EUR 600 corresponding to the preparatory and follow-up work relating to her participation in the two meetings in which CEPOL explicitly authorised her to participate. CEPOL confirmed that it agreed with the Ombudsman's proposal. The complainant expressed her satisfaction with the outcome of her case and thanked the Ombudsman for his work.

C. Draft recommendations accepted by institution

1. The European Commission

Case 3800/2006/JF

Former official's pension checks

The complainant, a Commission official, took early retirement and moved to the United Kingdom. His wife, however, continued to live in Brussels. On the basis of an anonymous letter, the Commission had doubts as to whether the complainant's real residence was Brussels or the United Kingdom. It first decided to suspend the United Kingdom weighting factor applied to his pension, and later asked OLAF to investigate. The latter subsequently made enquiries with the complainant's neighbours in Brussels. Consequently, the complainant approached the Ombudsman to complain about, among other things, the fact that the Commission did not give him an opportunity to defend himself before it adopted the above decision, which was, moreover, unwarranted.



The Commission acknowledged that it failed to allow the complainant to defend himself, and apologised for this fact. However, it refused to accept the Ombudsman's conclusion that its actions resulted in the complainant's honour and reputation being damaged. It therefore opposed, first, the Ombudsman's proposal for a friendly solution, and then his draft recommendation for the Commission to pay the complainant compensation of EUR 5 000.

Notwithstanding the above, after a subsequent meeting with the Ombudsman, the Commission offered the complainant EUR 1 000 compensation for non-material damage, and a letter of apology signed by the Commissioner for Inter-Institutional Relations and Administration. The complainant ultimately accepted this solution.

The Ombudsman emphasised that the Commission's actions damaged the complainant's honour and reputation. Notwithstanding this fact, he warmly welcomed the Commission's and, in particular, the competent Commissioner's willingness to bring the complaint to a satisfactory end. He emphasised that acknowledging mistakes and offering apologies where appropriate brings the EU civil service back into line with the culture of service citizens expect it to be guided by. He emphasised that an apology is a very powerful tool with which to restore confidence in a responsible administration, and to bring satisfaction to a harmed citizen.

The Ombudsman appreciated that the Commissioner for Inter-Institutional Relations and Administration decided to present the Commission's apologies to the complainant. Similarly, he appreciated the complainant's good will in accepting the Commission's proposal. He closed the case accordingly.

Case 3196/2007/(BEH)VL

Refusal to grant access to summary information on an infringement proceeding

The complainant is a United Kingdom citizen specialising in data protection issues. In 2007, he approached the Commission with a request for information concerning ongoing infringement proceedings relating to Directive 95/46/EC on the protection of personal data³⁴.

The Commission informed him that it had proceedings open against Austria, Germany, and the United Kingdom. As regards the first two of the aforementioned proceedings, the Commission provided the complainant with brief, one-sentence explanations of the issues examined in relation to each article of the Directive allegedly infringed. However, with respect to the United Kingdom, it omitted to include such information. In response to a query from the complainant, the Commission told him that it could not disclose the requested information in order not to prejudice negotiations with the United Kingdom.

The complainant could not understand how the level of information he had asked for could endanger negotiations with the Member State concerned. Therefore, he turned to the European Ombudsman.

³⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31.



After a careful examination of all the arguments, the Ombudsman made a proposal for a friendly solution based on the following considerations: (a) the type of information which the Commission refused to disclose in relation to the United Kingdom was made available with respect to Austria and Germany; (b) the Commission's arguments could, in any event, not explain its refusal to release information on issues that had been settled in the meantime; (c) the complainant only asked for brief descriptions of the alleged infringements; and (d) the Commission disclosed this type of information in a press release on another infringement proceeding against the United Kingdom concerning alleged infringements of the same Directive. The Ombudsman emphasised that it is good administrative practice to provide the information citizens request, unless there is a valid reason for not doing so. Therefore, he proposed that the Commission should either provide the complainant with the information he had requested or put forward a convincing explanation as to why this was not possible.

Following the Commission's rejection of his proposal, the Ombudsman made a corresponding draft recommendation. In its detailed opinion, the Commission informed the Ombudsman that it had provided the complainant with summary information on each of the articles allegedly infringed.

The complainant subsequently informed the Ombudsman that the United Kingdom authorities, in turn, provided him with summary information that appeared to be more extensive than that of the Commission. In response to a question to that effect by the Ombudsman, the Commission explained that the discrepancy in the information was due to the fact that: (i) it had only taken into consideration those articles of the Directive that were of relevance to the infringement proceeding at the time when the request for information was made; and (ii) that some of the issues the national authorities associated with certain articles were, in its point of view, covered by another article of the Directive that it had mentioned. The Ombudsman took the view that the Commission's explanations were plausible and noted that they were not challenged by the complainant. He therefore took the view that the Commission accepted his draft recommendation and had taken satisfactory steps to implement it.

The Ombudsman also made a further remark to suggest that it would be useful for the Commission, where a considerable amount of time passes between the request for information and the provision of this information, to provide applicants with the most up to date information.

Case 1181/2008/(BEH)KM

The enforcing of a claim of over EUR 40 000 arising out of an agreement that the Commission erroneously believed it had concluded with the complainant

The complainant is a German university. Mr B, who was a professor at that university, applied for a grant from the Commission's "Culture 2000" programme. He did so in the name of the complainant, using the latter's stationery bearing its letterhead. On 30 December 2000, the Commission and Mr B signed a grant agreement. In August 2005, an audit of the project expenses found that EUR 39 989.94 had to be repaid to the Commission.

In June 2006, the Commission sent the complainant a corresponding debit note. In its reply, the complainant stated that it had no information about the project and asked for further information. In September 2006, the Commission sent a



reminder, requesting payment. The complainant reiterated that it had no knowledge of the agreement and emphasised that Mr B was not authorised to enter into contracts on its behalf. In October 2006, the Commission informed the complainant that it would offset EUR 40 649.41 (the Commission's claim and accrued interest) against a payment due to the complainant. The complainant subsequently turned to the Ombudsman, who opened an inquiry.

In its opinion, the Commission essentially argued that, given that Mr B wrote the letter on the university's headed paper and received correspondence at the university's address, it believed, in good faith, that it had entered into an agreement with the university. The complainant recalled that only its Vice-Chancellor and its Head of Administration could bind it and that the Commission had been aware of this fact. The Ombudsman noted that the Commission had not established which substantive law applied to the agreement and thus had not provided a convincing explanation of why the university should be considered bound by the agreement. He thus proposed a friendly solution, which stated that the Commission should repay the money it had offset.

In its reply to this proposal, the Commission underlined that it was prepared to come to a friendly solution, but maintained that it did not have any reason to doubt that it was signing a contract with the university and added that the university was at least partly to blame. The complainant did not agree with the Commission.

The Ombudsman considered that, by maintaining its view that the university was partly to blame, the Commission appeared to be seeking a solution that differed from the friendly solution he had proposed. He recalled that the Commission had still not shown which substantive law underpinned its argument that the university should be bound by the agreement. He thus reiterated his proposal in the form of a draft recommendation.

The Commission subsequently accepted that there was no evidence to establish the claim that the university was bound by the agreement. Accordingly, it proceeded to repay the sum it had previously offset. The complainant confirmed that it was satisfied with this outcome and thanked the Ombudsman for his work. The Ombudsman concluded that the Commission had accepted his draft recommendation and had properly implemented it. He therefore closed the case.

Case 2273/2008/MF

Alleged incorrect assessment of an official's diploma

In the framework of the certification procedure allowing AST officials to become AD officials, the Commission awarded the complainant, a French citizen, eight points for his engineering diploma. The Commission considered that the complainant's diploma was a French "*second cycle*" qualification.

The complainant argued that the diploma he obtained was a "*third cycle*" qualification. In his view, the Commission should thus have granted him 10 points.

The Ombudsman found that the Commission failed (i) to contact the French authorities and (ii) explain, on the basis of the relevant French legislation, why it did not consider the complainant's diploma to be a third cycle qualification. He made a friendly solution proposal, followed by a draft recommendation,



inviting the Commission to contact the relevant French authorities in order to determine the level of the complainant's diploma.

As a result, the Commission contacted the relevant French authorities, which confirmed that the complainant's diploma was a second cycle qualification.

The Ombudsman therefore found that no further inquiries were justified and closed the case.

The Ombudsman also made a further remark suggesting that, for the purposes of its human resources management, the Commission could consider establishing a practice whereby it systematically contacts the relevant national authorities, before deciding on the level of national diplomas of its staff, unless it already possesses up-to-date information from the said authorities.

Case 2755/2009/JF

Recruitment of family members of staff

The complainant is a scientist who applied for a vacancy within a unit at the Joint Research Centre (JRC). If selected, he would join his wife who already worked in the unit in question. The JRC considered that staff having direct personal relationships should not work together and decided to transfer the complainant's application to another unit in which there was also a vacant post. After he was informed that he had not been selected for that second vacancy, the complainant complained to the Ombudsman alleging that the JRC had acted unfairly.

In its opinion on the complaint, the JRC took the view that candidates for vacant posts with the JRC should not benefit from the fact that their family members are already employed by it.

The Ombudsman made a draft recommendation. He emphasised that the complainant did not benefit from the fact that his wife worked in the JRC but was rather prejudiced by it. The JRC did not base its assessment on the relevance of the complainant's experience or qualifications for the post in question. The Ombudsman emphasised that many illustrious families of scientists have contributed to significant scientific progress and pointed to the potential difficulties scientists may experience when applying for jobs with the different institutes of the JRC. He recommended that the JRC apologise to the complainant and ensure that the selection of candidates for posts with the JRC is not influenced, either positively or negatively, by family ties or relationships. He also stated that the JRC should further ensure that its staff enjoys working conditions which are conducive to combining their professional and family lives and that it should render its internal rules on recruitment of family members public.

The Commission accepted the Ombudsman's draft recommendation without any reservations. The Ombudsman warmly welcomed the Commission's approach and closed the case.

Case OI/4/2009/PB

Officials' fundamental right to be heard regarding recovery orders



This own-initiative inquiry concerned officials' right to be heard when the Commission decides to recover "*undue payments*". The right to be heard is laid down in Article 41 of the Charter of Fundamental Rights of the European Union³⁵.

During his handling of a complaint, the Ombudsman became aware of possible shortcomings in the Commission's practices when implementing recovery measures under Article 85 of the Staff Regulations. This Article provides as follows:

1. *"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."*
2. *"The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Appointing Authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed."*

In a draft recommendation, the Ombudsman asked the Commission to ensure that it respects the fundamental right to be heard in relation to recovery orders that it issues to its officials.

The Commission replied that it fully agreed with the Ombudsman's finding that the right to be heard must be respected in this context. It referred to measures it was taking in order to respect this right.

In his decision, the Ombudsman welcomed the Commission's clear commitment to respect its officials' fundamental right to be heard. He noted that the procedural changes implemented by the Commission contained a slight compromise. He concluded, however, that the compromise was acceptable in light of the specific context and relevant procedural safeguards.

Case 856/2008/BEH

OLAF's power to hear witnesses

The complaint was submitted by a journalist. In 2002, he contacted the President of the Commission alerting him to certain irregularities which he believes occurred in relation to the European Parliament's acquisition of the so-called D3 building in Brussels. On the basis of the information provided by the complainant, the European Anti-Fraud Office (OLAF) opened an investigation. In the course of that investigation, OLAF considered the complainant to be a 'person concerned' within the meaning of the OLAF Regulation and invited him to be heard as a witness at OLAF's headquarters in Brussels, on the basis of Article 4(3)(2) of the said Regulation. According to this provision, OLAF may "*ask any person concerned to supply such information as it may consider pertinent to its investigations.*"

In his complaint to the Ombudsman, the complainant alleged various shortcomings in OLAF's investigation. In particular, he alleged that, by requesting him to give testimony on the basis of the said provision, OLAF exceeded the limits of its powers.

³⁵ Article 41 of the Charter covers the right to good administration.



In the course of the Ombudsman's inquiry, OLAF submitted that it had acted within the limits of its powers when it invited the complainant to attend a formal interview.

Following an analysis of the powers which OLAF enjoys in its inquiries, the Ombudsman arrived at the conclusion that, by inviting the complainant for an interview on the basis of Article 4(3)(2) of the OLAF Regulation, OLAF did exceed the limits of its powers. In a draft recommendation, the Ombudsman therefore asked OLAF to acknowledge that it had no power to invite a 'person concerned' to be heard as a witness on that basis and to apologise to the complainant for inviting him for such an interview.

In its detailed opinion, OLAF acknowledged that its practice in the complainant's case could have given rise to a misunderstanding. It stressed that persons in the complainant's situation could only be asked to provide information in the course of an interview if they so wished. The Ombudsman considered that OLAF had thus essentially acknowledged that it had acted incorrectly, but he also noted that it had failed to apologise to the complainant. However, OLAF had accepted significant parts of his draft recommendation, including the section that referred to other points raised by the complainant. Given that OLAF had thus shown a willingness to cooperate with him, the Ombudsman did not consider it to be necessary for him to make a critical remark.

2. The European Medicines Agency

See case 3106/2007/(TS)FOR above under "*Star cases*"

3. The Education, Audiovisual and Culture Executive Agency

Case 258/2009/(AF)GG

Alleged failure properly to handle an application for a town-twinning project grant

The complainant, a registered association, is the town-twinning organisation of a German city. In November 2007, it submitted to the Education, Audiovisual and Culture Executive Agency (EACEA) an application for a grant of around EUR 10 500 for a project under the 'Europe for Citizens' Programme of the Commission. This project concerned a meeting that was to take place from 10 to 13 April 2008.

It was foreseen that applicants were to be informed of the outcome of their applications by 1 March 2008. In December 2007, EACEA informed the complainant that the results would be published on 14 March 2008.

In mid-March 2008, EACEA published a notice on its website, according to which it had finalised its evaluation but still needed to consult the Member States and the European Parliament. The results could therefore only be published in mid-April.

On 17 March 2008, the complainant asked whether it could expect any funding. In its reply, EACEA noted that it was unfortunately not yet able to answer this question. A further e-mail, which the complainant sent on 1 April 2008 and marked as urgent, remained unanswered. In the end, the complainant decided to go ahead with its project without knowing whether an EU grant would be provided.



On 6 May 2008, EACEA informed the complainant that its application had not been successful.

In January 2009, after unsuccessful further approaches to EACEA, the complainant turned to the Ombudsman.

After having investigated the case, the Ombudsman concluded that there was no maladministration as regards the decision to reject the complainant's application. However, he found that EACEA failed to comply with the deadlines it had itself set. The Ombudsman accepted that the evaluation procedure was lengthened by the need to consult the Member States and the European Parliament. He was not, however, convinced that EACEA did all it could to avoid the delay that had occurred in the present case. Nor was he convinced that it was not possible for EACEA to provide the complainant with any useful information in reply to the latter's e-mails of 19 March and 1 April 2008.

The Ombudsman therefore made a proposal for a friendly solution, suggesting that EACEA make an *ex-gratia* payment in order to try and offset the negative consequences resulting from the way in which the complainant's application was handled. EACEA rejected this proposal, but offered to meet the complainant and to send a speaker to one of its next projects. The Ombudsman did not consider this satisfactory and therefore reiterated his proposal in the form of a draft recommendation. In its reply, EACEA explained that it was ready to make a payment of EUR 3 150. The complainant explained that, while it would have hoped for a higher sum, it was nevertheless satisfied. It added that the Ombudsman's way of proceeding had restored its faith in the EU's administrative action.

The Ombudsman concluded that EACEA had accepted his draft recommendation and implemented it in a satisfactory manner. He therefore closed the case.

D. Draft recommendations partly accepted by institution

1. The European Commission

Case 2403/2008/OV

Failure to respect procedural rules in an infringement case

On 27 September 2007, the complainant, a Dutch citizen residing in Germany who receives Dutch unemployment benefit, complained to the Commission about an alleged discriminatory practice against non-German citizens by the public broadcasting company for the south-west of Germany as regards exemption from TV and radio licence fees. Following the Ombudsman's intervention, the Commission sent two holding replies to the complainant in December 2007 and July 2008. However, having received no substantive reply, the complainant complained to the Ombudsman. He alleged that the Commission failed properly to deal, as regards both procedure and substance, with his complaint of 27 September 2007.

As regards the substance, the Commission explained, in its opinion, that the Dutch unemployment benefit received by the complainant (which is not means-tested) was not comparable with the German benefit which entitles its recipients to an exemption from TV and radio licence fees in Germany (and which is means-tested). In the Commission's view, there was therefore no



infringement of EU rules on the free movement of persons. The Ombudsman concluded that the Commission appeared correctly to have analysed and explained the substantive issues which arose in this case and therefore found no instance of maladministration.

As regards procedure, the Commission argued that it had dealt with the case within a reasonable time and that it had informed the complainant of its conclusion that there was no infringement. The Ombudsman first noted that the complainant's complaint was transferred from one Commission service to another on three occasions before being dealt with. He concluded that the Commission had failed to abide by the provisions of its Communication on relations with the complainant in respect of infringements of Community law ('the Communication')³⁶, more particularly as regards (i) the registration of complaints, (ii) the sending of an acknowledgement of receipt, and (iii) the closure of the case. He therefore made a draft recommendation to the Commission that it should (i) acknowledge that it failed to respect the Communication, (ii) apologise for this omission, and (iii) take the necessary measures to ensure that it will comply with the Communication when dealing with cases in the future.

The Commission both acknowledged that it had failed to respect points 3 (on the recording of complaints) and 4 (on acknowledgment of receipt) of the Communication and apologised for its failure to do so. However, it did not explicitly acknowledge that it failed to respect point 10 of the Communication, which provides that the complainant should be heard before a complaint is rejected. Neither did it apologise for its failure to do so. The Ombudsman therefore concluded that his draft recommendation had been partly accepted by the Commission. As regards the third part of the draft recommendation, the Ombudsman noted that, in the meantime, he had opened an own-initiative inquiry into the relationship between the new EU Pilot and the procedural guarantees set out in the Communication. He therefore concluded that no further inquiries into this matter were justified.

Case 715/2009/(VIK)ANA

The Commission's reports under the Cooperation and Verification Mechanism (CVM) and public access to documents

The complainant is the Bulgarian Duty Free and Retail Trade Association. The complaint concerns the Commission's statements published in a report under the CVM, according to which (i) the Bulgarian government continues to tolerate duty-free shops at Bulgaria's external borders, (ii) these shops have seen a substantial increase in turnover in 2007, and (iii) they are a focal point for local corruption and organised crime.

The Ombudsman opened an inquiry into the allegation that the above statements were incorrect and unsubstantiated. The Ombudsman's inquiry included the Commission's handling of a request to obtain access to the minutes of a meeting. In its opinion, the Commission explained that, in drafting the report, it consulted various independent sources which raised concerns about the links between duty-free shops and organised crime. The Commission

³⁶ 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. See footnote 26 above.



maintained its refusal to grant access to the minutes of the meeting on the ground of protecting its decision-making process.

Following an inspection of the file, the Ombudsman made draft recommendations in which he asked the Commission to acknowledge that statements (ii) and (iii) were not substantiated by concrete evidence in its possession, and that statement (i) was misleading. Moreover, he asked the Commission to take steps to improve its reports under the CVM and to grant access to the minutes of the meeting. In its reply, the Commission granted access to the minutes but did not accept the remainder of the Ombudsman's draft recommendations.

Regarding access to the minutes of the meeting, the Ombudsman concluded that the Commission accepted his draft recommendation and, accordingly, found that no further inquiries are necessary.

Regarding the Commission's statements in its report, the Ombudsman confirmed his finding of maladministration in his decision and made a critical remark. He also made a further remark to the Commission to the effect that it should ensure that the reports it issues under the CVM comply with the principles of good administration. To this end, the Commission could issue appropriate instructions or guidelines to its services to ensure that the statements in public reports contain accurate information, which the Commission will be in a position to defend. Moreover, the Commission should ensure that it offers adequate consultation opportunities and due regard to the interests of affected parties.

Case 703/2010/(AR)MHZ

Delays in handling a research grant offered by the Commission to a Polish University

The complainant coordinated a research project covered by an EU grant awarded by the Commission to a Polish University. In the course of the execution of the project, the Commission delayed the approval of the University's periodical reports. In addition, after the project had been completed successfully and the University had submitted its final report and audited costs to the Commission, which were equal to the sums prepaid by the Commission, the latter made one further pre-payment. It argued that pre-financing does not mean a financing prior to the incurring of costs but a contribution prior to the approval by the Commission of costs incurred. The complainant did not agree and turned to the Ombudsman, alleging that the Commission committed various administrative irregularities when handling the grant.

The Ombudsman made two findings of maladministration. One related to the Commission's delays and, in particular, its belated pre-financing at a point in time when the sums paid could no longer be used for the project, and the other related to the failure to inform the complainant, as coordinator of the project, of the Commission's direct correspondence with the Rector of the University. The Ombudsman made a draft recommendation to the effect that the Commission should send a letter to the Rector of the University in which it should apologise to the complainant and the University for its delays, in particular concerning the delayed and 'useless' third pre-financing payment, and in which it should state that the complainant's work as Project Coordinator had no impact whatsoever on the Commission's delays. The Ombudsman added that, in the letter, the Commission should also recognise the work of the complainant and of the University in being able to complete the Project with very good results



using lower EU funding than originally foreseen. The Commission accepted the essential part of the Ombudsman's recommendation and sent a letter to the Rector. The Ombudsman therefore closed the case.

E. Other

1. The European Commission

Case 1711/2010/BEH

Refusal to provide information on pension entitlements

The complaint was submitted by a lawyer acting on behalf of Mr B, who was a member of the Commission's temporary staff from 1989 to 1994. By paying contributions, Mr B had acquired entitlements to a pension from the EU pension scheme. Given that Mr B left the Commission before having served for a minimum of 10 years, he lost his right to receive a pension from the EU pension scheme but, upon termination of service, he received a severance grant. Considering that the grant consisted of different amounts, in March 2010 the complainant turned to the Commission and asked it to indicate the amount of pension entitlements acquired by Mr B while working with the Commission. In reply, the Commission referred the complainant to a judgment of the Civil Service Tribunal concerning Mr B and stated that no further information could be provided.

In his complaint to the Ombudsman, the complainant explained that Mr B needed further information from the Commission for the purpose of establishing the correct amount of the pension he was to receive in Germany. The complainant alleged that the Commission failed to provide the information requested, in particular as regards the amount of pension entitlements that could have been transferred to Mr B's employer if the rules currently in force had applied to his situation. He claimed that the Commission should provide the information requested.

In its opinion, the Commission submitted that it could not provide any further information. The Ombudsman thereupon asked the Commission to specify and substantiate its reasons for refusing to provide information regarding the amount of Mr B's pension entitlements or, in case there are no such reasons, to provide the information requested. In its reply, the Commission stated that it was up to the complainant to make the relevant calculation on his own, and explained the formula to be used for this purpose as well as all the amounts to be entered into that formula in Mr B's case. In his observations, the complainant thanked the Ombudsman for his vigorous efforts to resolve the matter.

The Ombudsman considered that the Commission had provided the information requested in the course of his inquiry. In view of the information provided, and bearing in mind the complainant's observations, the Ombudsman concluded that the Commission had settled the case to the complainant's satisfaction.

See case **2609/2010/BEH** above under "*Star cases*".

See case **899/2011/TN** above under "*Star cases*".

2. The European Personnel Selection Office (EPSO)

See case **2533/2009/VIK** above under "*Star cases*".



II. List of cases in which a proposal for a friendly solution was accepted by the institution

| Case reference | Link to text (EN) | Link to text (original language) |
|--------------------|--------------------|----------------------------------|
| 1633/2008/DK | EN | - |
| 3264/2008/(WP)GG | EN | DE |
| 784/2009/(GP)IP | EN | - |
| 1170/2009/KM | EN | DE |
| 1804/2009/(JMA)MHZ | EN | - |
| 1944/2009/(JMA)MHZ | EN | - |
| 2605/2009/MF | EN | - |
| 3072/2009/MHZ | EN | - |
| 266/2010/(BEH)VL | EN | - |
| 1581/2010/(FS)GG | EN | - |
| 2413/2010/MHZ | EN | - |

III. List of cases in which a draft recommendation was accepted by the institution

| Complaint reference | Link to text (EN) | Link to text (original language) |
|---------------------|--------------------|----------------------------------|
| 3800/2006/JF | EN | - |
| 3106/2007/(TS)FOR | EN | - |
| 3196/2007/(BEH)VL | EN | - |
| 856/2008/BEH | EN | DE |
| 1181/2008/(BEH)KM | EN | DE |
| 2273/2008/MF | EN | FR |
| 2755/2009/JF | EN | - |
| 258/2009/(AF)GG | EN | DE |
| OI/4/2009/PB | EN | - |
| 1786/2010/PB | EN | DA |



IV. List of cases in which a draft recommendation was partly accepted by the institution

| Complaint reference | Link to text (EN) | Link to text (original language) |
|----------------------------|--------------------------|---|
| 2403/2008/OV | EN | NL |
| 715/2009/(VIK)ANA | EN | BG |
| 703/2010/(AR)MHZ | EN | PL |

V. List of other cases

| Complaint reference | Link to text (EN) | Link to text (original language) |
|----------------------------|--------------------------|---|
| 2533/2009/VIK | EN | BG |
| 1711/2010/BEH | EN | DE |
| 2609/2010/BEH | EN | DE |
| 899/2011/TN | EN | - |



European Ombudsman

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62
www.ombudsman.europa.eu
eo@ombudsman.europa.eu

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