European Ombudsman

Putting it Right?

Annex

Detailed analysis of the responses to the Ombudsman's remarks, recommendations and proposals in 2013

November 2014

EN

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A. Star cases

Case 2097/2011/RA: Dialogue with churches, religious associations or communities, philosophical and non-confessional organisations

Article 17(3) of the Treaty on the Functioning of the European Union requires the Union to *"maintain an open, transparent and regular dialogue"* with churches, religious associations or communities, philosophical and non-confessional organisations.

The European Humanist Federation turned to the Ombudsman alleging that the European Commission wrongly refused its proposal for a *"dialogue seminar"* under Article 17 TFEU. Failing to see how engaging in a discussion with the complainant could infringe the Treaty in the way described by the Commission in its opinion, the Ombudsman criticised part of the reasoning put forward for refusing the dialogue seminar. In the decision closing the case, the Ombudsman also invited the Commission to (i) clarify its practices and rules in this area, and, if necessary (ii) draw up guidelines in terms of how exactly it plans to implement Article 17 TFEU.

In response, the Commission established guidelines and published them on its website dedicated to the dialogue, as follows:

1. Open

1.1. Interlocutors

Dialogue partners can be churches, religious associations or communities as well as philosophical and non-confessional organisations that are recognized or registered as such at national level and adhere to European values. There is no official recognition or registration of interlocutors at a European level.

Independently of the dialogue, all EU interlocutors are encouraged to register their organisations in the appropriate section of the European Transparency Register (http://europa.eu/transparencyregister).

1.2. Topics of discussion

All relevant topics related to the EU agenda can be addressed in this dialogue. Such topics can be raised both by the Commission and its interlocutors provided both parties agree. In the light of its policy priorities, the Commission may choose to suggest priority topics for discussion over a certain period of time with different interlocutors. However, this should not prevent both sides from addressing topical issues at any given time. The topic and format for a specific initiative are chosen jointly by the Commission and the respective interlocutor in a spirit of constructive mutual understanding. The fact that the Commission chooses not to sponsor a particular initiative or the interlocutor prefers not to participate in a specific Commission initiative should not imply that either are in breach of their obligations or do not wish to enter into dialogue.

2. Transparent

The Commission conveys to the public all relevant information about the activities within the dialogue on the following website: http://ec.europa.eu/bepa/activities/outreachteam/dialogue/index_en.htm

Press releases and press conferences as well as other communication tools may complement these efforts when appropriate.

Access to other Commission documents is subject to Regulation (EC) No 1049/2001 http://ec.europa.eu/transparency/access_documents/ .

3. Regular

The Commission maintains a regular dialogue with interlocutors at various levels in the form of written exchanges, meetings or specific events. Interlocutors are invited to contribute to the Union's policy-making process through the various written consultation processes launched by the Commission.

This dialogue may be conducted through inter alia informal meetings hosted by the Commission President, bilateral meetings with Commission representatives at all levels and, in particular, meetings with the responsible Adviser for the dialogue.

Further instruments in this non-exhaustive list may include dialogue seminars and ad-hoc consultation procedures on specific and timely policy issues.

The Ombudsman welcomes the Commission's highly constructive response.

Case 1339/2012/FOR: Improving transparency and communication at the European Central Bank

The complainant, an NGO, alleged that the ECB President's membership of the Group of Thirty was incompatible with the independence, reputation, and integrity of the ECB. It claimed that the ECB should ask its President to withdraw from the Group.

After an inquiry, the Ombudsman noted that, given the ECB's initially inadequate responses to the complainant, the latter was correct to raise concerns about the matter. However, in light of the arguments and explanations presented during the inquiry, the Ombudsman found no maladministration by the ECB.

In closing the case, the Ombudsman offered the ECB two pieces of advice in the form of further remarks. The first was that, in order to ensure transparency, the ECB should include on its own website the information that its President is a member of the Group of Thirty. The second was that that, in view of its enhanced visibility and responsibilities, the ECB should take steps to raise further the quality of its communication with the public.

In response, the ECB informed the Ombudsman that it had published an updated version of the President's CV on its website in early March 2013, which includes his membership of the Group of Thirty. Furthermore, the ECB's Executive Board and Governing Council decided to make improved communication one of the key priorities of the ECB's medium-term strategic planning for 2013-15. The ECB initiated a review of its communication policy, which also included communication issues arising from the imminent establishment of the single supervisory mechanism (SSM). The ECB also highlighted that it already undertakes a great variety of initiatives addressing the public at large. Special attention is also given to enquiries received directly from citizens via various channels. In view of the SSM, this function will be enlarged. All these initiatives are explained and described in greater detail for the benefit of citizens in Chapter 6 of the ECB's Annual Report 2012.

The Ombudsman welcomes the ECB's positive follow-up to the further remarks.

Case 2575/2009/RA: EU rules aimed at protecting the health of children

This case concerned the European Medicines Agency's procedures for deciding whether pharmaceutical companies should be obliged to carry out studies to investigate whether and how their product could be used to treat children. These procedures, which are derived from the EU's Paediatric Regulation, aim to improve the availability of medicinal products for children. While the Regulation establishes a general rule that pharmaceutical companies must carry out studies to determine whether and how their product could be used to treat children, it allows the Agency to waive this obligation in certain cases.

The Ombudsman concluded that, in the case at hand, the Agency was entitled to deny a waiver. However, it failed to ensure adequate transparency of the process through which it reached the relevant decisions in this case and, as a result, failed to provide adequate reasons for those decisions.

To avoid similar problems in the future, the Ombudsman made a draft recommendation, calling on the Agency to adopt measures to make its work in this area more transparent. The Agency agreed, setting out the initiatives it had already taken and those that are in the pipeline.

Specifically, the Agency explained that it will publish on its website a lay language summary of the procedure under the Paediatric Regulation and its outcome, as adopted by the Paediatric Committee. According to the Agency, this summary will help stakeholders understand the overall reasoning of the Paediatric Committee. The more detailed scientific grounds underpinning the Paediatric Committee's opinion will continue to form part of the Summary Report, which, the Agency says, is made public after the Commission has decided on the product's marketing authorisation.

The Agency also informed the Ombudsman that it is working on improving its guidelines to the Paediatric Committee, with a view to ensuring that the agreement or refusal of paediatric investigation plans, waivers, and deferrals is better justified.

Finally, the Agency outlined its efforts to include more detailed explanations in Paediatric Committee opinions outlining the grounds for granting or refusing a waiver.

The Ombudsman very much welcomes the Agency's positive response in this case. The extensive range of measures adopted by the Agency should help to pre-empt problems such as those which arose in the current case and, more generally, to instil even greater trust in its work for citizens.

Case 962/2011/AN: Better information about diplomas and qualifications

The complainant was not placed on the reserve list of a competition organised by the European Personnel Selection Office because the professional certificate issued by her employer did not constitute a 'diploma'. After a thorough inquiry, the Ombudsman concluded that the Selection Board's decision not to place the complainant's name on the reserve list was not manifestly erroneous. However, the Ombudsman made a further remark to the effect that EPSO should safeguard the legitimacy of the selection process by reminding the Selection Boards of the case law of the Court of Justice, which requires them properly and adequately to give reasons for all decisions to exclude candidates on the basis of their qualifications and diplomas.

In response, EPSO stated that it fully shares the Ombudsman's view regarding the importance of adequately justifying decisions and providing selection boards with the appropriate legal support. EPSO has recently restructured its services to create a new sector, the Admission Business Service, in order better to assist selection board members in the evaluation of qualifications and diplomas of candidates. It does so by contacting the relevant national authorities, namely *NARIC,* to seek advice on questions related to the recognition of degrees and education systems in the EU. As a result, EPSO has been able to improve significantly its database on diplomas, which is published as an annex to the Guide to Open Competitions: "*Examples of qualifications corresponding, in principle, to those required by the notices of competition*".

EPSO's response also mentioned that DG Education and Culture of the Commission set up the Eurydice Glossary, in cooperation with education ministries in all Member States, in order to provide reliable and comparable information on national education systems and policies. EPSO makes the Eurydice Glossary available to candidates, when they complete EPSO's online application form, and to the Selection Boards during the admission stage of the competitions. Each term in the original language is accompanied by a structured summary description providing for quick understanding and comparison of information.

EPSO concluded its response by stating that the result of the various improvements made is that none of the Article 90 complaints made by candidates in 2013 concerned diploma issues.

The Ombudsman applauds the action taken by EPSO, which has resulted in clearer information to candidates and, consequently, fewer complaints.

Case 434/2012/VL: Duty to reply to correspondence

The European Aviation Safety Agency (EASA) rejected an aircraft manufacturer's request for a permit to fly as regards one of its aircraft because the related certification exercise was on-going. The complainant alleged that EASA (i) worked inefficiently and failed to certify the aircraft concerned within a reasonable time; (ii) failed to communicate correctly with the complainant's parent company, in particular, by not replying to an e-mail it sent, and not providing it with a timetable for certifying the aircraft concerned; and (iii) ignored positive practical experience in relation to the hydraulic system used in the aircraft.

The Ombudsman found no maladministration as regards points (i) and (iii) but criticised EASA's failure to reply to the e-mail.

In response, EASA stated that, in order to avoid similar situations in the future, it would (i) continue to provide training to its staff members on the application of the Code of Conduct for the staff of EASA, (ii) keep the practical implementation of the principle of good administrative practice under continuous review, and (iii) consider a critical review of Article 16 of the Code of Conduct for the staff of EASA and the exemptions mentioned therein.

The Ombudsman welcomes the envisaged follow-up measures announced by EASA as a means to ensure that the instance of maladministration identified in this case should not occur again.

B. Friendly solutions accepted

1. European Parliament

Case 2178/2011/KM: Refusal to reimburse in full travel costs incurred in order to attend an interview

The complainant, a German national, participated in a competition for a position at the European Parliament. On 15 April 2011, after the written test, he was told that the invitations for the interviews would probably be sent in mid-June. He thus went on holiday, as planned, in May. However, on 13 May 2011, he received an e-mail (which he only read on 26 May 2011) inviting him to attend an interview in Brussels on 30 May 2011. He therefore had to book a flight from Rome at short notice.

He requested that he be reimbursed for the cost of this flight, that is, EUR 559.60. Parliament rejected his request. It argued that, since the complainant had not applied to have his address changed on Parliament's records, it could only reimburse him on the basis of the distance between his place of residence in Germany and Brussels, that is, EUR 221.08. The complainant turned to the European Ombudsman, who opened an inquiry.

In its opinion, Parliament maintained that it had correctly applied the relevant rules. Taking account of the particular facts of the case, the Ombudsman asked it to address the question of fairness. In reply, Parliament stated that it had treated the complainant fairly and underlined that it could not pay a higher sum because it had received no written notification from the complainant.

The Ombudsman agreed that the rules impose three conditions for a change of address to be acceptable: (i) the circumstances must be exceptional; (ii) the change must occur at least 15 days before the test; and (iii) a written request must be made. He was pleased that Parliament accepted that the first condition was fulfilled and showed some flexibility by choosing not to apply the second condition. However, Parliament insisted on the third condition. The Ombudsman considered that this position was unduly formalistic and did not take sufficient account of the complainant's specific situation. He therefore proposed that Parliament reconsider the complainant's request for full reimbursement.

Parliament accepted the Ombudsman's proposal and paid the complainant the remainder of his travel costs. The complainant expressed his satisfaction with this outcome.

2. Council of the European Union

Case 1519/2011/AN: Notice of dismissal served during sick leave

The complainant used to work for the EU military mission to Bosnia and Herzegovina 'EUFOR Althea'. The said mission served him with a notice of termination of his employment contract, and allowed the notice period to run, while he was on sick leave.

The Ombudsman's inquiry showed that, by acting in such a manner, EUFOR Althea breached the complainant's rights of defence. Moreover, since he was on unpaid sick leave when the notice period began to run, he was deprived of part of the income which, in accordance with EUFOR's staff rules, he was entitled to before dismissal. The Ombudsman made a friendly solution proposal to the Council, suggesting that EUFOR Althea consider paying the relevant amount to the complainant.

In its reply to the Ombudsman's friendly solution proposal, the Council stated that it was not competent to deal with the present case and that the proposal should be addressed to the Operation Commander directly. Out of courtesy and with the aim of assisting the Ombudsman in his inquiry, the Council forwarded the Ombudsman's friendly solution proposal to the Operation Commander for reply.

The Operation Commander agreed with the Ombudsman that EUFOR breached the complainant's rights of defence when handling his case. It accepted the Ombudsman's friendly solution proposal.

The Ombudsman welcomed the Operation Commander's acceptance of his friendly solution proposal. He thanked the Council for acting as a bridge between the Ombudsman and the Operation Commander and took note of its suggestion to address the Operation Commander directly, which the Ombudsman will follow in future cases concerning military missions. Finally, the Ombudsman recalled that the general issue of who is responsible for instances of maladministration in the activities of missions created in third countries under the auspices of the EU Common Security and Defence Policy forms the subject matter of an own-initiative inquiry[1].

3. European Commission

Case 828/2010/JF: Failure to reply to a request in a timely manner

The complainant, an NGO based in France, executed an EU-financed project in Angola, under the general supervision of the (then) Commission Delegation in Luanda. When it realised that the projected results of the project could not be attained within the foreseen deadlines, the complainant requested that the Delegation agree to an extension, in accordance with the contract signed by both parties. The Delegation, however, was unable to decide on that request before the project's contractual end, because of the complainant's alleged failure to submit in a timely manner a request which was compatible with the requirements of the contract. The complainant disagreed and complained to the Ombudsman.

The Ombudsman's inquiry revealed that the complainant correctly submitted its request and that the Delegation handled it in a manner which could have been perceived as negligent. As a result, the Delegation could possibly have committed an instance of maladministration, giving rise to compensation from the EU for non-contractual liability. The Ombudsman therefore proposed a friendly solution to the Commission that it consider compensating the complainant. The Commission accepted to reimburse to the complainant the sum of almost EUR 48 000, a move which the Ombudsman welcomed. However, it refused to pay for the expenses incurred by the complainant and its local partner after the project's contractual end. The Ombudsman made a complementary proposal for a friendly solution in that respect.

The Commission finally accepted to reimburse the costs incurred after the end of the project, but only in respect of the complainant's partner. As regards the complainant, the Commission made a counter-proposal setting out the extent to which it was ready to reimburse the relative costs. The Ombudsman invited the Commission to further demonstrate its commitment to good administration and to proceed without delay to the reimbursement of the remainder of the complainant's costs in accordance with its counter-proposal. He made a further remark to that effect and closed the case.

In its follow-up to the further remark, the Commission informed the Ombudsman that it had agreed an amount with the complainant that is satisfactory to both parties.

[1] The Ombudsman's decision in this inquiry is available at: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/51481/html.bookmark

Case 1682/2010/BEH: The operation of expert groups

The complainant is a civil society organisation. According to its website, it is a coalition of almost 200 public interest groups, trade unions, academics and public affairs firms. Its complaint to the Ombudsman concerned the operation of expert groups established by the Commission. The central allegation was that the Commission failed to ensure a balanced composition of such groups. The complainant argued that, in the majority of groups it identified, representatives from industry form the majority while all other stakeholders, such as consumer groups, academics and civil society, are underrepresented. The complainant also alleged lack of transparency in the operation of expert groups.

The Ombudsman proposed a friendly solution. She asked the Commission, among other things, to take further measures towards ensuring a balanced representation of relevant areas of expertise and interest in expert groups. She also suggested the Commission should complete its online Register of expert groups by ensuring that it includes all experts and all expert groups and provides a sufficient level of detail as regards minutes and/or reports of meetings.

The Commission accepted the proposal. It explained that it had completed the online Register of expert groups in early 2012 and made further improvements since then. As regards the composition of expert groups, the Commission detailed a number of specific actions it had taken towards ensuring balanced representation, correcting wrong classifications and preventing conflicts of interest. These measures included, for instance, an overall review of expert groups. As a result, the composition of a number of groups was modified or in the process of being modified. The complainant recognised the improvements made, but argued that corporate interests continue to dominate expert groups set up from September 2012 onwards.

The Ombudsman considers it imperative to keep a watchful eye on the situation. She therefore announced her intention to open an own-initiative inquiry, which she did in May 2014. This will allow her to take a close look at any further developments in the Commission's practice as regards the composition of expert groups and give all stakeholders an opportunity to make their views known.

Case 1817/2010/RA: Refusal to grant public access to documents relating to a call for proposals

The complaint concerns a refusal by the Commission to give access to documents. The complainant is a UK-based public body focusing on developing means to ensure safer internet use by children. After its proposal for funding was rejected, the complainant asked the Commission for public access to the Evaluation Summary Report relating to a competing proposal. The Commission refused the request, arguing that disclosure of the Report would seriously undermine its decision-making process and would undermine the protection of the commercial interests of the consortium whose proposal was funded.

After carrying out an inquiry, the Ombudsman made a proposal for a friendly solution, calling on the Commission to reconsider its refusal. The Commission replied by granting access to the document. The Ombudsman therefore closed the case with a finding that his friendly solution had been accepted. He took the opportunity to make a number of further remarks with a view to improving the Commission's procedures for the future.

Case 513/2011/EIS: Alleged failure to inform the complainant of the characteristics and relative advantages of the successful tender

The complainant, an Italian company specialised in environmental monitoring and management, participated in a tender procedure published by the EU Delegation to Albania. The complainant's offer was excluded from the tender procedure because it did not comply with a particular aspect of the technical specifications. The complainant then asked the Commission for a copy of the successful tender. Since the complainant was not satisfied with the replies received, it turned to the Ombudsman, who opened an inquiry. In his opening letter, the Ombudsman made clear that he considered the complainant also to have criticised the fact that the Commission did not provide it with information on the characteristics and relative advantages of the successful tender.

In its opinion, the Commission submitted that the complainant's request did not include any explicit reference to the characteristics and relative advantages of the successful tender. However, it added that it would be prepared to provide such information, if, in line with the Financial Regulation, the complainant were to request it.

The Ombudsman considered that the refusal to provide the complainant with a copy of the relevant tender was justified. However, he also took the view that the Commission should have understood that the complainant was also interested in receiving the information that the contracting authority is obliged to provide, upon request, to unsuccessful tenderers. He therefore made a proposal for a friendly solution, suggesting that the Commission consider providing the complainant with general information concerning the characteristics and relative advantages of the successful tender.

The Commission accepted the Ombudsman's proposal by providing detailed information on the characteristics and relative advantages of the successful tender.

Case 940/2011/JF: Reimbursement of eligible costs to beneficiaries of Commission grants

The complainant co-ordinated a consortium which was awarded a Commission grant to undertake an action in the field of eco-friendly construction. In the course of carrying out the action, the consortium requested reimbursement of the eligible costs incurred during the different reporting periods, in accordance with the contract signed with the Commission. The Commission, however, agreed to pay only 45.75% of those costs. The complainant considered that the Commission was wrong to limit its reimbursements to the above rate and complained to the Ombudsman.

The Ombudsman found that, under the contract, the 45.75% reimbursement rate applied to the overall Union contribution to the action. The contract made no reference to any rate for interim payments. Furthermore, before the consortium requested payment of the costs incurred during the first reporting period, a Commission official informed it that interim payments could be made at different reimbursement rates. The Ombudsman therefore proposed a friendly solution to the Commission, inviting it to (i) properly explain why it applied the above-mentioned rate to interim payments to the consortium; and (ii) ensure that it pay the consortium the balance, in accordance with the contract, once the action was over.

The Commission argued that it systematically applied the 45.75% rate to interim payments in order to ensure sound financial management of the EU budget and to avoid future complicated recovery procedures. The Ombudsman was not satisfied with that reply, pointing out, among other things, that the Commission could have drawn up guidelines that would have enabled the consortium correctly to interpret the contract in that respect. Nevertheless, since all grant agreements now include a very clear provision indicating that interim reimbursements will be made at the rate applicable to the Union's overall contribution to the action, the Ombudsman concluded that no further inquiries in this respect were justified. Finally, in a further remark, the Ombudsman invited the Commission to inform him how it complied with its assurances that it would pay the consortium all outstanding amounts at the end of the action (see section E.3 below).

4. Court of Justice of the European Union

Case 2252/2011/BEH: Alleged failure to reply fully to request for information

In September 2011, the complainant sent a letter to the President of the Court. In his letter, he asked various questions concerning the legal position of parties to proceedings before the courts (the Court of Justice, the General Court, and the Civil Service Tribunal) in relation to the composition of chambers hearing a case, in particular when those parties suspect a possible bias of judges. The Court limited its reply to providing the complainant with certain information as regards the composition of chambers and the reasons, set out in the Statute of the Court of Justice, for which judges may not take part in hearing and deciding a case.

In his complaint to the Ombudsman, the complainant alleged that the Court failed fully to address the questions raised in his letter and claimed that the Court should provide a complete and comprehensive reply to his questions. Initial contacts between the services of the Court and those of the Ombudsman led to the opening of an inquiry, during which the Ombudsman proposed, as a friendly solution, that the Court provide further details concerning, for instance, the sources of certain rules of procedure.

The Court accepted the Ombudsman's proposal and provided further information satisfying the complainant's claim. The Ombudsman therefore closed the case.

5. European Medicines Agency (EMA)

Case 693/2011/RA: Refusal to provide public access to clinical studies carried out on a multiple sclerosis drug

This complaint concerns a request for public access to documents held by the European Medicines Agency (EMA) and relating to clinical studies carried out on Avonex, a pharmaceutical product used to treat multiple sclerosis. The complainant argued that EMA did not provide him with any of the documents he requested, in particular, the marketing authorisation.

The Agency provided a number of reasons for its refusal to provide public access to the requested documents, including that, in some instances, it was not able to find them in its off-site archives.

The Ombudsman made a friendly solution proposal, according to which EMA should (i) diligently search its archives for the documents requested by the complainant; (ii) if the documents are found, provide the complainant with full access to them, or explain why one of the exceptions laid down in Article 4 of Regulation 1049/2001 applies; (iii) provide the Ombudsman with detailed information on its e-archive plan.

EMA fully accepted the Ombudsman's friendly solution proposal. It clarified, however, that certain of the requested documents were not in its possession. While the complainant expressed concerns regarding EMA's argument that it did not have all the documents he requested, the Ombudsman noted that the present inquiry only concerned a refusal to give access to documents, and not a failure to gather documents.

C. Draft recommendations accepted

1. European Commission

Case 2398/2009/EIS: Duty towards a former staff member

The complainant, a Commission official who has now retired, pays maintenance to three persons.

Until January 2006, the Commission provided the complainant with detailed information on the amounts paid to each of the three persons, as shown on his pension slip. Thereafter, however, due to a change in its IT system, the Commission indicated only the global amount paid. The complainant subsequently turned to the Ombudsman and alleged that the Commission (i) failed to respond adequately to his requests concerning the amounts paid, and

(ii) wrongly held that it has no obligation to check the accuracy of the calculations submitted to it by the three persons concerned.

After having inspected the Commission's file, the Ombudsman took the view that the Commission did not provide the complainant with full and detailed information on the amounts paid to the three persons as from February 2006. He therefore made a draft recommendation to the Commission, asking it to provide the same type of detailed information as it did until January 2006, when its old IT system was in place. As regards the complainant's view that the Commission did not properly check the calculations submitted to it, the Ombudsman found no maladministration.

The Commission accepted the Ombudsman's draft recommendation and provided the complainant with the requested information.

Case 2558/2009/DK: Alleged irregularities in the establishment and operation of a scientific committee

In 2008, the Commission asked its Scientific Committee on Health and Environmental Risks ('SCHER') to draw up an opinion on the use of non-human primates in research. Given the highly specialised field involved, SCHER decided to create a working group consisting of experts to assist it in delivering the opinion. The final opinion was adopted and delivered in January 2009.

In October 2009, the complainant, the European Coalition to End Animal Experiments, turned to the Ombudsman to complain that, in its view, SCHER, through its working group, (i) lacked the necessary expertise to give an opinion on the subject, and (ii) did not, in its final opinion, take into account all the evidence supplied.

On the basis of his inquiry, the Ombudsman found that the Commission should have issued a public call specifically aimed at identifying relevant experts to assist SCHER. He made a draft recommendation to the effect that the Commission should consider modifying its rules concerning the establishment of scientific committees to require that a call inviting experts to express their interest be published with the aim of identifying the best possible candidates.

In its reply, the Commission explained that it had adopted a new decision which provides that, when selecting experts for working groups, it will carry out a search in the 'Pool of Scientific Advisors on Risk Assessment', established by that decision, as well as in its database of external experts. It will also issue a web-based call for experts. The Ombudsman thus concluded that the Commission had accepted his draft recommendation.

As regards the allegation that SCHER failed to take into account all the evidence supplied, the Ombudsman found no maladministration.

Case 846/2010/PB: The Commission's alleged mishandling of an infringement complaint

This case concerned the Commission's handling of an infringement complaint submitted to it by a member of Danish civil society. That complaint related to the compatibility with European environmental law of a railway capacity extension scheme in Denmark. The main issue in the case was the quality of the Commission's explanations for why it found that the EU's Strategic Environmental Assessment Directive (the 'SEA Directive') was not applicable to the railway capacity extension scheme in question.

In a draft recommendation, the Ombudsman urged the Commission to better explain why it had concluded that the SEA Directive did not apply to the facts of the case. The Commission did so. In the decision closing this case, the Ombudsman also commended the Commission for giving due consideration to the systemic issues raised, notably the imprecise wording of the SEA Directive. The Commission referred to concrete improvements that it intended to introduce with a view to pursuing the objective of greater certainty and transparency in the application of the legislation.

Case 1013/2012/MHZ: Refusal to grant access to documents containing personal data

The complainant was dismissed from his position of key expert and team leader of an EU-funded project in Bosnia and Herzegovina. He requested access to documents related to his dismissal, under Regulation 1049/2001 on public access to documents, but the Commission refused. Moreover, the Commission did not reply to his request for access to the e-Register of the documents held by the EU Delegation in Bosnia and Herzegovina. In the course of the Ombudsman's inquiry, the complainant specified that his request for access covered, among others, all documents containing critical remarks on his performance and all documents/information containing his personal data within the meaning of the EU's Data Protection Regulation (Regulation 45/2001).

Following an inspection of the relevant Commission documents, the Ombudsman found that the Commission did not handle the complainant's request for access adequately and in a timely manner. He made a draft recommendation to the effect that the Commission should first identify and then disclose the relevant documents/information. The Commission accepted the draft recommendation and, on the basis of Article 13(c) of Regulation 45/2001, communicated to the complainant excerpts from all documents containing his personal data. The Ombudsman welcomed the action taken by the Commission, as well as the Commission's explanation that the system used for registering incoming and outgoing letters at the Delegation is not a system which contains electronic files.

2. European External Action Service (EEAS)

Case 706/2010/RT: Alleged failure to provide convincing reasons for the denial of a request to work part-time

In 2001, the Head of an EU Delegation authorised three local agents to work part-time. In 2009, the three agents asked the Head of the Delegation for an extension of this authorisation. Their request was refused. On an exceptional basis, an extension was granted until the end of 2010. In their complaint to the Ombudsman, the complainants mainly alleged that the European External Action Service ('EEAS') had failed to provide convincing reasons for its decision to deny them authorisation to work part-time.

The Ombudsman's inquiry was initially opened against the Commission. As of 1 January 2011, following a transfer of competencies, the EEAS became the competent body to handle all decisions concerning staff in the EU Delegations. Thus, the EEAS replaced the Commission for the purposes of the present inquiry.

In its opinion, the EEAS explained that it could not extend the authorisation it had granted to the three local agents to work part-time on the following grounds: (i) local law does not provide for a common practice of granting part-time work and there are "*no binding provisions*" in this respect; (ii) the specific EU rules concerning local agents do not include any provisions on granting part-time work; and (iii) there is no "*interest of the service*" that permits part-time work.

The Ombudsman considered unjustified the EEAS's refusal to extend the authorisation to work part-time for the three local agents. In his view, part-time work was, at least, a common option allowed by the local law. Even if there are no general "*binding provisions*" in the local law laying down that part-time work should be compulsorily granted upon request, the parties to work agreements are free to negotiate and allow for such a possibility. Moreover, even if the specific EU rules concerning local agents are silent in respect of part-time work, they do not forbid such an arrangement from being agreed upon. Finally, the Ombudsman recalled the relevant International Labour Organisation rules which all recognise part-time work as an **appropriate** form of employment for workers with family responsibilities.

The Ombudsman initially addressed a proposal for a friendly solution to the EEAS and, subsequently, a draft recommendation. Following his draft recommendation, the EEAS explained why it was in the interest of the service to deny the requests. In addition, the EEAS informed the Ombudsman that it had re-opened discussions with the Commission on the possibility of granting authorisations for part-time work to local agents. The Ombudsman accepted this explanation and considered that the EEAS had taken adequate measures to implement his draft recommendation.

3. European Food Safety Authority (EFSA)

Case 775/2010/ANA: Handling of a potential conflict of interest arising from a staff member's move to the private sector

The complaint was submitted by a non-governmental organisation and concerns EFSA's handling of a potential conflict of interest arising from a situation which is referred to as 'revolving doors'.

The Ombudsman opened an inquiry into the allegation that EFSA failed adequately to address the issue of a potential conflict of interest in the move of a former member of its staff to the private sector and related claims.

Following his inquiry into the complaint, the Ombudsman addressed three draft recommendations to EFSA. In its detailed opinion, EFSA insisted that it had complied with the Ombudsman's draft recommendations.

In his decision closing the case, the Ombudsman found that:

(i) EFSA has taken action to strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type and to require serving staff members to disclose them in a timely manner. However, because EFSA unduly restricted the scope of what might amount to a possible conflict of interest in such circumstances, the Ombudsman concluded that EFSA only partially accepted his first draft recommendation.

(ii) EFSA did not duly acknowledge its failure to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising in the present case and, consequently, failed to implement the Ombudsman's second draft recommendation.

(iii) EFSA has taken action to ensure that, if a similar case arises in the future, it (a) obtains sufficient information, including, as a minimum, a proper account of the tasks carried out at EFSA, a precise description of the proposed new employment, and information concerning possible links between the new and the previous employment, (b) proceeds with an assessment that is as thorough as possible, and (c) properly records the results of its assessment. EFSA therefore accepted and implemented the Ombudsman's third draft recommendation.

In order to improve on its implementation of the first draft recommendation, the Ombudsman made four further remarks asking EFSA to consider making additional changes to its procedures and forms.

4. European Medicines Agency (EMA)

See **case 2575/2009/RA** above under 'Star cases'.

D. Draft recommendations partly accepted by the institution

1. European Food Safety Authority (EFSA)

See **case 775/2010/ANA** above in Section C.3.

2. European Agency for the Management of Operational Cooperation at the External Borders (Frontex)

Case OI/5/2012/BEH-MHZ: Compliance with fundamental rights obligations

Regulation 1168/2011/EU requiring Frontex to put in place administrative mechanisms and instruments to promote and monitor compliance with its obligations as regards respect for fundamental rights entered into force in 2011. At the same time, civil society raised concerns about the human rights implications of Frontex's activities. In these circumstances, the Ombudsman decided to launch an own-initiative inquiry in order to check how Frontex implements the 2011 Regulation. The Ombudsman asked Frontex for clarification as regards the Fundamental Rights Strategy, Codes of Conduct, the Fundamental Rights Officer, European Border Guard Teams, and Coordinating Officer, and the termination of joint operations and pilot projects.

The Ombudsman sent Frontex's reply for comments to the Fundamental Rights Agency and launched a public consultation in which international organisations, NGOs, a national Ombudsman, and interested individuals took part.

After having analysed all contributions and Frontex's opinion, the Ombudsman made a detailed draft recommendation as to how Frontex could improve and render more effective its mechanism to monitor respect for fundamental rights in all its activities.

While Frontex responded positively to the Ombudsman's recommendations concerning (a) the Fundamental Rights Strategy, Action Plan, Codes of Conduct, termination/suspension of operations, and the Consultative Forum, it failed to take on board the Ombudsman's recommendation that (b) the Fundamental Rights Officer should consider dealing with complaints on infringements of fundamental rights in all Frontex's activities submitted by persons individually affected by infringements and also in the public interest.

The Ombudsman therefore decided to close the inquiry and consider the aspects under (a) as settled by Frontex and to make a special report to the European Parliament as regards aspect (b).

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

1. European Parliament

Case 2393/2011/RA: Transparency of international trade negotiations

In December 2011, 28 digital civil rights associations from 18 European countries complained about Parliament's refusal to disclose several documents concerning the Anti-Counterfeiting Trade Agreement (ACTA) negotiations. Parliament explained that it was bound by a confidentiality agreement, negotiated by the Commission. The Ombudsman accepted this explanation, but in a further remark advised Parliament to ensure that the Commission and the Council do not sign confidentiality agreements in the future that could undermine Parliament's ability to deliberate openly on such issues.

In its response, Parliament pointed to subsequent positive developments. In particular, the Lisbon Treaty gave Parliament full co-legislation powers for adopting trade legislation, the Commission must keep Parliament regularly informed of on-going negotiations and Parliament's consent is now required for the ratification of all trade agreements. In this context, Parliament has repeatedly called for greater transparency, information and involvement of relevant stakeholders during trade negotiations. Drawing on the experience of ACTA and following Parliament's demands, the Commission is taking a different approach to the preparation of future negotiations, in particular negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

No confidentiality agreement was signed in the context of TTIP and the public statement by the Chief EU negotiator about the protection of negotiating documents takes full account of the fact that EU institutions must comply with Regulation 1049/2001 in dealing with any requests for public access.

A number of the EU's initial position papers and information about major negotiation meetings as well as progress made in the negotiations are available on the Commission's dedicated websites[2]. Moreover, in the interest of transparency, the Commission has undertaken to make public certain documents that reflect exclusively the EU position on the TTIP negotiations, after consultation with the U.S. negotiating partners.

The views of civil society are taken into consideration through public consultations and dialogue in the preparatory phase of the negotiating process and through meetings in its final stage when the outcome of the negotiations comes under scrutiny, before being approved by the Council and Parliament.

Parliament contributed to the preparation of the negotiations and sent a political message through a Resolution[3]. Parliament will continue to remind the

[2] http://trade.ec.europa.eu/doclib/press/index.cfm?id=943 and http://ec.europa.eu/trade/policy/in-focus/ttip/resources/

[3] European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America (2013/2558(RSP)) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-

Commission of the need to take a pro-active position with regard to outreach and transparent engagement in international trade negotiations.

In a press release issued on 28 January 2014, the Ombudsman welcomed the announcement that future trade negotiations, in particular the on-going TTIP negotiations, will be more transparent and open for stakeholder involvement. After taking note of concerns raised by civil society, and notwithstanding the aforementioned improvements, the Ombudsman subsequently opened an own-initiative inquiry in relation to transparency and public participation of the TTIP negotiations (OI/10/2014/RA). That inquiry was ongoing at the time the present report was being finalised.

Case 2407/2011/CK: Alleged irregularities in the handling of a number of requests made by an MEP

The case concerned Parliament's reaction to a number of requests that the complainant made to it following the publication of a newspaper article entitled *"Euro MPs exposed in 'cash-for-laws' scandal"*. The complaint to the Ombudsman concerned (i) Parliament's failure to prevent and to react to the journalists' entry into its premises and their unauthorised recordings, (ii) Parliament's failure to provide assistance to the complainant in order to defend him against the journalists' allegedly defamatory accusations, and (iii) Parliament's decision to seal the complainant's offices in Parliament, shortly after the article was published.

After conducting an inquiry, the Ombudsman concluded that there had been no maladministration. As regards (i) there was no breach of Parliament's security rules for which its services could be held responsible, (ii) Parliament was under no obligation to defend MEPs against defamatory accusations or to establish a specialised body in this respect, and (iii) Parliament's decision to seal the complainant's offices was lawful. The Ombudsman also made two further remarks with an eye to assisting Parliament to avoid problems in the future. In particular, the Ombudsman invited Parliament to reconsider its rules regarding hidden cameras and recording devices and decide whether their use should be prohibited as regards all its visitors. The Ombudsman also suggested that Parliament could consider adopting specific rules regarding the sealing of offices within its premises.

In its reply Parliament informed the Ombudsman that regarding the first remark, Parliament decided to ban the use of hidden cameras and recording equipment. Regarding the second remark, Parliament considered it best not to adopt rules, but to continue to treat each case on an ad hoc basis. According to Parliament, requests for the sealing of an office emanate from judicial authorities or OLAF and it would be difficult to draft a general rule to govern the response to such requests.

The Ombudsman welcomes Parliament's reaction to the first further remark. Regarding the response to the second remark, the Ombudsman accepts that,

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although it would be in the interests of legal clarity and good administration to adopt a general rule, there may be practical obstacles to doing so.

Case 1040/2012/VL: Good administration requires proper documentation of recruitment procedures

A Parliament official complained about Parliament's handling of a selection procedure aimed at recruiting an assistant in an information office in the capital of a Member State. After carrying out an investigation, the Ombudsman found no maladministration, but recommended that Parliament improve its internal recruitment procedures by ensuring that all procedural steps and stages are properly documented.

In response, Parliament took the view that there was no need for any action as its internal recruitment procedures are already properly documented. According to the response, the interviewing committees draw up reports that form the core of the draft note to be signed by the Director-General for Personnel proposing the recruitment of the successful candidate.

The Ombudsman inspected Parliament's file during the inquiry and found that it did not contain any documents on which the Director General's note was based. This was the reason for the further remark, as explained in the decision closing the case. It is regrettable that Parliament failed to react in a constructive way to the further remark.

Case 1283/2012/AN: Better handling of sexual harassment cases

The complaint concerned lack of action by Parliament's Harassment Committee following a complaint concerning sexual harassment submitted by a former trainee. After the Ombudsman opened an inquiry, the Harassment Committee resumed its investigation. Deciding to build on trust rather than blame, the Ombudsman considered that no further inquiries were necessary and closed the case. In doing so, the Ombudsman emphasised the vital importance for alleged victims of sexual harassment of having a reliable contact person who responds efficiently to their grievances. In the absence of such a person, victims can only feel more helpless. The closing decision also contained two further remarks, encouraging the Committee to act diligently and sensitively in its dealings with the complainant, reach a decision as soon as possible and, in the future, apply the lessons learnt from this case.

In response, Parliament informed the Ombudsman that the investigation had now been closed and that the new Chair of the Harassment Committee had made a firm commitment to speeding up the investigation procedure, in accordance with the applicable rules.

The Ombudsman commends Parliament's constructive follow-up.

2. Council of the EU

Case 1649/2012/RA: EU participation in the Open Government Partnership

This complaint concerned the Council's refusal to grant public access to a document containing Common Steps towards visa-free short-term travel of Russian and EU citizens. After the Russian authorities agreed to the EU's proposal to provide public access to the document, the Council published it on its Public Register of documents. In a further remark, the Ombudsman invited the Council to consider taking steps towards EU participation in the Open Government Partnership (OGP)[1], a multilateral initiative that aims to increase the transparency, accountability and responsiveness of governments to citizens. This could increase the Union's credibility in the field and provide a forum in which to encourage greater openness by Russia, which after signalling its intention to join the OGP subsequently withdrew its letter of intent.

The Council's reply alluded to the fact that the external action of the Union may be completed through initiatives taken by EU Member States in international fora of which the EU is not a member or does not participate. This is the case of organisations, such as the OGP, it said, which is an international platform joined by certain EU Member States and civil society organisations. The Council did not, however, respond on the question of possible EU participation in the OGP.

The Ombudsman regrets that the Council did not take this opportunity to engage with the question of possible EU participation in the Open Government Partnership. In May 2014, the Ombudsman spoke at the European meeting of the OGP. She announced her intention to do whatever she can to help the EU administration to live up to the expectations of openness, accountability, and citizen participation, in line with the provisions of the Union Treaties.

3. European Commission

Case 217/2008/FOR: Public access to policy notes of DG Trade

The complaint concerned the Commission's refusal to give public access to policy notes used by its Directorate General for Trade to guide staff conducting trade law investigations.

The Ombudsman found no maladministration as regards the alleged refusal, but recommended that the Commission identify on a public register the documents comprising its internal guidelines to staff on the use of trade defence instruments. A second further remark asked the Commission to identify the requested documents appropriately when it receives requests for public access.

[1] See: http://www.opengovpartnership.org

In response, the Commission assured the Ombudsman that it always assists persons to identify documents for which public access is sought and that it has made efforts to identify the most important documents in its possession on a public register. It suggested that further improvements might be made in this regard.

The Ombudsman welcomes the Commission's efforts to assist the public to identify documents in its possession and encourages the Commission to renew its efforts in this regard.

Case 2335/2008/CK: Access to documents concerning proposed investments in nuclear energy

The complainant, a global organisation which campaigns for the protection and conservation of the environment, turned to the Ombudsman in order to contest the Commission's refusal to disclose documents relating to a proposed investment project for the construction of a new nuclear power plant in Bulgaria. In the Commission's view, Article 44 of the Treaty establishing the European Atomic Energy Community (the 'Euratom Treaty') meant that access to documents concerning an investment project has to be denied as long as both the investor and the Member State concerned have not given their explicit consent to disclosure. The Ombudsman made the preliminary finding that the Commission's position was not convincing and invited the institution to reassess its interpretation of Article 44 of the Euratom Treaty and to consider adopting a more proactive approach to disclosing the documents referred to in Articles 43 and 44 of the Euratom Treaty. In its reply, the Commission repeated its previously expressed views and the Ombudsman closed the case with a critical and two further remarks.

In the critical remark, the Ombudsman pointed out that the Commission failed to take into account recent developments in EU law concerning the principle of transparency and the fundamental right of access to documents when interpreting and applying Article 44 of the Euratom Treaty and Article 15 TFEU. In the two further remarks, the Ombudsman invited the Commission (i) to adopt guidelines which set out the procedural rules to be applied when dealing with requests for access to Euratom documents and (ii) to develop a proactive approach to disclosing Euratom documents.

In response, the Commission maintained its view that Article 44 prevails over Article 15 TFEU and that the consent requirement in Article 44 is an absolute requirement for disclosure. However, it undertook to elaborate and adopt a set of procedural rules for access to Euratom documents in the form of publicly available guidelines. It also informed the Ombudsman of its proactive approach regarding: (i) the drafting of its viewpoints and (ii) the publishing on its website of information on nuclear installations.

The Ombudsman regrets that the Commission maintains its narrow interpretation of Article 44 of the Euratom Treaty, which raises questions about the Union's compliance with its obligations under the Aarhus Convention.

The Commission's positive and constructive follow-up to the further remarks is welcome.

Case 2781/2008/FOR: Access to expert reports on applications for funding

The complainant unsuccessfully sought EU funding for an information technology project. He requested access to the reports of the individual experts who evaluated his proposal. The Commission refused access, arguing that disclosure would seriously undermine the decision-making process. In particular, it feared damage to the collective nature of the decision and that undue external pressure may prevent experts giving their full and frank opinion.

The Ombudsman was not convinced by this reasoning and criticised the Commission's failure to provide valid and adequate grounds for its decision. A further remark was made encouraging the Commission to review its overall approach concerning the release of individual expert reports and to consider granting public access to anonymised individual expert reports.

In response, the Commission referred to its Code of Conduct for independent experts, which was annexed to the Rules for submission of proposals. This explicitly states that *"the task of an expert is to participate in a confidential […] evaluation"*.

The Ombudsman regrets that the Commission has merely referred to its existing practices rather than taking the opportunity to review those practices.

Case 563/2009/VL: Inadequate explanation for the decision to close an infringement case

A member of a German ornithological society complained about the Commission´s decision to close infringement proceedings against Germany concerning its obligations to set up a special protection area (SPA) for certain wild birds listed in Council Directive 79/409/EEC on the conservation of wild birds.

The Ombudsman criticised the Commission´s failure to provide a convincing and reasonable explanation of its position as regards the methodology for delineating the SPA.

In response, the Commission merely repeated its view that it assessed all the complainant´s arguments and provided full explanations of its decision.

The Ombudsman regrets that the Commission has not learnt any lessons from this case.

Case OI/10/2010/JF: Evidence of time worked on EU projects

The complaint concerned a grant agreement between DG Environment and a University in Lebanon for the implementation of a project designed to

strengthen Lebanese environmental legislation. The Commission declared the completed project to have been a success, but refused to pay for the working time of the University's Vice-President, who acted as the project's co-ordinator, because appropriate evidence of the time worked had not been submitted. The Vice-President then made available his personal agenda, in an effort to provide evidence of the time he had spent on the project.

DG Environment refused to regard the agenda as adequate evidence. The complainant then turned to the Ombudsman, arguing that the Commission had previously accepted the same kind of evidence from other beneficiaries of Commission projects in Lebanon. After an inquiry, the Ombudsman made a proposal for a friendly solution and, when the Commission refused that proposal, a draft recommendation, suggesting that it reassess the agenda's probative value against the results of the project and that it reconsider the complainant's costs. The Ombudsman invited the Commission to take account, in deciding on the matter, of its longstanding relationship of trust with the complainant and of the risk that the Union might be perceived as having acted unfairly. The Commission rejected the recommendation and the Ombudsman closed the case with a critical remark.

In response, the Commission informed the Ombudsman that, in order to avoid similar situations in the future, it has taken several measures to highlight the need for and improve the use of time sheets to justify staff costs as eligible expenditures for LIFE projects. It clarified to financial initiators, ex-post auditors and all beneficiaries what could be accepted as timesheets. It also published a set of Guidelines on the LIFE+ website containing instructions on timesheets. In addition, during kick-off meetings with beneficiaries, the Commission puts additional emphasis on the issue of time sheets. External monitoring teams carry out specific and systematic controls of timesheets during their visits of LIFE projects. The Commission also checks samples of timesheets during their visits to LIFE projects.

The Ombudsman considers that the measures described by the Commission should reduce the risk of similar maladministration occurring in the future to an acceptable level.

Case 202/2010/VL: Disclosing the identity of evaluators for EU-funded projects

The complainant company applied for research funding under the Commission's Sixth Framework Programme ('FP6') and Seventh Framework Programme ('FP7'). The complainant's FP7 proposals received a low score while the same proposal under the FP6 had received a very good score. In turning to the Ombudsman, the complainant also raised a number of issues with regard to the evaluation of scientific research proposals by the Commission, in particular that the Commission did not provide it with the names of the evaluators and that the latter might have had a conflict of interest.

Having inspected the Commission's file, including the CVs of the evaluators, the Ombudsman found no maladministration with regard to the evaluation of the complainant's proposals. The decision closing the close included a

suggestion that, in order to improve transparency, the Commission consider changing its rules to allow disclosure of the evaluators' identity to applicants once the evaluations have taken place and the results have been communicated to the applicants.

In response, the Commission agreed that the Ombudsman's suggestion would allow an applicant to judge if experts were subject to conflicts of interest and that it might increase experts' accountability. However, it considered that such a proposal would run counter to considerations of personal data protection and the efficiency of procedures. In this context, it put forward that (i) personal data could be transferred to a third party only if the recipient established the necessity of having the data transferred and if there was no reason to assume that the data subject's legitimate interest might be prejudiced, (ii) disclosure could potentially have serious repercussions on the personal and professional life of the experts concerned due to the size of the research/industrial communities, (iii) whilst there was a rotation of experts, there was a certain proportion of experts that remained, who could be subject to exertion of pressure in the subsequent year, and (iv) it could invite hundreds of applicants to make all sorts of subjective and spurious allegations, which would be almost impossible to assess and resolve within a reasonable period of time.

The Ombudsman is not convinced by the arguments put forward by the Commission. The right to personal data protection could be ensured by providing adequate information to experts in advance and giving them the right to object to disclosure of their identities on compelling grounds. Attempts to exert pressure on experts could be detected and deterred by appropriate measures. Finally, subjective and spurious allegations could be easily identified and answered rapidly.

Case 768/2010/VL: Recognition of educational qualifications for the purpose of an internal competition

The complainant, who worked as a temporary agent, was excluded from an internal competition on the ground that his educational qualifications did not meet the requirements of the Notice of Competition. The complaint to the Ombudsman relied on the fact that he had produced a Statement and a Certificate from the UK National Recognition Information Centre (NARIC), certifying that his qualification corresponded to a UK Bachelors degree (Honours).

As the Ombudsman considered that the recruitment process had not taken sufficient account of the certificate issued by the competent national authority, he proposed a friendly solution, inviting the Commission to reconsider its position. Since the Commission refused to do so, the Ombudsman closed the case with a critical remark.

In response, the Commission merely restated its view that it had correctly applied the relevant rules and provisions.

The Ombudsman regrets that the Commission has made no effort to learn from this case and has done nothing to reduce the risk that similar

maladministration will occur in the future. The Commission's approach in this case contrasts unfavourably with EPSO's star case 962/2011/AN.

See **Case 828/2010/JF** in Section B.3 above.

Case 1533/2010/MMN: Duty of former Commissioners to behave with integrity and discretion

Article 245(2) TFEU imposes on members of the Commission the *"duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits"*.

The present case concerned the authorisation given by the Commission to a former Commissioner to take up a specific post in the private sector after leaving the Commission.

The complainant NGO was of the opinion that the Commission failed to deal properly with the matter and turned to the Ombudsman. After an inquiry, which included two inspections of the Commission's file, the Ombudsman found no maladministration. The Commission had respected the procedure it had established for such cases by asking its Ad Hoc Ethical Committee to look into the matter before deciding on it. That Committee had asked for and obtained certain clarifications. Moreover, the Commission had reconsidered the matter after the complainant, among others, voiced concerns.

However, the Ombudsman noted an internal e-mail in which a Commission official requested another official, who was familiar with the activities of the former Commissioner, to provide further information concerning the former Commissioner's alleged involvement in a specific project in which the intended employer participated. That request had remained unanswered. The Ombudsman made a further remark as follows:

"When carrying out the necessary in-depth assessment of possible conflicts of interest affecting former Commissioners, it would be advisable for the Commission to ensure that all the necessary inquiries or other investigative measures undertaken in the context of that assessment are duly completed and that adequate records are kept as regards all these steps."

In its response, the Commission stated that the e-mail in question was sent at the end of February 2010, while the Commission adopted its decision on the compatibility of the activities of the former Commissioner at the end of January 2010. The e-mail was sent in order to provide information to the Commission's spokesperson to answer possible questions from journalists in the press room.

The Ombudsman notes that the Commission's reply seems to be based on the incorrect assumption that, because it had already adopted the decision considering the envisaged occupation as compatible with the Treaty, anything that might subsequently emerge would be relevant only to presentation and could not call the decision itself into question. The e-mail in question concerned the former Commissioner's alleged involvement in a specific project in which the intended employer participated. Thus, if confirmed, this could have called

into question the Commission's decision that the (envisaged) occupation was compatible with the Treaty. It is therefore clear that the Commission should have followed up on this e-mail, which raised a potentially very important issue.

The Ombudsman continues to take an active interest in the Commission's handling of ethical issues such as possible conflicts of interest.

Case 1817/2010/RA: Deadlines for replies to requests for public access to documents

The Ombudsman's inquiry in this case was closed after the Commission agreed to give access to the document in question (see section B.3 above). Three further remarks were made with a view to improving the Commission's procedures for the future. They related to consultations with third party authors under Article 4 of Regulation 1049/2001, deadlines for responding to initial and confirmatory applications, and information about remedies.

In response to the first remark, the Commission promised to use best endeavours to consult third-party authors as rapidly as possible, but pointed out that the need to consult can only be established through prior analysis of the documents. The time this takes varies depending on factors specific to the documents requested (such as their number and length) and the general workload.

As regards the second remark, the Commission recalled that it systematically follows the Ombudsman's recommendation, made in the context of case 87/2012/KM, by indicating, in the acknowledgement of receipt, the date when the request was registered and the date when its reply is due.

In response to the third remark, the Commission explained that it is not always able to give a precise estimate of the date on which the applicant can expect a decision but promised best endeavours, in line with the spirit of the remark, to keep applicants as well-informed as possible about the handling of their applications, including any delays and the reasons for them. As regards information about remedies, the Commission's view is that it would be premature to provide it whenever it is aware that it will not meet the deadlines, given that decisions are generally taken in such cases just after the initial or extended deadline. Such information would also be misleading in cases where the Commission finally succeeds in reaching a decision within the deadline. Confirmatory decisions systematically indicate the available complaint and redress procedures, thus enabling applicants to obtain review, not only of the extent to which the Commission has respected the applicable procedures, but also of the substance of its decision. The Commission also drew attention to the judgment in Case T-494/08, which confirms that when an institution takes an explicit confirmatory decision after the extended deadline, this becomes the actionable act, and applicants lose their interest in having the implicit refusal annulled.

The Ombudsman welcomes the Commission's promises to use best endeavours in relation to meeting the objectives of the first and third

remarks. The Commission's response to the second further remark is also helpful and reasonable. As regards providing information about remedies, the Ombudsman accepts that the need for internal and external consultations means that it may not always be possible for the service responsible for sending the decision to know, sufficiently far in advance to be useful, whether they will just meet a deadline or just miss it.

It is important that the case law to which the Commission refers not be understood as meaning that the time limits under Regulation 1049/2001 do not matter as long as the institution concerned replies in the end. On 11 December 2013, the Ombudsman addressed an own-initiative inquiry to the European Parliament, the Council and the Commission concerning respect of the time limits for dealing with initial and confirmatory applications for access (OI/6/2013/KM).

Case 10/2011/AN: Candidates should be told which institutions are allowed to recruit them

The complainant was successful in a competition aimed at setting up a database of candidates eligible for recruitment by the (then) Commission's delegations to third countries and international organisations. The letter informing the complainant that his name was in the database stated that he would be eligible for recruitment by all the EU institutions, offices and agencies. On the basis of this information and knowing that several candidates from the database were indeed recruited by bodies other than delegations, the complainant successfully took part in recruitment procedures organised by EU agencies. However, the Commission informed all the EU agencies that they could not recruit candidates from the database in question.

During the Ombudsman's inquiry, the Commission opened the database to all the EU institutions, bodies, offices and agencies, thus settling the matter. However, since the Commission neither informed the Ombudsman of this outcome, nor published clear information for the candidates' attention, the Ombudsman made two further remarks. The first remark was that, in future, the Commission should provide the Ombudsman with information that is relevant to the outcome of an on-going inquiry. The second remark was that, in order to ensure fair and equal treatment, the Commission should inform all the candidates on the database that it was open to all EU institutions, bodies, offices and agencies.

In its follow-up, the Commission informed the Ombudsman that it had published the required information on the website of the European Personnel Selection Office (EPSO).

The Ombudsman considers that no specific follow-up to the first further remark is necessary and that the follow-up to the second further remark is satisfactory.

Case 851/2011/KM: Delay in responding to infringement complaint about multiple-entry visas

The complainant, a German national, complained to the Commission on 9 April 2010 about the way in which Germany handles multiple-entry visa applications. On 25 November 2010, he reminded the Commission of his complaint. The Commission finally replied on 4 April 2011, stating that the relevant rules allowed Member States to test whether visa applicants had sufficient means. It could not ascertain, from the information the complainant had submitted, whether there was any breach of EU rules.

In its opinion to the Ombudsman, the Commission explained its position in more detail and added that the German authorities had acknowledged that they had made a mistake. The Ombudsman considered that, since the national authorities had accepted their mistake, there were no grounds for further action. However, a critical remark was made concerning the fact that the Commission had only replied nearly a year after the complainant's first e-mail and more than four months after his second e-mail, without explaining this delay.

In response, the Commission promised to improve its procedures for replying to citizens with the aim of replying as soon as possible.

The Ombudsman welcomes the Commission's commitment to review its procedures to ensure that it replies to letters from citizens within a reasonable timeframe.

Case 875/2011/JF: Commission's work in the field of powered two-wheelers

The complainant, a motorcyclist, corresponded with the Commission about a new policy on road safety. He took the view that the Commission had not properly conducted a survey seeking stakeholders' views. When the Commission refused to communicate further with the complainant, he turned to the Ombudsman. Following an inquiry, the Ombudsman (i) invited the Commission to consider providing guidance to its staff as regards the circumstances in which the Code of Good Administrative Behaviour may legitimately be invoked to discontinue correspondence; (ii) encouraged the Commission to acknowledge in the present case that it would have been better not to have confined the survey to the English language and to consider whether there are any lessons to be drawn for the future; and (iii) invited the Commission to confirm that it forwarded the complainant's comments and opinions on its regulatory proposals to the expert groups working on the relevant legislation, for their consideration.

In response, the Commission explained that it provides guidance in respect of the application of the Code, both in the compulsory training sessions for its staff and on its 'MyIntracom' website. Its Ethics Correspondents and Directorate-General Human Resources and Security provide further guidance when needed. The Commission also acknowledged that it would have been better to conduct the survey also in languages other than English. Finally, it

stated that it had submitted the complainant's remarks, which were widely known, to its experts working on the relevant legislation.

The Ombudsman welcomes the Commission's helpful follow-up to the further remarks.

Case 940/2011/JF: Delayed payment for EU-funded action

The complainant was the co-ordinator of a consortium undertaking an EU-funded an action in the field of eco-friendly construction. The complainant turned to the Ombudsman with a dispute concerning the percentage of eligible costs that the Commission should pay on an interim basis.

After an inquiry that included a proposal for a friendly solution, the Ombudsman concluded that no further inquiries were justified. In a further remark, the Ombudsman invited the Commission to explain how it complied with assurances it gave during the inquiry that it would pay the balance to the consortium at the end of the action without incurring unnecessary delays.

In its reply, the Commission explained that it received the last set of financial evidence from the complainant on 4 July 2013. However, that evidence proved to be incomplete and, in cases, incorrect. The Commission therefore asked the consortium to provide missing financial documentation and to clarify incorrect or inconsistent information. The consortium submitted the last outstanding documentation and clarifications on 13 December 2013. Following this, the Commission was prepared to pay the outstanding balance to the consortium immediately. Unfortunately, at that stage, insufficient appropriations were available to make the payment before the end of the year. Therefore, the payment had to be postponed to 2014. The Commission nevertheless gave it priority and, following a last minor clarification from the consortium and the consortium's submission of the final consolidated cost claim on 24 January 2014, paid the consortium the balance of EUR 643 037.11 on 3 February 2014. In addition, on 14 February 2014, the Commission paid the consortium interest for late payment of EUR 402.88.

The Ombudsman takes note of the genuine efforts of the Commission to follow-up constructively in this case.

Case 1235/2011/MMN: Compliance with the UN Convention on the Rights of Persons with Disabilities

The complainant succeeded in an EPSO competition and obtained a position as a contract agent at the Publications Office in Luxembourg. A few years later, the complainant obtained an interim contract through a Belgian company at the Commission's Office of Infrastructure in Brussels. Later that year, the complainant participated in interviews held to fill a permanent position in the Commission. However, the complainant was not selected and was placed on a reserve list.

The complainant and his lawyer addressed a number of letters to the Commission. In these letters, the complainant claimed that (i) the Commission

should have offered him an indefinite contract when he started working for the Office of Infrastructure in Brussels and that (ii) the Commission should have offered him a permanent post by reason of his disability. The Commission rejected these claims but assured the complainant that it would keep him informed of any possibilities of recruitment at the Commission that might arise. The complainant subsequently turned to the Ombudsman, who found no maladministration.

In a further remark, the Ombudsman recommended that the Commission examine whether its Code of good practice for the employment of people with disabilities is fully compliant with the UN Convention on the Rights of Persons with Disabilities (CRPD).

In response, the Commission stated that it had carried out the analysis requested by the Ombudsman and concluded that the Code is fully compliant with the CRPD.

The Commission's response is satisfactory.

Case 1325/2011/VL: Decision to use negotiated procedure after cancellation of a tender should be transparent

A Slovenian company participated unsuccessfully in a tender procedure handled by the EU Delegation to Montenegro. The Delegation subsequently cancelled the tender procedure. The Slovenian company wished to participate in the new tender procedure. However, instead of issuing a new call for tenders, the Delegation awarded the contract using a negotiated procedure. The Slovenian company turned to the Ombudsman alleging that the Delegation had acted in a biased manner, unfairly, and contrary to public procurement rules.

The Ombudsman's inquiry found no maladministration. In closing the case, the Ombudsman made a further remark suggesting that, when an EU Delegation cancels a tender procedure and then enters a negotiated procedure with some of the initial tenderers, it would be advisable to inform the unsuccessful tenderers openly and proactively about that development. Doing so would further strengthen the perception of legality and transparency of tender procedures implemented by EU Delegations.

In response, the Commission acknowledged that correspondence with unsuccessful tenderers should be handled in a transparent and forthcoming manner. It pointed out, however, that it is not in the interests of good administration for tender and grant procedures to become endless and resource consuming. Moreover, the applicable provisions do not impose any obligation to inform unsuccessful tenderers of a subsequent negotiated procedure.

The Ombudsman regrets that the Commission failed to address the suggestion in the further remark, which would be easy to implement. Although the Commission invoked the principle of good administration, its response suggests that it will only do what the rules in force expressly oblige it to do. In the Ombudsman's view, this is not the attitude that an institution that cares about good administration should adopt.

Case 1640/2011/MMN: Clarifying the meaning of Commission patronage for events and activities

The complaint concerned a photographic exhibition under the patronage of Commission Vice-President Reding and was hosted in a Commission building. The exhibition related to same-sex couples. The Ombudsman did not uphold the complainant's allegations that the Commission exceeded its powers and that it insulted and discriminated against those EU citizens that do not share the views promoted by the exhibition. Having concluded that there were no grounds for further inquiries, the Ombudsman made two further remarks.

The first advised the Commission to include an appropriate disclaimer when it decides to host, finance or place events or activities under its patronage, in order to avoid the risk of giving the misleading impression to the public that it has endorsed the specific content or message of the event or activity in question. This would be particularly appropriate if the content of the event or exhibition may arguably exceed at least partially the scope of its competence, or if the content or message may be controversial.

The second further remark was to the effect that, whenever the Commission receives a request for information concerning the use of EU funds, it could consider providing as complete information as possible from the outset regarding the relevant facts and the legal basis for such financing.

In response, the Commission undertook to update its guidelines on patronage to include a recommendation on the use of appropriate disclaimers. The Commission also expressed its agreement with the second further remark. It decided to publicise both remarks internally, in particular within Commissioners' cabinets and other services dealing with patronage of events or activities.

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

Case 1786/2011/MHZ: Alleged fraud in the implementation of EU funds

The complainant made an infringement complaint to the Commission against Poland concerning a construction project co-financed by EU funds. He alleged that there were hidden reasons (fraud and political pressure) behind the choice of location for the project. The Commission closed the complaint on the grounds that there was no infringement of EU law. The complainant then turned to the Ombudsman, contesting both the way the Commission dealt with his complaint and its decision to co-finance the project.

The Ombudsman's inquiry clarified the reasons why the Commission found no infringement. However, it also became clear during the inquiry that the Commission did not close the case when it made that finding in July 2011. Instead, it suspended the infringement investigations until 20 December 2012, the date on which it sent the pre-closure letter to the complainant.

The Ombudsman criticized the fact that the Commission was unable to explain convincingly why it did not close the infringement case earlier, when it made the finding that there was no infringement.

As regards the Commission's approval of the Polish application for co-financing, the Ombudsman found no maladministration. A further remark was made advising the Commission, when dealing with an application for co-funding, to look into any possible allegations of fraud or corruption immediately when they are made and prior to adopting the final decision on the application for co-funding.

In its response to the critical remark, the Commission explained that it suspended investigations until 20 December 2012 because an appeal against the decision on the environmental conditions for the project was pending before the competent national authority.

In response to the further remark, the Commission explained, in substance, that Regulation 1083/2006 provides for the Commission to adopt a decision not later than three months after the submission of a project. A mere suspicion of fraud or even an on-going investigation, is not sufficient to reject a project. If allegations of fraud or corruption are subsequently confirmed, the Commission can suspend payments or ask the Member State to carry out financial corrections. If the Member State does not do so, the Commission can reduce the EU contribution to the operational programme. The Commission also explained that, in the present case, OLAF had rejected the allegations of fraud.

The Ombudsman is satisfied with the Commission's follow-up to both remarks.

Case 2086/2011/ER: Indicating appeal possibilities against a decision affecting reimbursement of medical expenses.

An EU official applied for the recognition of his medical condition as a serious illness. Such recognition means that the relevant medical expenses are fully reimbursed under the sickness insurance scheme. The Commission rejected the complainant's application on the ground that his condition did not meet the relevant criteria. After having exhausted the internal administrative remedies, the complainant turned to the Ombudsman who found no maladministration as regards most of the issues raised. However, the Ombudsman criticised the Commission's failure to provide the complainant with information on the possibilities of appeal available for challenging the decision.

In response, the Commission undertook to indicate appeal possibilities in such decisions in the future and began the process of making the necessary IT adjustments.

The Ombudsman welcomes the Commission's positive response.

See **Case 2097/2011/RA** above under 'Star cases'.

Case 47/2012/AN: Infringement investigation took too long

In 2006, a Spanish citizen made an infringement complaint against the Spanish authorities about alleged irregularities in the public procurement procedure relating to the construction of a port in La Coruña. At the end of 2011, the Commission had not yet taken a decision on the complaint. The complainant turned to the Ombudsman, who opened an inquiry.

During the course of the inquiry, the Commission took a decision to close the infringement case. The Ombudsman considered that the Commission's statement of reasons for its decision was reasonable. However, the length of the Commission's investigation, at six and a half years, was not reasonable within the meaning of Article 41 of the Charter of Fundamental Rights. Furthermore, until the Ombudsman's intervention, the Commission had failed to inform the complainant in a timely manner of the steps taken during its investigation.

In response to the critical remark, the Commission acknowledged that the length of its investigation was inappropriate even taking into account the difficulties of the case and the need to examine the facts in depth. It also acknowledged that it could have been in contact with the complainant more regularly.

The Commission's response to the critical remark demonstrates willingness to learn from mistakes.

Case 452/2012/CK: Clearer guidance on tender procedures

The complainant company led a consortium which took part in a tender procedure. It challenged the way the Commission interpreted the selection criteria relating to the technical capacity of the candidates. After an inquiry, the Ombudsman concluded that, even though the decision not to include the complainant among the shortlisted tenderers was correct, the Commission failed to provide the complainant, in a clear, coherent and unequivocal fashion, with adequate reasoning for the decision.

In response, the Commission informed the Ombudsman that the Practical Guide to Contract procedures for EU external actions (PRAG) was amended in January 2012 and January 2013. The new version of the PRAG contains clearer guidance on shortlisting and on how to apply selection criteria. The amended provisions should help avoid similar situations in the future and assist the evaluation committees in their decisions and the Commission in providing clear answers to tenderers.

The Ombudsman notes that Section 2.4.11.1.3 of the PRAG (*'Checking the technical and professional capacity of candidates or tenderers'*) has been amended and now explains in a clear manner when and how an applicant can use completed parts of incomplete projects as valid references.

Case 277/2012/RA: Operation of the Transparency Register

The complainant, an NGO, alleged that the Commission had not properly handled its complaints about the accuracy of declarations made by two multinationals in the Commission's Register of Interest Representatives. The NGO also alleged that the Commission had not properly handled its request for public access to documents.

The Ombudsman inspected the file and found that the Commission had good reasons for rejecting the complaints. The Ombudsman, however, criticised the Commission for failing to explain these reasons adequately to the complainant. The Ombudsman also criticised the fact that the Commission had redacted information from the requested documents as "irrelevant". By doing so, it failed to apply Regulation 1049/2001 on public access to documents correctly.

Since the Commission and Parliament were in the process of reviewing what is now their Joint Transparency Register, the Ombudsman made three proposals:

(i) the review should fully take into account the OECD Principles for Transparency and Integrity in Lobbying;

(ii) it could examine whether guidelines on methodology could be provided to ensure not only greater accuracy, but also an achievable degree of comparability of the declarations on the Register;

(iii) complaints make a valuable contribution to effective implementation of the Register and should be welcomed as an opportunity to enhance the accuracy of the information it contains. Such complaints should be thoroughly investigated and the responses to them should deal in sufficient detail with the arguments made by the complainant.

The Ombudsman invited the Commission to take into account the views of the European Parliament in its follow-up to these proposals.

Finally, the Ombudsman proposed that the Commission could systematically inform interest representatives, in advance of meetings with Commission staff members, that the Commission intends to release the names of interest representatives, if so requested in the context of applications for access to documents under Regulation 1049/2001.

In its response to the first critical remark, the Commission stated that providing more detailed reasoning to the complainant would have entailed publicly revealing information that the companies in question were not required to reveal as part of their declarations on the Register of Interest Representatives.

The Ombudsman regrets the Commission's failure to understand the critical remark. The Ombudsman did not expect the Commission to reveal to the complainant information that the companies in question would not have been expected to reveal as part of their declarations on the Register. The Ombudsman's decision in this case drew attention to elements of the Commission's reasoning that could have been provided to the complainant.

For instance, in its internal assessment, the Commission refers a number of times to its FAQs, a publicly available document, while leaving this information out of its response to the complainant.

With regard to the second critical remark, the Commission insisted that it applied the access to documents rules correctly by redacting parts of the documents and clearly marking the redacted parts as being "out of scope".

The Ombudsman regrets that the Commission has missed the opportunity to learn how the procedures provided by Regulation 1049/2001 allow it to achieve efficiency whilst also respecting the rights of applicants. Article 6(3) of the Regulation allows an institution to confer with an applicant with a view to seeking the latter's agreement to provide access only to certain parts of a very long document. In this way, the institution may redact parts of the document(s) that are not relevant to the applicant's request without having to carry out an in-depth (and possibly time-consuming) analysis of whether exceptions apply. In order to apply this article correctly, however, the institution must respect a number of important procedural requirements. In particular, it should explain clearly to the applicant that, in its view, parts of the document(s) in question are not relevant to the applicant. Furthermore, it should explain, in general, what those parts of the documents concern, in order to allow the applicant to make an informed choice as to whether or not he or she wishes also to request access to those parts[1].

With regard to the Ombudsman's proposals for the Joint Register, the Commission informed the Ombudsman that it had already improved the system. Specifically, the Joint Secretariat of the Register has provided registrants with specific guidelines including a clear methodology on declarations. In relation to the OECD Principles for Transparency and Integrity in Lobbying, the Commission informed the Ombudsman that its services contributed to the work leading to these principles and that it shares the ideas deriving from these principles. However, the Commission refrained from taking any specific action in relation to the proposal to disclose the names of lobbyists in the future.

The Commission's positive response to the first three proposals is welcome. The Ombudsman will continue to take a keen interest in the operation of the Joint Register and the handling of complaints and requests for access to information and documents, as well as proposals that may result from the public debate about a possible mandatory Register.

Case 295/2012/MMN: The Commission should explain delays in infringement proceedings

In 2002, the Commission launched infringement proceedings against Spain on its own initiative. In May 2008, the Commission sent a reasoned opinion to Spain. In December 2010, the complainant asked the Commission about the status of the investigation. The Commission replied that it had not yet decided whether to refer the case to the Court of Justice.

[1] See the Ombudsman's decision in case 693/2011/RA, available at: http://www.ombudsman.europa.eu/cases/decision.faces/en/51460/html.bookmark (paragraphs 36-37).

The Ombudsman inquired into the allegation that the Commission failed to take action within a reasonable time, either by bringing the matter before the Court of Justice or by closing the case, as well as a related claim. On the substance, the Ombudsman considered the Commission's explanations as reasonable and closed the case. However, it would have been better if the Commission had given these explanations to the complainant earlier, rather than doing so only in the course of the Ombudsman's inquiry. The Ombudsman therefore made a further remark inviting the Commission in the future to consider providing citizens with adequate information about the reasons for which it suspends the investigation of an infringement proceeding.

In response, although the Commission acknowledged the benefits of increased transparency and improved communication, it rejected the Ombudsman's suggestion.

The Ombudsman regrets the Commission's unconstructive follow-up in this case.

Case 412/2012/MHZ: Avoiding delays and ensuring transparency in infringement cases

The complainant made an infringement complaint to the Commission against Poland. The complaint to the Ombudsman alleged that the Commission failed to handle its infringement complaint with due diligence and to provide an appropriate statement of reasons for the closure of the case.

During the Ombudsman's inquiry, which included an inspection of the Commission's file on the matter, the Commission demonstrated that it had kept the complainant properly informed. Furthermore, in the meantime, a Polish court had referred the subject-matter of the infringement complaint to the Court of Justice for a preliminary ruling. For these reasons, the Ombudsman found that no further inquiries into the complaint were justified. With an eye to helping the Commission improve its handling of future infringement cases, the Ombudsman made two further remarks, based on the facts of the case as revealed by the inspection.

The first remark concerned the indicative time limit of one year for deciding whether to begin infringement proceedings (set out in point 8 of the Commission's 2012 Communication). The Ombudsman suggested that the Commission make clear to its services that the need for inter-service consultations does not, in itself, justify exceeding the one-year deadline.

The second remark was that, when giving reasons for its decisions in infringement cases, the Commission could take into account that proactive disclosure, at least in outline, of different views taken by its services could help to convince complainants and citizens generally that the stated reasons underlying the closure of the case are genuine.

The Commission's response to the first remark mainly concerned the facts of the specific case.

In response to the second remark, the Commission stated that the decision to open or close an infringement procedure is made by the Commission as a collegial body. The different views of the responsible units taking part in the consultation process preceding the adoption of decisions in infringement cases is exclusively an internal issue.

The Commission also stated that it is aware that increased transparency and improved communication are key to relations between the European institutions and the European citizens. That is valid also as regards the task of "guardian of the treaties" entrusted to the Commission in Article 17(1) of the Treaty on European Union. This has been publicly acknowledged by the Commission in its Communication "A Europe of Results – Applying Community Law". The annual reports published by the Commission on the annual implementation of EU Law, the summary information provided to complainants on all the main steps taken in their complaints or the press releases issued regarding the reasoned opinions sent to Member States are good evidence of this.

The Commission also noted that the infringement procedure is not intended primarily to provide individuals with a means of redress, but to ensure that the Member State correctly applies EU law. As the Commission has publicly acknowledged, this could sometimes leave complainants feeling frustrated. The fact remains, however, that they are not a party to the procedure and that the satisfaction of their individual interests is not the aim pursued.

The Ombudsman regrets that the Commission did not engage with the substance of the first further remark.

As regards the second further remark, the Ombudsman notes that, in the specific case, the complainants were first informed of the intention, albeit provisional, to send a letter of formal notice to the Polish authorities. Subsequently, they were informed that no such letter would be sent. In these circumstances, the Ombudsman is surprised that the Commission should react negatively to the suggestion that proactive disclosure, at least in outline, of different views taken by its services could help to convince complainants and citizens generally that the stated reasons underlying the closure of the case are genuine.

Cases 519/2012/AN and 547/2012/AN: Commission should inform infringement complainants about postponement of closure

The Ombudsman opened a joint inquiry into two complaints about the Commission's decision to close an infringement complaint. In its opinion, the Commission informed the Ombudsman that, after announcing to the complainants its intention to close the case, it had in fact postponed a decision on closure. In a further remark, the Ombudsman pointed out that, in such cases, it would be useful, citizen friendly and in line with an administrative culture of service to citizens for the Commission to (i) inform complainants in a timely manner of the postponement, and (ii) give reasons for the postponement.

In response, the Commission referred to the confidentiality of the negotiations with the Member State as the reason for not informing complainants that their case remains pending.

The Commission's response is unconvincing. The fact that it has postponed closure does not itself constitute confidential information. Furthermore, the Commission could give reasons for the postponement without disclosing confidential information.

Case 984/2012/EIS: Recovery of family allowances

The complainant was a member of the Commission's staff. When applying for the child allowance foreseen by the Staff Regulations, she declared a family benefit received from the national authorities. The Commission services took the view that the child allowance should not be reduced to take account of this benefit. Two years later, they said this decision was a mistake and proceeded to recover the corresponding sums from the complainant's monthly salary. The complainant turned to the Ombudsman to contest both the revised decision concerning the nature of the benefit and the timetable for recovery of the amounts concerned, which resulted in a monthly deduction that put her in a difficult financial position.

When opening the inquiry, the Ombudsman invited the Commission to consider suspending or reducing the amount of the monthly deductions. The Commission did not do so, nor did it address the issue in its opinion.

Following the inquiry, the Ombudsman took the view that the decision to recover the relevant amounts was reasonable and in line with the relevant case law. However, the Ombudsman criticised the Commission's failure to consider setting the monthly amount deducted from the complainant's salary to an amount that was fair and reasonable in her specific circumstances.

In response, the Commission referred to its internal rules. It took the view that the complainant's requests, based on her financial situation, were not an acceptable justification for reducing the monthly amount. However, it did not explain why its internal rules did not allow it to take the complainant's situation into account.

The Ombudsman regrets that the Commission has not acted to reduce the risk of a similar situation occurring again. On the contrary, the Commission's response indicates that it has learnt nothing from the case.

Case 1108/2012/RT: Handling requests for public access when the applicant also has a right of access as a data subject

The complainant applied to the Commission for access to a document under Regulation 1049/2001 on public access to documents. The document in question related to her employment in a project funded by the Commission. In the course of the Ombudsman's inquiry, the Commission provided the complainant with the document. It explained that its legal basis for doing so was Regulation 45/2001 on the protection of personal data. (Article 13 of Regulation 45/2001

provides for data subjects to have a right to access data about themselves). The Commission explained that, because of an administrative error, the document was not attached to its decision on a previous request made by the complainant under Regulation 45/2001. The Ombudsman considered that no further inquiries into the case were needed.

In a further remark, the Ombudsman offered general guidance on how to handle requests where access might be sought under either Regulation 45/2001 or Regulation 1049/2001.

In response, the Commission confirmed that, if an applicant who has already been given access to a document under Regulation 45/2001 makes a subsequent request under Regulation 1049/2001 for access to the same document, the Commission would carry out an assessment under the latter Regulation if, but only if, the applicant explicitly asks it do so.

The Commission also confirmed that where a request is made under Regulation 1049/2001, but wider or full access could be provided to the applicant under Regulation 45/2001, it would use the latter Regulation as the basis for its decision.

Finally, in rare situations where the applicant seeks access to a particular document using the procedures under both Regulation 45/2001 and Regulation 1049/2001, the Commission would apply the procedure that leads to the widest possible access for the applicant.

The Ombudsman welcomes the Commission's constructive response, which ensures that the fundamental rights concerned can be exercised effectively and in a way that is efficient for both the applicant and the institution.

Case 1111/2012/AN: Delay in handling requests for access to documents

The Ombudsman found that the Commission had breached the complainant's procedural rights as an applicant for access to documents under Regulation 1049/2001. The Ombudsman's critical remark pointed out that the Commission (i) twice extended the deadline for replying to the complainant's confirmatory application and (ii) failed to provide an estimated date for a decision when it sent the second holding reply.

The Ombudsman also made two further remarks designed to help the Commission in dealing with future requests. The first remark pointed out that an annex to a document to which access is requested is not a separate document, but forms an integral part of the document to which it is attached. The assessment as to whether or not it must be disclosed should thus be made at the same time as the assessment concerning the main document. The second remark was to the effect that consultations concerning personal data should take place as soon as possible, in order to respect the deadlines in Regulation 1049/2001.

In response to the critical remark, the Commission acknowledged that it did not handle the complainant’s confirmatory application within the deadline. It said

that, in general, the factors that lead to deadlines being exceeded (such as the number, size, scope and complexity of the documents requested and, as in the present case, the need to consult third parties) also prevent it from being able accurately to estimate the time that will be needed to send a substantive reply to an applicant. However, the Commission stated that it strives to keep applicants informed of the progress of their applications in the most complete possible way.

In response to the first further remark, the Commission indicated that it had treated the case at hand in line with the Ombudsman's remark.

In response to the second further remark, the Commission pointed out that the need to consult only becomes clear once the requested documents have been assessed. However, the Commission fully shared the Ombudsman's view that consultations must be carried out as soon as possible and it endeavours to do so as rapidly as possible.

The Ombudsman is satisfied by the Commission's response in this case. The general issue of respect for the time limits for dealing with applications for access under Regulation 1049/2001 is the subject of an own-initiative inquiry to the European Parliament, Council and Commission (OI/6/2013/KM). The inquiry was on-going at the time the present Study was completed.

Case 1146/2012/AN: Infringement proceeding against Spain

In December 2009, the complainant made an infringement complaint to the Commission against the Spanish authorities. The Commission opened the EU Pilot procedure. In June 2012, the complainant turned to the Ombudsman complaining of the delay by the Commission in dealing with the matter. During the inquiry, the Commission stated that it had kept the EU Pilot procedure open because it wished to solve the problems raised by the complainant through cooperation with the Member State. The length of the procedure was due to the Spanish authorities' delays in replying to its requests for information and to the incompleteness of the replies provided.

The Ombudsman noted that the normal time-limits under the EU Pilot procedure had been greatly exceeded and that more than three years after the complainant submitted his infringement complaint, the situation remained exactly the same. The Ombudsman criticised the Commission for failure to respect the normal deadline of one year for deciding whether or not to open infringement proceedings and for delays in informing the complainant.

In its response, the Commission informed the Ombudsman that it opened the infringement procedure by sending a letter of formal notice to the Spanish authorities because no tangible progress had been made in the framework of the EU Pilot. Furthermore, it recognised that complainants have a right to receive information about their complaint, even if no progress has been made as a result of factors beyond the control of the Commission.

The Ombudsman welcomes the Commission's constructive response to the critical remark.

Case 1832/2012/EIS: Helping grant applicants to understand the Commission's requirements

The Commission rejected the complainant's grant application on the grounds of failure to submit a technical/narrative report. After an inquiry, the Ombudsman concluded that the Commission's interpretation of what constitutes a technical/narrative report appeared to be reasonable in view of the applicable provisions of the Financial Regulation and the Implementing Rules. However, given that the present case had revealed that the term could be open to misinterpretation, the Ombudsman invited the Commission to consider the possibility of including in its future Calls for Proposals and/or Guides for Applicants an explanation or description of what is to be understood by the term 'technical/narrative report'

In response, the Commission explained that the relevant Directorate General (DG Justice) has included an explanation of the term "technical/narrative report" in its 2013 Guide for Applicants.

The Ombudsman notes that the text in the relevant Guide for Applicants describes and explains in detail the Commission's understanding of this notion. This prompt follow up to the further remark is welcome.

Case 2347/2012/PMC: The validity of tenders that have already expired cannot be extended

The complainant company unsuccessfully tendered for contract concerning technical assistance for capacity development of state and non-state actors in all Eastern Partnership countries.

The complainant alleged that the Commission had requested tenderers to extend the validity of their tenders, which had already expired, and that this was contrary to the Practical Guide to Contract Procedures for EU External Actions and the Instructions to Tenderers (the PRAG). It claimed that the Commission should have cancelled the tender procedure and launched a new one.

The Ombudsman found that the allegation was justified. The PRAG clearly states that such a request can only be made *before* the period of validity has expired.

As regards the complainant's claim, the Commission emphasised that all tenderers had been treated in the same way. The Ombudsman was not convinced that this was sufficient justification for the Commission to continue with the tender procedure. However, cancelling the tender would have meant that the EUR 5.5 million budgeted for 2012 would have remained unspent, because there was not enough time to launch a new tender procedure. In these circumstances, the Ombudsman took the view that it was not unreasonable for the Commission to take the position that accepting the complainant's claim would have been disproportionate. The case was therefore closed with a critical remark as regards the failure to comply with the PRAG.

In response, the Commission stated that the existing procedures and procedural guidelines are clear with regard to the Ombudsman's finding of maladministration and regretted the error that had occurred. Due to the clarity of the rules, the Commission did not see any need to modify them. However, the Commission stated that its relevant services will inform their staff about the present case and remind them to pay particular attention to deadlines in such situations.

The Ombudsman welcomes the Commission's acknowledgment of its mistake and its positive and constructive follow-up to the critical remark.

Case 297/2013/FOR: Conflicts of interest and the Commission's Ad Hoc Ethical Committee

The complainant, a corporate lobby group, submitted a complaint concerning the Commission's Ad Hoc Ethical Committee. Specifically, the complainant raised the issue of the membership in the Committee of the former Head of the Commission's Legal Service.

The complainant alleged that (i) the Commission's decision to reappoint one of the members of its Ad Hoc Ethical Committee breached Article 4 of the 2003 Commission decision establishing the Committee; and (ii) the activities of the Ad Hoc Ethical Committee were not sufficiently transparent.

The complainant claimed that: (i) the Commission should revoke the said re-appointment and appoint a replacement who met the requirement for independence; (ii) the Commission should introduce a pro-active transparency policy of (a) publishing the CVs and Declarations of Interest of the members of the Ad Hoc Ethical Committee online; (b) improving online transparency regarding both the members of the Ad Hoc Ethical Committee and its decisions; and (iii) the Commission should - in the longer term - set up an independent ethics committee, with a broader and better defined mandate than the existing Committee, which should be fully independent and composed of experts on public administration ethics.

After an inquiry, the Ombudsman found that, by replacing the Member concerned, the Commission had taken the necessary steps to settle the first allegation. No further inquiries were considered necessary as regards the second allegation and the second and third claims.

In closing the case, the Ombudsman made a further remark, to the effect that the Commission should comply with its commitment to create a specific page on the EUROPA website relating to the Ad Hoc Ethical Committee and its work.

In response, the Commission informed the Ombudsman that it intends to create such a webpage, containing the relevant Commission decisions creating the Committee and appointing its members, as well as their CVs and "declarations of honour" attesting the absence of conflict of interests between their function as members of the Committee and their other activities or interests.

The Ombudsman welcomes the fact that the web page in question has now been made available at: http://ec.europa.eu/about/ethics-transparency/index_en.htm

Case 349/2013/EIS: Service-mindedness towards infringement complainants

An Italian citizen complained to the Commission that Italy had failed to take measures to implement properly an EU Directive on collective redundancies (Directive 98/59/EC). The Commission decided to refer the matter to the Court of Justice on 24 October 2012 and published a press release to that effect the same day.

In his complaint to the Ombudsman, the complainant alleged that the Commission failed to inform him about its referral of the infringement case to the Court.

The Ombudsman concluded that, in the course of the inquiry, the Commission had taken steps to settle the matter and thus closed the case. However, in a further remark, the Ombudsman suggested that if similar situations were to arise in the future, it would be in line with a culture of service for the Commission to apologise for the delay in responding to the citizen concerned.

In its response to the further remark, the Commission explained that (i) it informs complainants of each procedural step regarding their case; and (ii) it is common practice of Commission services to apologise when delays occur in this respect.

The Ombudsman welcomes the Commission's commitment to a service-minded approach to complainants in infringement cases.

Case 583/2013/MHZ: Role of national ombudsmen in obtaining redress in infringement cases

The complainant, a Polish eco-farmer, made two infringement complaints to the Commission against Poland. He pointed out that quick action was needed because protected species were in danger. Having heard nothing from the Commission, he turned to the Ombudsman, who opened an inquiry. As a result of the inquiry, the Commission contacted the complainant and launched the "EU-Pilot" procedure. However, by the time it did so, 11 months had passed without action. The Ombudsman criticised the delay, which the Commission had not been able to justify. The closing decision also contained a further remark aimed at improving the standard letters used by the Commission to inform the complainant about the EU-Pilot procedure:

The Ombudsman encourages the Commission to add to its standard letters informing complainants about the Pilot procedure that they may complain to national Ombudsmen or similar bodies, whose procedures generally do not involve any costs, regarding alleged infringements of EU law by national administrations.

The Commission's response to the critical remark confirmed the commitment in its Communication on this subject to arrive to a decision to issue a letter of formal notice or to close the case within one year from the date of registration of a complaint, including the EU Pilot procedure, and to inform the complainant where this time limit is exceeded.

The Commission's confirmation of its commitment to the timely handling of infringement complaints is welcome. The Ombudsman will continue to take an active interest in the matter.

As regards the further remark, the Commission explained that it advised the complainants to seek remedies before national courts "*as only national courts may decide about the complainant's right for compensation. In this regard, the national Ombudsmen are not the right addressee to obtain redress. Furthermore, Article 47 of the Charter obliges Member States inter alia to make legal aid available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice, since according to Article 51 of the Charter, the provisions of the Charter apply to Member States when implementing EU law.*" The Commission concluded that it takes note of the proposal to point out the possibility also to turn to national Ombudsmen when appropriate.

The Ombudsman regrets that the Commission does not appear to understand that national ombudsmen often succeed in obtaining redress for individuals. The Ombudsman finds this surprising, since the Commission itself actively promotes non-judicial methods of dispute resolution at Member State level in a variety of contexts, including Solvit and the EU Pilot itself. The Ombudsman will make further efforts to help the Commission understand the role of non-judicial dispute resolution and to formulate a consistent policy in this regard.

Case 1745/2013/TN: Information about reimbursement of medical expenses

The complainant, a retired official of the Court of Auditors, requested reimbursement of certain medical expenses under the joint sickness insurance scheme for officials of the EU institutions. His request was rejected and he made a complaint to the Commission under Article 90(2) of the Staff Regulations. He received no reply.

Following contact between the Ombudsman's services and those of the Commission, the complainant was reimbursed. The Commission thus settled the matter and the case was closed. However, the complainant, who retired in 1987, was concerned that the Commission had not updated him on the applicable rules and reimbursement forms. The Ombudsman, therefore, made a further remark inviting the Commission to provide the complainant with comprehensive information, in his own language, about the applicable rules, procedures and forms for claims for reimbursement under the joint sickness insurance scheme.

The Commission sent the relevant information to the complainant.

The Ombudsman welcomes the Commission's positive response.

Delayed follow-up to a case closed in 2012

Case 914/2009/ER: Duty of sincere cooperation in the Ombudsman's inquiries

The complainant asked the Commission for access to all documents concerning the establishment and implementation of the quality premium regime providing monetary support to farmers producing certain varieties of durum wheat. Having received no reply, the complainant turned to the Ombudsman. The Commission accepted the Ombudsman's proposal for a friendly solution and informed the Ombudsman that it had granted the complainant access to all the available documents. Subsequently, the complainant submitted a new complaint to the Ombudsman, in which he alleged that the Commission provided inaccurate information in response to the Ombudsman's friendly solution proposal and failed to respond adequately to his request for access.

After an inquiry, the Ombudsman underlined that the duty of sincere cooperation requires EU institutions to provide accurate information when responding to a friendly solution proposal. The Commission had failed to do so in the present case, when it stated that it had disclosed all the available documents, which proved not to be the case. The absence of full disclosure also constituted a failure to comply with Regulation 1049/2001.

In response, the Commission regretted that the Ombudsman considered that its behaviour was in breach of the duty of inter-institutional loyal cooperation and emphasised that it was committed to respecting this duty. The Commission also stated its commitment to a positive outcome in the case and, more specifically, its willingness to provide the complainant with any further available document.

The Ombudsman considers the Commission's response to be satisfactory.

4. European Central Bank (ECB)

See Case 1339/2012/FOR above under 'Star cases'.

5. European External Action Service (EEAS)

Case 532/2011/CK: Age discrimination by an EU Mission

The complaint concerned the refusal of the EULEX-Kosovo mission to allow the complainant to continue working after the age of 65. Having considered the opinion provided by the EEAS, the Ombudsman proposed a friendly solution, which the EEAS rejected. The Ombudsman closed the case with two critical remarks.

The first critical remark concerned the failure by the EEAS to provide sufficient reasons for its decision not to renew the complainant's contract beyond the age of 65. In the second remark, the Ombudsman criticised the failure of the EEAS to (i) acknowledge the mistakes that occurred in handling the complainant's case and (ii) present a full and effective apology to the complainant.

In response, the EEAS insisted that it cannot be held responsible for the maladministration identified by the Ombudsman. It argued that the Head of the mission is in charge of the administration and the logistics of the mission. It also noted that the staff members of the mission are not EEAS staff.

The Ombudsman notes the refusal by the EEAS to assume responsibility for the maladministration that occurred. In the context of OI/12/2010/MMN, the High Representative and the EEAS agreed to accept procedural responsibility for complaints concerning EU missions.

The present case shows that no one is willing to accept responsibility when the Ombudsman finds maladministration in relation to an EU mission. This indicates a systemic problem in the protection of fundamental rights vis-à-vis EU Missions. The Ombudsman will draw this problem to the attention of the European Parliament.

6. European Investment Bank (EIB)

Case 48/2012/MHZ: EIB improves information to complainants about delays

The EIB Complaints Mechanism (CM) investigated a complaint concerning a construction project in Poland. The complainant subsequently turned to the Ombudsman because he did not agree with the CM's findings. He also complained that the CM delayed its decision on his complaint.

After carrying out an inquiry, the Ombudsman found no reason to question the findings of the CM. As regards delay, the EIB's opinion on the complaint properly explained the reasons for it. The Ombudsman concluded that there was no maladministration. A further remark encouraged the EIB to explain the reasons for any such delay in the future at an earlier stage; that is, when it informs the complainant that there will be delay in handling the complaint.

In response, the EIB updated its Complaints Mechanism Operating Procedures by adding the following text to paragraph 4.11:

"Whenever the EIB-CM is not able to provide a response to the complainants within the prescribed deadlines, the EIB-CM will inform the complainant(s) accordingly, before the expiration of the deadline and providing the reasons for the delay."

The Ombudsman welcomes the EIB's action. The change to the Operating Procedures is fully in line with the principles of good administration.

Case 526/2012/ER: Information about education allowances

The complainant is a retired EIB employee who resides in Luxembourg. Both her children receive education allowances from the EIB. In 2012, the EIB began to deduct from the education allowances an amount corresponding to the Luxemburgish 'CEDIES allowance'.

The complainant turned to the Ombudsman, arguing that there was no basis for the deduction because the CEDIES allowance and the EIB education allowance are not of a similar nature.

The Ombudsman considered that the EIB's position that the two allowances are of a similar nature was reasonable. In the decision closing the case, the Ombudsman made a further remark welcoming the EIB´s readiness to continue its efforts to foster inter-institutional exchange of information with a view to reducing administrative burdens on the beneficiaries of CEDIES financial assistance who are entitled to EIB allowances. The Ombudsman encouraged the EIB to pursue this objective and to inform its present and former staff accordingly.

In response, the EIB took a number of measures to inform its present and former staff of changes made to the CEDIES scheme as of September 2013.

The Ombudsman welcomes the EIB's constructive response.

7. European Personnel Selection Office (EPSO)

See Case 962/2011/AN above under 'Star cases'.

Case 1906/2011/TN: EPSO's handling of requests for information and review

The complaint concerned EPSO's handling of requests for information and requests for review made in the context of an open competition. The Ombudsman criticised EPSO's failure to inform the complainant of the date of her assessment exercises at least two weeks in advance. A further remark was also made to the effect that it would be appropriate for EPSO to draw up general guidelines advising selection boards to take their decisions on requests for review in such a manner as to allow EPSO to inform candidates of the date of their assessment exercises at least two weeks in advance.

In response, EPSO apologised to the complainant for the inconvenience caused. It undertook to do all it can to ensure that candidates receive as much advance notice as possible and that the minimum deadline of two weeks is respected.

The Ombudsman welcomes EPSO's constructive response to the remarks.

Case 2006/2011/ER: Information about the marking of written tests

The complainant participated in an open competition to select assistants in the secretarial field. He complained that EPSO failed to provide him with sufficient information concerning the marking of his practical tests c) and d).

The Ombudsman's inquiry found that EPSO had failed to record and indicate, in the appropriate evaluation sheets or in the competency passport (a) the evaluation criteria/competencies assessed in respect of the practical tests, and (b) the partial marks for these criteria/competencies. The Ombudsman concluded that EPSO had failed to comply with a commitment it had made in the framework an earlier own-initiative inquiry regarding the level of detail of the information provided to candidates.

In response to the critical remark, EPSO acknowledged the deficiency and apologised for it. EPSO also stated that it had meanwhile taken measures to ensure that competency passports contain appropriate descriptive feedbacks on both the general and the job-specific competencies.

The Ombudsman welcomes EPSO's positive response.

Cases 2022/2011/RT and 2430/2011/RT: Feedback on performance in practical tests

The complainants participated in a competition organised by EPSO for assistants in the secretarial field. They complained that EPSO failed to give them adequate feedback on their performance in the practical tests.

EPSO explained that the Selection Board decided that, because of the "technical nature" of the tests it would not include any specific comments concerning them in the competency passport. The Ombudsman took the view that the commitment EPSO made in the framework of own-initiative inquiry OI/05/2005/PB meant that it should record and indicate, in appropriate evaluation sheets or in the competency passport (a) the evaluation criteria/competencies assessed in respect of the practical tests, and (b) the partial marks for these criteria/competencies. Since EPSO had failed to do so, the Ombudsman made a critical remark.

In response, EPSO underlined the importance it attaches to the transparency of its processes and explained that the competency passport is intended to provide meaningful (quantitative and qualitative) feedback to candidates. It represents a major step forward compared to previous practice, which made it very difficult for candidates to understand how they had performed. In the present case, however, the Selection Board did not include comments in the competency passport for practical tests c) and d) of open competition EPSO/AST/111/10. EPSO undertook to take into consideration the Ombudsman's critical remark in future procedures and emphasised its determination to continue to improve the quality of the feedback given to candidates.

The Ombudsman welcomes EPSO's acknowledgement that it is good administration to provide candidates with adequate information about their

performance in practical tests and trusts that EPSO will inform selection boards accordingly.

Case 2163/2011/ER: Alleged confusion of a candidate's written test with that of another candidate

The complainant, a Romanian citizen, took part in an open competition for lawyer-linguists organised by EPSO. She complained to the Ombudsman that EPSO had mixed up her written test with another candidate's test and refused to provide information to her about the anonymisation of tests.

After an inquiry, including an inspection, the Ombudsman found no maladministration as regards the alleged mix-up of papers. Moreover, there were no grounds for further inquiries as regards the provision of information to the complainant, since EPSO had provided such information during the inquiry. However, in a further remark, the Ombudsman suggested that, in future, EPSO provide candidates who express the view that their test papers may have been mixed up with those of other candidates, with a proper description of the measures it has taken to avoid such a risk.

In its response, EPSO expressed its readiness to provide information to candidates, on request, on the measures it takes to ensure that written tests and their results are correctly linked to candidates. EPSO also made clear that, in light of its experience, candidates who express doubts on a possible mix up of written tests, are generally reassured once they receive the unmarked copy of their test paper.

The Ombudsman welcomes EPSO´s explanation of its approach in such cases.

Case 2383/2011/ER: Checking supporting documents

The complaint concerned the pre-selection procedure in an open competition organised by EPSO for administrators in the field of management of structural funds. The Ombudsman found no maladministration but made a further remark inviting EPSO to consider the possibility of checking candidates' supporting documents at an earlier stage of the competition.

EPSO's response distinguished between competitions based purely on tests and competitions based on both qualifications and tests. As regards the former, the Guide to open competitions foresees the possibility of undertaking a check directly on the basis of supporting documents. However, EPSO proceeds to an early check only if the institution requesting the organisation of the competition so wishes. Should this be the case, the notice of competition is drafted accordingly. In the case of competitions based both on qualifications and tests, the Guide and the competition notice clearly state that a first check is made solely on the basis of the information given by candidates in the online application form. However, the Selection Board has the obligation to verify, at a later stage, whether this information is supported by documents. In EPSO's view, this procedure has been upheld by the Civil Service Tribunal in its judgment of 24 April 2013 in Case F-73/11. EPSO concluded that in case of

competitions based on tests only, it will follow the wishes of the requesting institution while in the case of competitions based on both qualifications and tests it will maintain the current procedure.

The Ombudsman notes that the relevant provision of the Guide to open competitions, Article 5.1, is drafted in broad terms and would not prevent EPSO from following the Ombudsman's suggestion.

According to paragraph 83 of the aforementioned judgment, a procedure consisting in ascertaining, only after the pre-selection tests, whether candidates meet the specific conditions for admission to the competition is consistent (i) with Articles 4 and 5 of Annex III of the Staff Regulations, (ii) with the Commission's interest in ensuring that only candidates meeting those conditions take part in the tests, and (iii) with the principle of sound administration. It should be noted that this finding was made in the context of the applicant's claim for annulment of the selection procedure on the grounds that it favoured candidates who overstated their experience in the on-line application.

The Ombudsman's view is that EPSO has distorted the Court judgment in question by presenting it as a justification for refusing to put in place a procedure that would reduce, to the greatest extent possible, the risk that candidates are excluded at the first stage of a competition because they obtain lower scores than candidates who are subsequently themselves excluded from the competition because of lack of appropriate documentation.

Case 2518/2011/MHZ: EPSO's "request for review" procedure

The complainant succeeded in the tests of an open competition organised by EPSO. The Selection Board decided not to put her on the reserve list on the ground that she failed to provide documents proving the required professional experience. She asked for a review of that decision and was not satisfied with the explanation for maintaining it. She then turned to the Ombudsman, alleging that the reasoning for the Selection Board's decision was flawed. She claimed that EPSO should intervene with the Board. During the Ombudsman's inquiry, EPSO obtained additional information from the Selection Board and provided a detailed explanation for its decision. The Ombudsman concluded that there was no substantive error and that no further inquiries were justified. In closing the case, the Ombudsman made two further remarks.

The first remark encouraged EPSO to do its utmost to ensure that candidates who are dissatisfied with decisions of selection boards have access to an effective internal review procedure, which provides adequate and clear reasons for its conclusions. The second remark encouraged EPSO to take appropriate action at the stage of the internal review procedure if a selection board's decision is legally flawed. The Ombudsman also emphasised that an effective internal review mechanism would enable the Ombudsman to assess whether there are grounds to open an inquiry if the candidate is still dissatisfied and would help to avoid the cumbersome appeal procedure under Article 90(2) of the Staff Regulations.

In response, EPSO explained the changes it made in its "request for review" procedure, through which candidates may ask a selection board to reassess decisions and correct errors.

According to EPSO, the procedure before the changes had two main weaknesses. First, there was no harmonisation of the approach to review among different competitions. Second, selection boards lacked access to legal expertise, resulting in laconic replies that often ignored candidates' legal arguments and left legal flaws in decisions undetected and uncorrected. Because of these weaknesses, candidates were often dissatisfied with boards' replies to requests for review and escalated the matter to the Court, or to the Ombudsman, or made a complaint under Article 90(2) of the Staff Regulations.

In November 2012, changes were made with the aim of ensuring that (i) all outgoing replies are based on legally sound decisions; (ii) requests for review receive adequate, clear and convincing answers; and (iii) uniform standards are applied in responding to requests across all competition procedures.

In order to deliver these outcomes, a new workflow process was put in place, administered by a specialised team within EPSO's legal affairs sector. Once the deadline for submission of requests relating to a particular competition has passed, a case handler from the team identifies all candidates' valid arguments and separates those that need a specific input from the selection board and/or an EPSO lawyer from those that can be answered using a catalogue of standard replies based on case-law. The case-handler drafts replies for the selection board and presents them at a meeting of the board. The board normally accepts the case handler's proposals, sometimes with additional reasoning. It records its decision on each individual case in a review sheet, which is included in the candidate's file. The case-handler subsequently updates each draft reply to reflect the board's decision taken during the meeting. The draft reply is then submitted to an EPSO lawyer for a final quality check and countersigning. At this stage, the lawyer may still reinforce and/or adjust the statement of reasons given in the reply, without, however altering the substance of the board's decision.

If the board's decision appears erroneous, or if its reasoning is incomplete or raises legal concerns, the lawyer either refers the case back to the board with written comments, or requests a meeting with the board with a view to resolving the problem through discussion. Boards usually follow EPSO's legal advice. Should a board fail to do so, the Director of EPSO (as the competition appointing authority) may decide on the appropriate follow up, in light of the case-law according to which the appointing authority cannot be bound by illegal decisions taken by a selection board.

A key factor that needs to be taken into account in considering what EPSO can do to provide an effective internal review mechanism for candidates is that selection boards are independent. The appointing authority (in this case EPSO) cannot substitute its judgment for that of the selection board in evaluating the eligibility or the performance of candidates. (The same constraints apply when candidates make complaints under Article 90(2) of the Staff Regulations). As EPSO correctly pointed out, however, the case-law acknowledges the power

and responsibility of the appointing authority to take appropriate action if a selection board makes an illegal decision.

Against this background, EPSO's new "request for review" procedure appears to be well-designed to (i) assist selection boards to identify and correct possible errors in their decisions; (ii) ensure that candidates who make a request for review receive a timely and well-reasoned response; and (iii) enable EPSO to detect and remedy any cases where a selection board acts illegally.

The new procedure was put in place towards the end of 2012. A strong indication that it appears to be working well is provided by the 65% reduction in the number of complaints to the Ombudsman that provided grounds for addressing an inquiry to EPSO in 2013.

The Ombudsman takes the request for review procedure into account in applying Article 2(4) of her Statute, which requires complaints to be preceded by *"appropriate administrative approaches"* to the institution concerned. In practice, this means that before making a complaint to the Ombudsman against EPSO in relation to the decision of a selection board, the complainant will normally be expected to have used the request for review procedure. Furthermore, the complaint should provide grounds for considering that the request for review was not properly dealt with.

The Ombudsman welcomes EPSO's positive and constructive follow-up to the further remarks.

Case 688/2012/MHZ: Noise at a test centre

A candidate in an EPSO competition was disturbed by noise from construction works being carried out next to the test centre in Barcelona. After an inquiry, the Ombudsman concluded that EPSO had failed to reply to the complainant adequately and in a timely manner, with the consequence that the opportunity to take appropriate action and deal effectively with the matter had been lost. In a further remark, the Ombudsman suggested that EPSO adopt a proactive approach to deal with similar situations that might arise in the future. Specifically, EPSO could establish general rules applicable in situations where the tests cannot be carried out in an optimal way because of circumstances beyond EPSO's control. Such rules would not only constitute useful guidance for EPSO's contractor in charge at the test centres, but would also enhance the transparency of the selection procedures, by allowing candidates to know what measures to expect should a disturbance occur during the tests.

In response, EPSO stated that it had apologised to the complainant and that it would continue to take all actions necessary to ensure full compliance and fair testing conditions across the test centres in order to avoid any adverse impact on candidates' performance. EPSO agreed that the general rules suggested by the Ombudsman would be useful and undertook to evaluate thoroughly the relevant practical and operational framework.

The Ombudsman welcomes EPSO's positive and constructive response.

Case 717/2012/CK: Accommodating special needs

The complainant was eight months pregnant when EPSO invited her to participate in an assessment centre test in Brussels. The complainant, who was unable to travel, asked EPSO to accommodate her special needs. Following EPSO's refusal to reschedule the oral test or to allow her to participate in it via videoconference, the complainant turned to the Ombudsman. After an inquiry the Ombudsman found that, while EPSO was right to refuse the request to participate via videoconference, it did not convincingly explain why it could not grant the complainant's request for a short extension of the time frame for conducting the tests.

In response, EPSO undertook that, in the future, it will consider the feasibility of extending the testing period for a reasonable time in order to meet the needs of pregnant candidates and allow more flexibility in the initial planning.

The Ombudsman welcomes EPSO's positive and constructive response.

Case 2302/2012/RT: EPSO acts to prevent disputes

A candidate in a competition organised by EPSO complained that EPSO had lost one of the pages of her practical test, which involved word-processing a document. The Ombudsman inspected the file, found that nothing was missing and closed the case.

The Ombudsman suggested, however, that in future tests, EPSO could ask each candidate to include by hand, in each page of the examination script, in addition to his or her name, signature and candidate number, the page number and the total number of pages (for example, '1/7' on the first page of a script made up of 7 pages).

In response, EPSO welcomed the further remark and said it would be taken into consideration for similar tests in open competitions to be organised in the future.

EPSO's reply is satisfactory.

8. Publications Office

Case 2741/2008/CK: Insufficient explanations led to perception of unfair treatment

The Publications Office of the European Union entered into a framework contract under which the complainant would supply it with services related to an IT application ('the Application'). The complainant presented a number of grievances to the Publications Office concerning, in particular, (i) the Publications Office's decision to order the migration of the Application to a new technology from the previous contractor before transferring the Application to the complainant; (ii) delays in launching, and (iii) lack of information regarding

the take-over process. Not satisfied with the Office's response, the complainant turned to the Ombudsman.

After carrying out an investigation, the Ombudsman found that the Publications Office had failed to provide comprehensive and adequate explanations in response to the complainant's grievances and that this had led the complainant to believe that the Office was acting in an abusive, unfair or partial manner.

In response to the Ombudsman's criticism, the Publications Office undertook to pay greater attention to proper communication with contractors in order to ensure that they are adequately informed and understand the functioning of and measures taken by the Office. It also promised to continue its efforts to ensure fair treatment of its contractors.

The Ombudsman welcomes the positive and constructive follow-up by the Publications Office to the critical remark.

Case 1859/2010/ER: Use of negotiated procedure

In 2009, the Publications Office awarded a contract for the provision of services related to the software used for its EU Bookshop internet portal. Rather than issuing a call for tenders, it awarded the contract through the negotiated procedure. The complainant, a Greek company operating in the field of information technology and communications, objected to the use of this procedure.

After an inquiry, the Ombudsman found that the relevant rules stipulate that institutions may use the negotiated procedure only if it is absolutely necessary, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, to award a contract to a particular contractor. In the present case, the Publications Office failed to provide sufficient evidence to show that it was absolutely necessary to entrust the service contract to the software developer to which it awarded the contract.

The response of the Publications Office to the critical remark made reference to events and circumstances related to the conclusion of a different contract, in relation to which a first call for tender was launched in late 2012.

The Ombudsman regrets that the response of the Publications Office failed to address the issues raised by the critical remark.

Case 1922/2010/ER: Non-renewal of a contract

The complainant company won a call for tenders for the development, maintenance and support for information systems. The contract stipulated that it would last for two years with the possibility, unless the Publications Office decided otherwise, of two automatic renewals, each for one year. The contract was renewed once. Following a meeting with the official at the Publications Office responsible for the management of the contract, the complainant's business manager sent him a follow-up e-mail. He thanked the official for the

meeting and said that he had told his colleagues that the Publications Office planned to renew the contract again. The following month, the Publications Office informed the complainant that it did not wish to renew the contract.

The complainant turned to the Ombudsman, who opened an inquiry. The Publications Office took the position that no assurances as regards the extension of the contract had been given during the meeting. An inspection of the file revealed internal notes, which showed that internal discussions at the time of the meeting envisaged non-renewal of the contract. The Ombudsman therefore considered it unlikely that the official concerned would have given the alleged assurances at the meeting. Furthermore, in the circumstances of the case, the lack of reaction by the Publications Office to the complainant's follow-up e-mail could not be considered as tacit agreement.

At the same time, the Ombudsman pointed out that nothing would have prevented the Publications Office from replying to the complainant's e-mail. In that reply, it could have informed the complainant of the timeframe for deciding on whether or not to renew the contract. This could have been done without disclosing the then ongoing internal decision-making process. The Ombudsman made a further remark to this effect in order to provide guidance if similar cases arise in the future.

In response, the Publications Office drew the Ombudsman's further remark, and the need to ensure adequate and timely communication with contractors, to the attention of its management.

The Ombudsman welcomes this positive follow-up.

9. European Agency for the Management of Operational Cooperation at the External Borders (Frontex)

Case 2053/2012/AN: Need for procedural fairness in dealing with personnel issues

The complainant worked as an interpreter in Frontex joint operations, pursuant to an agreement between Frontex and his Member State. Frontex asked the Member State not to deploy him again. The complainant turned to the Ombudsman alleging that he had been the victim of unfair treatment. After an inquiry, the Ombudsman found that the complainant's allegation of unfair treatment was justified.

In response to the Ombudsman's criticisms, Frontex offered further explanations of its actions in the specific case and indicated its willingness to cooperate with the Ombudsman to find systemic solutions to deal with such cases fairly and effectively.

The Ombudsman welcomes Frontex's constructive response.

10. European Aviation Safety Agency (EASA)

Case 51/2011/AN: EASA's policies on whistleblowing and conflicts of interest

The complainant raised safety and conflict of interest concerns with EASA in relation to a particular type of aircraft. The Ombudsman criticised EASA's failure adequately to address the complainant's concerns about a conflict of interest in the certification procedure. Moreover, the Ombudsman encouraged EASA to amend, or interpret, its internal rules so as to ensure that whistleblowers receive meaningful feedback as regards the outcome of EASA investigations based on their concerns. A second further remark encouraged EASA to put a new policy on the management of conflicts of interest into effect.

In response, EASA explained that the purpose of its whistleblower procedure is to obtain information on safety concerns from external sources. In EASA's view, it is essentially different from procedures based on Article 22b of the Staff Regulations. The procedure is currently under review and will also be renamed *"confidential safety reporting"*, so as to avoid misunderstanding and confusion. As regards conflicts of interest, EASA referred to the implementation of the policy it adopted in August 2012 for the prevention and mitigation of conflicts of interest. In particular, its Code of Conduct for staff now contains a dedicated section *'Policy on impartiality and independence: prevention and mitigation of conflict of interest'*.

The Ombudsman understands that EASA's procedure for confidential reporting of safety concerns has a specific purpose. However, the Ombudsman remains of the view that EASA should provide adequate feedback to persons who report serious concerns. Such feedback provides assurance that EASA has dealt properly with the matter and reached a grounded conclusion. It thus ensures accountability and also encourages reporting, which is in the public interest.

The Ombudsman welcomes the new provisions on conflicts of interest contained in EASA's Code of Conduct for staff.

See **Case 434/2012/VL** above under 'Star cases'.

11. European Banking Authority (EBA)

Cases 1321/2011/LP, 1875/2011/LP, 1876/2011/LP and 1966/2011/LP: Composition of of a Stakeholder Group

The complaints concerned the decision made in 2011 by the European Banking Authority (EBA) regarding the composition of its 30-member Banking Stakeholders Group (BSG). That decision was made pursuant to EBA's founding Regulation.

After inquiring into the complaints, the Ombudsman criticised EBA for having applied the requirement laid down in Article 37(3) of the Regulation to ensure

to the extent possible *"an appropriate geographical and gender balance and representation of stakeholders across the Union"* only as regards the composition of the BSG as a whole, and not also within each category of membership. The Ombudsman also found that, by appointing only one employees' representative to the BSG, EBA failed to comply with the requirement of Article 37(2) of the Regulation to ensure, to the extent possible, a balanced representation of stakeholders across the Union. Finally, the Ombudsman found that by including in the "users" category applications from representatives of entities which are clearly not retail users of the services provided by the financial/banking sector, but rather providers of remunerated services to the latter, EBA committed another instance of maladministration.

The Ombudsman also recommended that EBA: (i) avoid in the future the risk that one or more Member States may appear to be over-represented; (ii) publish future calls for expression of interest in becoming a member of the BSG not only on its own website, but also in the specialised financial press, and use, in general, any other communication channel that could increase the awareness and interest of women candidates; (iii) require future applicants to indicate only one of the six categories for which they would like to be considered; and (iv) publish in the future, once the members of the BSG have been appointed, meaningful information that could show how, in the light of the various applications received, EBA complied with the requirement to ensure a balanced representation of all the various categories of stakeholders concerned, and how, in doing so, it also ensured *"to the extent possible (...) an appropriate geographical and gender balance and representation of stakeholders across the Union"*.

In its response, EBA indicated its willingness to implement all of the Ombudsman's suggestions when constituting a new BSG.

The Ombudsman welcomes EBA's positive and constructive response.

12. European Chemicals Agency (ECHA)

Case 1826/2010/VL: Public dissemination of information under the REACH Regulation

The REACH Regulation (Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals) requires manufacturers and importers of chemical substances to register the substances with the European Chemicals Agency (ECHA). The complaint in this case, submitted by a company acting in the interests of its subsidiaries in the chemical industry, concerned ECHA's handling of an application, made by a third party under Regulation 1049/2001, for public access to its registration dossier.

After an inquiry, the Ombudsman found no maladministration. In closing the case, the Ombudsman made two further remarks. The first invited ECHA, if it does not already do so, to warn registrants not to insert information they consider confidential in fields that must be published pursuant to the REACH Regulation. The second remark concerned the fact that when ECHA consults third-party authors of documents in relation to which it has received a request

for public access, it has to grant these third parties a minimum of five working days to express their views. The remark was to the effect that, in future cases, ECHA should ensure that the relevant deadline actually includes five working days.

ECHA's response explained the existing measures that warn registrants not to insert information considered confidential in fields that are published pursuant to the REACH Regulation. It also announced several new actions aimed at ensuring proper application of the five working days requirement.

The Ombudsman welcomes ECHA's positive response to the further remarks.

13. European Food Safety Authority (EFSA)

Case 775/2010/ANA: Handling of potential conflict of interest arising from a staff member's move to the private sector

A former member of the staff of EFSA moved to the private sector two months after the expiry of his contract with EFSA. Following an inquiry, the Ombudsman made three draft recommendations, two of which EFSA accepted (see section C.3 above).

The draft recommendation that was not accepted invited EFSA to acknowledge its failure to observe the relevant procedural rules and to carry out an assessment of the conflict of interest. The Ombudsman's decision closing the inquiry criticised EFSA's failure to accept the draft recommendation. In addition, the Ombudsman made four further remarks. These remarks provided detailed guidance to EFSA as regards the implementation of the first draft recommendation accepted by EFSA.

In response, EFSA undertook to feed the first three further remarks into the review of its procedures that was underway. As regards the fourth further remark, EFSA explained why it considers the rules in force to be sufficient.

The Ombudsman regards EFSA's response to the further remarks as reasonable and notes that EFSA has substantially improved its rules and procedures on questions of conflicts of interest and revolving doors. The Ombudsman regrets, however, that EFSA failed to respond to the critical remark in this case.

Case 1228/2011/MMN: Recovery of an installation allowance

EFSA employed the complainant as a contract agent and paid her an installation allowance. After the expiry of the probationary period, EFSA decided not to confirm the complainant's contract and to recover the installation allowance in full. The complainant turned to the Ombudsman as regards the recovery.

During the inquiry, the Ombudsman made a reasoned proposal that EFSA consider making an *ex gratia* payment corresponding to an appropriate percentage of the installation allowance. EFSA rejected the friendly solution

proposal. Since its explanation for doing so was not convincing and failed to deal with some of the considerations put forward in the proposal, the Ombudsman closed the case with a critical remark.

In its response, EFSA confirmed that it had amended its practice and now pays the installation allowance only at the end of the probationary period, unless the staff member concerned makes an explicit request to receive an advance.

The Ombudsman continues to regret EFSA's stubbornness in the complainant's specific case. The amendment to its practice should, however, ensure that similar problems will not occur again in the future.

Case 622/2012/ANA: Handling of an alleged conflict of interest

The complaint was about EFSA's handling of an alleged conflict of interest concerning the Chair of an EFSA Scientific Panel ('the Chair'). The complainant, an NGO, alleged that the Chair had an on-going interest in an Institute ('the Institute') which EFSA failed to address.

According to the complainant, the alleged conflict of interest covered the period from 2003 to 2012. However, the rules governing conflicts of interest at EFSA had changed in 2009 and EFSA's attention was drawn to the matter only in 2010. In view of these facts, the Ombudsman's inquiry focused on the years 2009-2012.

After an inquiry, which included an inspection of EFSA's file, the Ombudsman concluded that, from a substantive perspective, EFSA was justified in considering that that there was no conflict of interest in the period covered by the inquiry.

As regards procedure, the Ombudsman concluded that although the Chair's involvement in the Institute appeared to have ended in 2005, the Chair's annual Declarations of Interest did not reflect this until the update made in November 2010. It was also clear that EFSA had failed to notice this error. The Ombudsman took the view, on the basis of the inspection, that this was a one-off error, which EFSA had since corrected.

In closing the inquiry with a finding that no further inquiries were needed, the Ombudsman nevertheless made a further remark:

In line with the accountability culture which the Ombudsman aims to instil in EU institutions in their relations with citizens and civil society, EFSA could consider informing its services that when an error is made, in addition to taking remedial action to correct it, it would be appropriate to acknowledge this error and to apologise for it.

In response, EFSA sent a letter of apology to the complainant. EFSA also undertook to continue its efforts to increase staff awareness of good administrative principles and ethical standards.

The Ombudsman welcomes EFSA's positive follow-up.

14. European Medicines Agency (EMA)

Case 1701/2011/ANA: Public access to a long-term epidemiological study

This case concerns a request for public access to a long-term epidemiological study ('the SAGhE study'). The French Medicines Agency ('the AFSSAPS') forwarded the study to EMA, triggering a referral procedure concerning a medicine called Genotropin. The complainant, a pharmaceutical company that holds an EU marketing authorisation for Genotropin, applied for public access to the study, invoking Regulation 1049/2001 on public access to documents. EMA refused access on the grounds that the study was sent to it confidentially and that its disclosure would undermine the commercial interests of the scientific investigators involved in it. The complainant turned to the Ombudsman.

During the course of the inquiry, it emerged that the complainant's real objective was to have access to the SAGhE study on a basis other than that of Regulation 1049/2001. The Ombudsman, therefore, closed the case. Before doing so, the Ombudsman formed the view that EMA had not provided sufficiently detailed explanations as to how the disclosure of the SAGhE study would undermine the commercial interests of the scientific researchers involved. The Ombudsman pointed this out in a further remark and invited EMA to draw appropriate lessons for the future.

In response, EMA stated that it understood why applicants whose requests for access to documents are refused should receive detailed reasons and gave an undertaking to provide better reasoning in the future.

The Ombudsman welcomes EMA's positive reply and undertaking.

Case 1877/2010/FOR: Public access to documents and a public register

EMA refused applications for public access to various documents , namely access to (i) mock-up packaging; (ii) Periodic Safety Update Reports (iii) reports on the dextropropoxyphene and paracetamol combination and on topical ketoprofen and (iv) a reference Member State assessment report on the risk management plan for rimonabant.

The Ombudsman found no maladministration as regards point (i) and considered that no further inquiries were justified as regards point (ii). She made critical remarks as regards points (iii) and (iv). She also made the further remark that EMA should establish a comprehensive publically accessible register of documents.

EMA subsequently released the documents that were the subject of the critical remarks.

As regards the further remark, EMA referred to various web-based services aimed at improving its transparency. However, it rejected the suggestion that it should have a comprehensive register of documents.

The Ombudsman regrets EMA's failure to acknowledge the legal and administrative reasons for it to develop a comprehensive register of documents.

15. European Securities and Markets Authority (ESMA)

Case 1967/2011/LP: Composition of a Stakeholder Group

The complaint concerned the decision made in 2011 by the European Securities and Markets Authority (ESMA) regarding the composition of its 30-member Securities and Markets Stakeholders Group (SMSG). The decision was based on ESMA's founding Regulation.

After inquiring into the complaint, the Ombudsman criticised ESMA for having applied the requirement laid down in Article 37(3) of the Regulation to ensure as far as possible *"an appropriate geographical and gender balance and representation of stakeholders across the Union"* only as regards the composition of the SMSG as a whole, and not also within each category of membership. She also criticised ESMA for having appointed only one representative of SMEs to the SMSG, thus disregarding the requirement of Article 37(2) of the Regulation to ensure, as far as possible, a balanced representation of stakeholders across the Union. Finally, the Ombudsman found that by failing properly to explain its choice as regards the representative of employees, ESMA did not comply with Article 37(2) of the Regulation, and thus committed an instance of maladministration.

The Ombudsman also recommended that ESMA (i) publish future calls for expression of interest in becoming a member of the SMSG, not only on its own website, but also in the specialised financial press, and use, in general, any other communication channel that could increase the awareness and interest of women candidates; (ii) require future applicants to indicate only one of the six categories for which they would like to be considered; (iii) ensure, as far as possible, that the "users" category is not given an undue numerical preference to the detriment of the seats to be allocated to the remaining four categories of the SMSG; and (iv) in order to maintain the required level of transparency in the setting up and functioning of the SMSG, avoid in the future compiling an Alternate Members List.

In response, ESMA stated that it is endeavouring to implement all of the Ombudsman's suggestions in setting up a new SMSG.

The Ombudsman welcomes ESMA's positive and constructive response.

16. Research Executive Agency (REA)

Case 2111/2011/RA: Transparency of evaluation of research proposals

The complaint concerned a review carried out by the Agency's redress committee and the Agency refusal to make public certain information about the

review process. The Ombudsman found no maladministration as regards the review. Furthermore, as a result of the complaint, the complainant received the information in question. In closing the case, the Ombudsman made two further remarks.

The first remark encouraged the Agency to raise awareness among its staff of the information that can be disclosed to the public in the relevant procedures.

The second remark suggested that the Agency could, in future, consider making public the names of evaluators. The Ombudsman noted that although evaluators are currently told that their names will not be released, the Agency could change this for the future. The Ombudsman drew the Agency's attention to the European Data Protection Supervisor's position paper of 24 March 2011 on *'Public access to documents containing personal data after the Bavarian Lager ruling'*. The section of that paper entitled "*The proactive approach*" provides guidance for EU institutions that wish to work transparently, while respecting the rights to privacy and to protection of personal data.

As a follow-up to the first remark, the Agency reminded its call coordinators that they can provide information, on request, concerning the score necessary to be placed on the final ranked list or on the reserve list.

As regards the second remark, the Agency explained that the question of whether to disclose the names of the individual expert evaluators goes beyond its remit. The Agency signalled the remark to the Commission's DG Research and Innovation (DG RTD), which is the lead service for such horizontal questions. DG RTD will discuss the issue with all DGs and Agencies concerned when preparing for the new framework programme Horizon 2020.

The Ombudsman welcomes the Agency's positive response to the remarks and the information it provided concerning preparations for the framework programme Horizon 2020.

17. European Anti-Fraud Office (OLAF)

Case 637/2009/FOR: Equal treatment under the Early Warning System

The complaint concerned the operation of the Early Warning System (EWS), a computerised information system intended to identify threats to the EU's financial interests and reputation. The EWS contains different levels of warning. The complainant was the subject of a 'W3b warning', which is issued in relation to persons who are the subject of judicial proceedings for serious administrative errors or fraud. He complained that OLAF's request to register a warning against him was irregular, as was its refusal to lift this warning, since he was not subject to *"judicial proceedings"* as required by the decision setting up the EWS.

The Ombudsman found that OLAF's interpretation of the conditions for issuing warnings could result in persons in comparable situations being categorised differently according to the national legal system which applies to them. The

Ombudsman proposed, as a friendly solution, that OLAF lift the W3b warning against the complainant and consider if another type of warning would be appropriate. OLAF failed to follow the proposal and the Ombudsman made a critical remark.

In its response, OLAF understood the Ombudsman to mean that a W3b warning is only justified if the natural or legal person involved in an OLAF investigation has been indicted before the competent national judicial authority on the basis of OLAF's findings. OLAF took the view that the term *"judicial proceedings"*, as used in Article 12 of the EWS decision, also covers judicial investigations.

OLAF also informed the Ombudsman that the complainant in the specific case had now been indicted in Belgium.

The Ombudsman regrets that OLAF has not addressed the issue of how to ensure that differences between national legal systems do not result in unequal treatment for the purposes of the EWS.

Case 1560/2010/FOR: New Guidelines on Investigation Procedures for OLAF staff

A UK-based non-governmental organisation complained about an investigation carried out by OLAF. Following an inquiry, the Ombudsman found that OLAF (i) failed to respect the procedural guidelines for interviews set out in the OLAF Manual; (ii) failed to ensure that its investigators produced written authorisations and (iii) wrongly forwarded its findings to the complainant's donors.

In response, OLAF explained that, following the entry into force of the new Regulation concerning OLAF investigations, it adopted new Guidelines on Investigation Procedures for OLAF staff. The Guidelines have the same rationale as the critical remarks: i.e., to ensure that OLAF investigations are conducted with full respect for human rights and fundamental freedoms, in particular, for the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value.

The Ombudsman welcomes the adoption of the new Guidelines on Investigation Procedures for OLAF staff.

Case 1697/2010/JN: Whistleblowing

In the course of his professional duties as an official of the European Court of Auditors (ECA), the complainant discovered information relating to a closed OLAF investigation. He took the view that the information fell under the reporting duty set out in Article 22a of the Staff Regulations. He reported the information to OLAF but received no reply. In his complaint to the Ombudsman, the complainant invoked Article 22b of the Staff Regulations. He took the view that, on the basis of his disclosure, OLAF could have pursued its investigation. In its opinion, OLAF argued that it did not need to apply the said

procedure because the complainant's disclosure was related to the audit on which he was working. The Ombudsman found that OLAF's handling of the matter amounted to maladministration and made four critical remarks.

In its response, OLAF first explained that the circumstances of the case were unusual and unlikely to be repeated: an auditor availed himself of the whistleblowing provisions of the Staff Regulations although he had already discussed the same matters with OLAF in the framework of the audit. OLAF also emphasised that whistleblowers represent a valued source of information for OLAF. For several years, OLAF has been involved in the elaboration of a comprehensive policy on whistleblowing. It contributed to the drafting of the Guidelines on Whistleblowing adopted by the Commission in 2012.

OLAF's response also explained improvements made to its internal procedures. Rules for the handling of information provided by whistleblowers have been included in OLAF Instructions to Staff on Investigative Procedures (ISIP). The Director General issued an internal note prohibiting the inclusion of whistleblowers' personal data in final reports forwarded to the EU institutions and bodies and to the national judicial authorities. This has the effect of significantly limiting the risk of disclosing a whistleblower's identity. In addition, OLAF now has a single assessment point for incoming information, which provides a consistent approach to whistleblowers. Specific provisions concerning whistleblowers form part of the working arrangements, which are being concluded between OLAF and other Union institutions and bodies.

The Ombudsman agrees with OLAF that the circumstances of the case were unusual and unlikely to recur. Insofar as lessons can be learnt from the case, the Ombudsman is satisfied that OLAF's response indicates a generally constructive approach.

Case 2515/2011/CK: OLAF should provide rapid information on the outcome of investigations

The case concerned alleged irregularities and discrimination in the way that OLAF conducted administrative investigations into the complainant and three other MEPs, whose names appeared in a newspaper article entitled *"Euro MPs exposed in 'cash-for-laws' scandal"*.

After an inquiry into how OLAF had conducted its investigations, the Ombudsman considered that although the four investigations were based on similar allegations, the facts were not identical and OLAF had to assess each case separately. Therefore, the mere fact that the length of the individual investigations varied did not prove that there was discrimination. Nor was there anything to suggest that OLAF treated the complainant less favourably than the three other MEPs concerned. The Ombudsman also considered that the overall duration of the procedure remained within reasonable time limits. However, that there had been a delay of two months before OLAF informed the complainant of the closure of the investigation. To help OLAF improve its administration, the Ombudsman made a further remark that, in future, OLAF should inform the person concerned of the outcome as rapidly as possible after the investigation has been completed.

In response, OLAF explained that the new Regulation governing its activities, which entered into force on 1 October 2013 provides for the person concerned to be informed within 10 working days of the closure of an investigation when no evidence has been found. OLAF added that its services also generally inform the person concerned within the same deadline even in cases where an investigation reveals the existence of evidence against that person, unless there is a risk of prejudicing follow-up actions taken by a competent authority.

The Ombudsman welcomes OLAF's positive and constructive response.

Case 598/2013/OV: Public access to an OLAF investigation report

The complaint concerned OLAF's refusal to grant an NGO public access to OLAF's investigation report concerning allegations made against former Commissioner John Dalli. The Ombudsman found no maladministration as regards the alleged refusal, but recommended that OLAF, when refusing access to documents because of ongoing national proceedings, provide reasoning that allows the applicant to understand why the release of the documents would specifically and effectively undermine the ongoing national proceedings. The Ombudsman also recommended that OLAF seek information and views from the national authorities before refusing access to documents because their disclosure would undermine ongoing national proceedings.

In response, OLAF stated that it will take the Ombudsman's further remarks into account when handling similar requests for public access in the future. It pointed out that it requests national authorities for updates of their follow-up actions on a regular basis and endeavours to be as specific as possible when the point is of relevance in responding to requests for public access to documents.

The Ombudsman welcomes OLAF's statement that it will take into account the further remarks when dealing with future requests for public access.

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