



European Ombudsman

Follow-up

to critical and further remarks

**How the EU institutions
responded to the Ombudsman's
recommendations in 2009**

November 2010

EN



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Foreword

The present document contains the fourth study to examine the EU institutions¹ follow-up to all the critical and further remarks issued by the European Ombudsman during a particular year. The present study deals with the remarks made in 2009.

The adoption of a strategy for the Ombudsman's 2009-2014 mandate² should be mentioned as an important back-drop to the present study. The strategy document outlines a series of objectives and priorities designed to achieve the Ombudsman's overarching aim of, first, ensuring that EU citizens enjoy their rights fully, and, second, enhancing the quality of the EU administration. This follow-up exercise forms an integral part of the Ombudsman's efforts to achieve the latter aim. Critical and further remarks³ contain constructive criticism and suggestions from the Ombudsman, resulting from inquiries conducted on his own initiative or following complaints. They should, moreover, serve as a stimulus for the institutions to reflect on whether the experience of handling a complaint has provided any information that can be used to raise the quality of its administration.

The study looks at follow-up in terms of *systemic* improvements that should make maladministration less likely to occur in the future. In dealing with critical remarks, the study does not focus on the specific instance of maladministration that led to the remark, but on the lessons that the institution concerned has learnt. I am pleased to report that this study contains plenty of examples where, as a result of the follow-up to the Ombudsman's remarks, real improvements have been introduced, in areas ranging from the documentation of internal procedures to tenders and contracts.

This is extremely encouraging. The way in which an institution reacts to complaints and to criticism and suggestions constitutes a key indication of how citizen-centred it is. Many of the replies to the Ombudsman's critical and further remarks summarised in this report are indeed highly constructive. In seven cases, the follow-up was exemplary and I have designated these as "*star cases*", by analogy with the "*star cases*" mentioned in my Annual Reports.

Not all responses are exemplary, however, and I note that the institutions appear to adopt a particularly defensive approach when it comes to cases concerning calls for tender and staff cases⁴. As Ombudsman, I have made efforts to persuade the institutions and their officials not to adopt a defensive approach. In this regard, I should also underline that the follow-up exercise is not an invitation to contest the findings in the Ombudsman's decision or an additional mechanism for an eventual review of that decision. The exercise is geared solely at securing improvements for the future and, in the case of critical remarks, providing reassurance that the maladministration identified will not occur again. I am happy to report that it is in this spirit that most institutions provided their follow-up.

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

² The strategy document is available in 23 languages on the Ombudsman's website at: <http://www.ombudsman.europa.eu/resources/strategy.faces>

³ A critical remark is premised on a finding of maladministration, whereas a further remark is made without such a finding.

⁴ See, in particular, cases **OI/4/2005/GG**, **OI/3/2007/GG**, and **3112/2007/MF** as regards tenders and grants, and staff cases **344/2007/BEH** and **2007/2008/ELB**.



Overall, the institutions gave a satisfactory follow-up to over 80% of the critical and further remarks made in 2009. This is a slightly better result than that registered for 2008. The rate of satisfactory follow-up to critical remarks (70%) was, once again, considerably lower than for further remarks (94%). It was, however, considerably higher than the figure for 2008 of 62%. For further remarks, the corresponding figure in 2008 was 100%. It is clear that there is still important work to be done, by the Ombudsman and by the institutions themselves, in persuading officials that a defensive approach to the Ombudsman represents a missed opportunity for their institution and risks damaging the image of the European Union. The relatively high number of unsatisfactory replies, to critical remarks, submitted by the European Commission (10 out of the 32 replies) is of particular concern, as is the fact that it was unable to provide responses on time in four cases. On the other hand, the Commission replied positively to 23 out of the 25 further remarks I addressed to it. I am happy to report that, on the whole, the responses from the other institutions were most encouraging.

I am confident that we will continue to work together for the benefit of citizens. From the very beginning, the Ombudsman has been guided by the vision of an EU administration that welcomes complaints, embraces change, and embodies an administrative culture of service. We are not quite there yet but significant progress has been made. As we move along this path towards a top class EU administration, I hope that the institutions continue to see the Ombudsman as an ally, not a foe. Rather than simply pointing out where things have gone wrong, the Ombudsman's remarks are meant to offer the EU institutions guidance on how to provide a better service. Together, we can ensure that the Union delivers on the promises it has made to citizens in the Treaty of Lisbon.

P. Nikiforos Diamandouros

25 November 2010



Study

1. Introduction

The present study explains the purpose of critical remarks and further remarks and the different kinds of circumstance which give rise to them. It then analyses the follow-up which the institutions, bodies, offices, and agencies concerned have given to critical remarks and further remarks made in 2009 and identifies seven star cases. Finally, conclusions are drawn as regards the main lessons of the study for the future.

The European Ombudsman serves the general public interest by helping to improve the quality of administration and of service rendered to citizens by the EU institutions⁵. At the same time, the Ombudsman provides the Union's citizens and residents with an alternative remedy to protect their interests. That remedy is complementary to protection by the EU Courts and does not necessarily have the same objective as judicial proceedings.

Only the Courts have power to give legally binding judgments and to provide authoritative interpretations of the law. The Ombudsman can make proposals and recommendations and, as a last resort, draw political attention to a case by making a special report to the European Parliament. The effectiveness of the Ombudsman thus depends on moral authority and, for this reason, it is essential that the Ombudsman's work be demonstrably fair, impartial, and thorough.

2. The purpose of critical remarks and further remarks

Against this background, **further remarks** have a single purpose: to serve the public interest by helping the institution concerned to raise the quality of its administration in the future. A further remark is not premised on a finding of maladministration. It should, therefore, not be understood as implying criticism of the institution to which it is addressed but rather as providing advice on how to improve a particular practice in order to enhance the quality of service provided to citizens.

In contrast, a **critical remark** normally has more than one purpose. Like a further remark, a critical remark always has an educative dimension: it informs the institution of what it has done wrong, so that it can avoid similar maladministration in the future. To maximise its educative potential, a critical remark identifies the rule or principle that was breached and (unless it is obvious) explains what the institution should have done in the particular circumstances of the case. Thus constructed, a critical remark also explains and justifies the Ombudsman's finding of maladministration and thereby seeks to strengthen the confidence of citizens and institutions in the fairness and

⁵ Article 228 of the Treaty on the Functioning of the European Union empowers the Ombudsman to inquire into maladministration in the activities of the "Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role". See also the note of page 3 above for the use of the term "institutions" in the present study.



thoroughness of the Ombudsman's work. Moreover, by showing that the Ombudsman is willing publicly to censure the institutions, when necessary, critical remarks enhance public trust in the Ombudsman's impartiality.

A critical remark does not, however, constitute redress for the complainant. Not all complainants claim redress and not all claims for redress are justified. When redress should have been provided, however, closing the case with a critical remark signals a triple *failure*. The complainant has failed to obtain satisfaction; the institution concerned has failed to put the maladministration right; and the Ombudsman has failed to persuade the institution concerned to alter its position⁶.

Where redress should be provided, it is best if the institution concerned takes the initiative, when it receives the complaint, to acknowledge the maladministration and offer suitable redress. In some cases, this could consist of a simple apology.

By taking such action, the institution demonstrates its commitment to improving relations with citizens. It also shows that it is aware of what it did wrong and can thus avoid similar maladministration in the future. In such circumstances, it is unnecessary for the Ombudsman to make a critical remark. If, however, there is a suspicion that the individual case may result from an underlying systemic problem, the Ombudsman may decide to open an own-initiative inquiry, even though the specific case has been resolved to the complainant's satisfaction.

3. Critical remarks in cases where a friendly solution or draft recommendation is not appropriate

From the foregoing, it can be seen that many critical remarks represent missed opportunities. The best outcome would have been for the institution concerned to acknowledge the maladministration and offer suitable redress, which in some cases could consist of a simple apology. If it had done so, no critical remark would have been necessary.

The complainant, however, is not always right and the institution concerned is entitled to defend its position. About half of the cases that are not settled by the institution at an early stage eventually give rise to a finding of no maladministration. In these cases, the institution succeeds in explaining to the Ombudsman's satisfaction (and, in some cases, also to the complainant's satisfaction) why it was entitled to act as it did and why it will not change its position.

Where the Ombudsman disagrees with the institution and finds maladministration for which the complainant should receive redress, the normal procedure is to propose a friendly solution. If the institution rejects such

⁶ The Ombudsman's annual reports include many examples of cases in which the institutions have provided redress to complainants. They provide, therefore, a more complete picture of the Ombudsman's activities to combat maladministration, promote good administration, and improve relations between the European Union and its citizens.



a proposal without good reason, the next step is usually a draft recommendation.

In cases where the Ombudsman considers that the institution is unlikely to accept a friendly solution, or that a friendly solution would not be appropriate, he may proceed directly to a draft recommendation. In proposing a friendly solution, the Ombudsman aims to achieve agreement between the institution concerned and the individual complainant, who is often seeking personal redress. If the maladministration that should be remedied primarily affects the public interest, the Ombudsman may consider it more appropriate to make a draft recommendation than to seek a friendly solution.

Apology as a form of redress deserves special mention in this context. In order to be effective, an apology must be sincere. An apology that is perceived as insincere only makes matters worse. The complainant is more likely to accept that an apology is sincere if it is offered by the institution on its own initiative, rather than in response to a formal suggestion from the Ombudsman. For this reason, the Ombudsman often considers that it would not be useful to propose a friendly solution consisting of an apology. A draft recommendation to apologise is even less likely to be useful.

If nothing can be done to put the maladministration right, a critical remark provides a fair and efficient way of closing the case.

A critical remark in such circumstances is **fair** both to the complainant and to the institution concerned. It is fair to the complainant because it confirms that the complaint was justified, although no redress is possible. It is also fair to the institution concerned because it constitutes the outcome of Ombudsman procedures designed to ensure that the institution is informed of the allegations, claims, evidence, and arguments submitted by the complainant. The same procedures afford the institution the opportunity to state its point of view in full knowledge of the case against it before the critical remark is made.

A critical remark is **efficient** because it avoids prolonging an inquiry that cannot lead to any redress for the complainant.

As regards the public interest, the remark itself provides the necessary educative dimension. The institution to which the critical remark is addressed should draw the appropriate lessons for the future. What is appropriate will depend on the maladministration in question. An isolated incident, for example, may not need any follow-up.

4. Critical remarks following rejection of a friendly solution or a draft recommendation

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

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

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



First, the Ombudsman may take the view, after considering the institution's response, that his earlier finding of maladministration should be revised.

Second, if the institution's detailed opinion on a draft recommendation is not satisfactory, the Ombudsman may make a special report to the European Parliament. As first pointed out in the Ombudsman's Annual Report for 1998, the possibility to present a special report to the European Parliament is of inestimable value for the Ombudsman's work. Special reports should, therefore, not be presented too frequently, but only in relation to important matters, where Parliament is able to take action in order to assist the Ombudsman.

Finally, the Ombudsman may decide to close the case with a critical remark, either at the stage when the institution rejects a friendly solution, or if the institution's detailed opinion on a draft recommendation is not satisfactory.

In some cases, the case may be closed with a critical remark because the Ombudsman takes the view that the institution has convincingly shown that, although there is maladministration, the remedy proposed in the friendly solution or draft recommendation is unsuitable and no other solution or redress is possible. In such cases, the critical remark is essentially similar in nature to that which would have been made if the case had been closed without a friendly solution or draft recommendation.

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

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



5. Follow-up given to critical remarks and further remarks made in 2009

In 2009, a total of 47 critical remarks were made in 35 decisions and a total of 36 further remarks were made in 33 decisions. A single decision may contain more than one remark, and both kinds of remark may be included in the same decision. Table 1 shows the distribution of remarks by institution⁷.

Table 1 - Distribution of remarks by institution.

Institution	Number of critical remarks in 2009	Number of further remarks in 2009
European Parliament	5	1
European Commission	39	26
European Economic and Social Committee (EESC)	1	
Education, Audiovisual and Culture Executive Agency		2
European Data Protection Supervisor (EDPS)		1
Centre for the development of vocational training (Cedefop)		1
European Investment Bank		1
European Personnel Selection Office (EPSO)	2	4
Total	47	36

The institutions concerned were invited to respond to the remarks within a period of six months. Responses were received to almost all the remarks made in 2009, although with a delay in some cases. The responses to cases **672/2007/PB**, **819/2007/PB**, **70/2008/TS**, and **1059/2008/VL** did not arrive in time to be taken into account in the present study. This contrasts with the previous year, when all responses arrived in time to be taken into account.

Annex I contains a detailed analysis of each of the cases in which one or more critical remarks and/or further remarks were made. Seven of the follow-ups warrant special mention as "*star cases*", which should serve as a model for other institutions of how best to react to critical remarks and further remarks. The "*star cases*" are listed first. Other cases are organised by institution and complaint reference.

Annexes II and III contain, respectively, lists of the cases in which critical remarks and further remarks were made. In their on-line versions, the Annexes include links to the text of the remark in the decision on the Ombudsman's website (in English and, if different, the language of the complaint).

Taking critical and further remarks together, the rate of satisfactory follow-up was 81%. The follow-up to further remarks was satisfactory in 94% of cases, whilst the rate of satisfactory follow-up of critical remarks was 70%. Examples of unsatisfactory responses to critical remarks include those of the European

⁷ Included, at the end of the report, is a further case, concerning the European Medicines Agency. Even though no critical or further remark was made in this case, the Ombudsman found the follow-up provided by the Agency to be of particular interest and has therefore included it in this study.



Parliament and the Commission in cases 344/2007/BEH and 429/2007/PB respectively.

Table 2 shows the number and percentage of satisfactory replies by institution.

Institution	Number of critical and further remarks	Number of satisfactory replies	% of satisfactory replies
European Parliament	6	5	83%
European Commission	57 ⁸	45	79%
European Economic and Social Committee (EESC)	1	1	100%
Education Audiovisual and Culture Executive Agency (EACEA)	2	2	100%
European Data Protection Supervisor (EDPS)	1	1	100%
Centre for the development of vocational training (Cedefop)	1	1	100%
European Investment Bank (EIB)	1	1	100%
EPSO	6	5	83%
Total	75	61	81%

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

The strategy for the 2009-2014 mandate makes clear that the Ombudsman aims to help the Union to deliver on the promises it has made to citizens in the Treaty of Lisbon concerning fundamental rights, enhanced transparency, and greater opportunities for participation in the Union's policy-making. Some of the follow-up responses to the critical and further remarks made in 2009 are particularly relevant to this aim.

- Among the fundamental rights issues brought to the Ombudsman and examined in the present study are rights of defence and the presumption of innocence. In case **226/2007/MHZ**, the Ombudsman welcomed the Commission's efforts to address the shortcomings identified in the two critical remarks in this case, which concerned the aforementioned rights, as well as the failure to act fairly. Case **1748/2006/JMA** also concerned the principles of fairness, impartiality, and the presumption of innocence. The Ombudsman welcomed OLAF's agreement in this case to implement some of his suggestions. The rights of persons with disabilities were the subject of the follow-up in case **2350/2007/RT**, where Parliament provided the Ombudsman with an exemplary response to a further remark. Finally, case **2449/2007/VIK** concerned the fundamental right to good administration, as laid down in Article 41 of the EU Charter of Fundamental Rights. The Ombudsman welcomed the Commission's constructive engagement with him on the issues raised in this case.

⁸ In calculating the percentage of satisfactory follow-up replies, the eight critical and further remarks on which the Commission has not yet responded are not taken into account.



- Many cases in the present study concern the fundamental right of public access to documents⁹. In case **491/2008/PB**, the European Data Protection Supervisor (EDPS) provided the Ombudsman with a detailed account of systemic measures it would introduce in order to improve its handling and dissemination of documents. In case **1150/2008/CK**, the European Personnel Selection Office (EPSO) informed the Ombudsman of the steps it envisaged with a view to possibly establishing its autonomy vis-à-vis the Commission in the area of processing requests for access to documents held by EPSO's services. Rather less positive was the Commission's inadequate response to criticism in case **429/2007/PB**, which concerned serious delay in registering the complainant's initial request for public access to documents and failure to explain its decision to charge fees for the provision of documents.
- For citizens who want to participate in, or to scrutinise, the application of EU law, the infringement procedure (through which the Commission fulfils its duties as guardian of the Treaties) is a natural focus of interest. The Ombudsman welcomed the Commission's timely and positive response to his further remark in case **791/2005/FOR** concerning the large landfill site located at Malagrotta (Rome). In case **443/2008/JMA**, he found that the Commission handled appropriately the horizontal infringement procedure against Spain, concerning urban waste water treatment in sensitive areas. And in case **1087/2009/MHZ**, the Commission's follow up was helpful for the complainant in that it obtained for him relevant information from the Italian authorities. On the other hand, in case **706/2007/BEH** which concerned air quality standards in Vienna, the Ombudsman did not find the Commission's response to the critical remark to be satisfactory.

Some cases in this area concern procedure and the Ombudsman welcomed the Commission's reassurances in case **1890/2008/BU** regarding communication with complainants. The Commission also provided a satisfactory reply, in case **2884/2008/GG**, to the Ombudsman's further remark that infringement complaints should be registered as such as rapidly as possible. In case **80/2009/BU**, the Commission explained its delay in providing the requested information and, following the introduction of the recording system, *Complaints Handling- Accueil des Plaignants 'CHAP'*, appears to apply the good administrative practice to which the Ombudsman's further remark refers. Similarly, in case **1628/2008/TS**, the Commission provided an extensive explanation of the measures it has taken in the area of enquiry and complaint registration. With regard to access to documents in infringement cases, the Commission provided a very helpful follow-up to the further remark made in the Ombudsman's own-initiative inquiry, **OI/2/2009/MHZ**.

Finally, complainants are increasingly turning to the Ombudsman in the area of competition law:

- Case **1342/2007/FOR** concerned the alleged improper disclosure of highly sensitive information provided to the Commission by Ryanair in the context of the notification of its proposed acquisition of another airline, Aer Lingus. The Ombudsman welcomed the Commission's positive and detailed response to the critical and further remarks in this case. In case **1935/2008/FOR** concerning alleged procedural errors in the Commission's anti-trust investigation of the computer microprocessor producer, Intel, the Ombudsman welcomed the action taken by the Commission in the form of its Draft Best Practices on the conduct

⁹ Article 42 of the Charter of Fundamental Rights of the EU and Article 15(3) TFEU.



of proceedings concerning Articles 101 and 102 TFEU. The actions outlined should help improve the Commission's internal procedures in this important area.

7. Conclusions

The follow-ups given to critical and further remarks in 2009 show that, while the Ombudsman's efforts to reach out to the institutions and to promote a culture of service to citizens are continuing to bear fruit, further work remains to be done to convince the institutions not to adopt a defensive approach. In certain cases, the follow-up has been exemplary, clearly showing that those responsible are keen to use this opportunity to demonstrate that they are fully committed to a service culture. In others, the response has been defensive and disappointing.

Where issues have not been satisfactorily resolved through the follow-up to a critical or further remark, the Ombudsman may decide to open an own-initiative inquiry, thereby ensuring that systemic problems brought to light through the complaints procedure are thoroughly investigated and, where possible, resolved for the future.

The Ombudsman intends to publish in November 2011 the study of the follow-up of critical and further remarks made in 2010.



Annexes

I. Detailed analysis of cases

A. Star cases

Case 2350/2007/RT

In case 2350/2007/RT, the Ombudsman made a further remark to Parliament, as follows:

"As well as taking action to ensure that disabled people are not denied opportunities by reason of their disability, Parliament and the other EU institutions should also be conscious of the need to respect their dignity. This includes avoiding the impression that employment and analogous opportunities, such as traineeships, have been offered to a disabled person only because of disability and not because of his merits and qualifications. Failure to act in this way could seriously damage the public image of the European Union."

This followed a complaint from a participant in Parliament's Pilot traineeship programme for persons with disabilities.

In its reply to this remark, Parliament provided the Ombudsman with a detailed report of the steps it has taken in this area. It started by confirming that it is committed to creating an open and inclusive working environment and promoting the employment, inclusion, and full participation of persons with disabilities, and that it is very conscious of the need to respect their dignity.

Specifically, on the traineeship programme, Parliament informed the Ombudsman that traineeships for persons with disabilities were launched with the aim of removing barriers to employment, by offering meaningful work experience as a trainee. These traineeships do not differ from other traineeships from a professional point of view. Candidates are selected after an evaluation of their merit and skills. All information related to disability and specific requirements of candidates are only needed for the purpose of providing them with reasonable accommodation at work.

More generally, Parliament acknowledged that mainstreaming the disability aspect into all policies and processes and recruiting persons with disabilities as permanent members of staff is a long-term process. In the short term, Parliament has resolved to take positive action measures, in order to redress the situation of under-representation in Parliament of persons with disabilities, to compensate for disadvantages and to remove obstacles. The positive action measures do not undermine the principle of selection based on merit and qualification, but contribute to selecting the best candidates on the basis of their skills and professional background, independently of disability.

Parliament further explained that it has developed its disability policy over the years. Among the concrete actions it has taken are the following:

- The principles of equality and non-discrimination can be found in a body of texts adopted by the Bureau of Parliament, notably, a) the Code of good



practice for the employment of persons with disabilities; b) the Statement of principles on the policy on promoting equality and diversity in Parliament's Secretariat; and c) the Action plan for the promotion of gender equality and diversity in Parliament's Secretariat (2009-2013).

- Guaranteeing full equality of opportunity for persons with disabilities and favouring their full participation and inclusion is one of the three principal themes in the aforementioned Action plan. Among its specific objectives are to: (i) encourage the development of the institution's culture concerning disability; (ii) launch and pursue positive action measures to further the employment of persons with disabilities; (iii) facilitate entry into work of, and career development for, persons with disabilities; (iv) ensure accessibility of buildings, work stations, and information.
- Parliament confirmed its commitment concretely to implement the Action plan, which is an integral part of its Administrative Work Programme 2009-2011. Moreover, Parliament has focused the implementation of its disability strategy on elements such as mainstreaming the disability aspect into all human resource processes and improving the overall accessibility of the institution.
- In order to promote a change in perceptions and behaviours in the institution and to stress the human rights and dignity perspective, many efforts have been made in terms of awareness-raising (seminars, publications), information, and training. Parliament also exchanges information and experience with other institutions and with disability organisations, in order to improve its internal disability policies.

The Ombudsman welcomes Parliament's constructive and detailed follow-up to the further remark in this case.

Case 791/2005/FOR

In a further remark in case **791/2005/FOR**, the Ombudsman called on the Commission, as soon as was practical after 16 July 2009, carefully to conduct the appropriate inquiries to determine whether the large landfill site located at Malagrotta (Rome) complies with all the requirements set out in the EU's Landfill Directive¹⁰. This followed a complaint from an Italian citizen who argued that there were certain irregularities in relation to the conditioning plan for this site. In his decision, the Ombudsman found that the purpose of a conditioning plan for existing landfills was not to establish that they already comply with the environmental standards of the Landfill Directive, but rather to establish how such sites will, by no later than 16 July 2009, be brought into compliance with those environmental standards.

In its follow-up to the further remark, the Commission stated that it intended to verify — by means of a coordinated horizontal action addressing all Member States, as opposed to launching separate investigations for individual landfill sites — whether the high number of landfills in question had been brought fully into compliance with the Directive. To this end, letters requesting, inter alia, specific information on compliance with the relevant article of the Directive

¹⁰ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L 182 p. 1.



were sent to all Member States on 15 July 2009. It added that this horizontal action does not prevent it from investigating specific situations further, as the need arises.

Specifically, in view of the Ombudsman's further remark and new correspondence from the complainant, the Commission decided to request information on the implementation of the conditioning plan for the Malagrotta landfill, which was adopted by the competent national authorities on 31 March 2005, and on compliance of this landfill with the Directive. Based on the reply by the Italian authorities, the Commission stated that it would be in a position to decide whether any additional action is necessary on its side.

The Ombudsman welcomes the Commission's timely and helpful response to his further remark.

Case 834/2007/TN

Case 834/2007/TN concerned the way the Commission carried out its role as a conciliator in a contractual dispute relating to an EU-funded project in a third country. In a further remark, the Ombudsman stated that the Commission could consider adopting procedural rules for conciliation under contracts not funded by the European Development Fund. It would be useful for these rules to include:

- a)** a requirement to obtain conflict of interest declarations from any external experts engaged to assist in the conciliation procedure; and
- b)** a clarification that the aim of the conciliation procedure is to settle the differences between the parties, not to adjudicate on the merits of the dispute.

The Commission replied that it fully accepts the Ombudsman's further remark, with both suggestions having been included in the template for conciliation procedure rules. The template has been published on the intranet site of the Practical Guide to external aid contracts financed from the European Communities general budget, with a reference to the Commission Delegations to use this whenever called upon to intervene as conciliators. In addition, the Directorate-General for Enlargement has already included the Ombudsman's remarks in the conciliation guidelines provided to the parties in dispute in an on-going conciliation procedure handled by it.

The Ombudsman welcomes the Commission's positive and constructive response to the further remark.

Case 1342/2007/FOR

Case 1342/2007/FOR concerned the allegedly improper disclosure of highly sensitive information provided to the Commission by Ryanair in the context of the notification of its proposed acquisition of another airline, Aer Lingus. In his decision, the Ombudsman criticised the Commission in relation to the inadequate Confidentiality Declaration, which it had asked Aer Lingus to sign.



He, however, praised the fact that the Commission subsequently amended its Confidentiality Declaration with a view to correcting this error¹¹.

In its response to the critical remark, the Commission again conceded that the wording of the original Confidentiality Declaration was not sufficiently clear and comprehensive. It noted that, not only did the amended Confidentiality Declaration serve a purpose during the aforementioned merger investigation, but it had since been included as a template in the internal manual of procedures for handling merger cases.

The Ombudsman also made a further remark, encouraging the Commission to explore with national competition authorities (NCAs) appropriate mechanisms for ensuring that the transmission of confidential information and documents remains secure. In response, the Commission noted that it had already taken steps to deal with this specific problem in the Ryanair/Aer Lingus case, when it contacted the NCAs and requested them to carry out an internal investigation and report the results to the Commission. As already recognised in the Ombudsman's decision, the Commission's use of encryption technology (PKI) and the transmission of confidential documents only to one responsible person in each NCA are considered as appropriate security measures. The Commission also informed the Ombudsman that it discusses issues of confidentiality within the European Competition Network (ECN)¹², as the need arises. The handling of sensitive information will be discussed in one of the next ECN Plenary Meetings, it said, including the presentation of the specific marking scheme of the Directorate-General for Competition and the corresponding handling instructions.

The Commission confirmed that ensuring appropriate protection of confidential information is and remains one of its priorities. Together with the NCAs, it continuously seeks further to improve the established mechanisms of secure data transmission. For instance, the Commission is currently working on a new secure document storage platform.

The Ombudsman welcomes the Commission's positive and detailed response to the critical and further remarks in this case.

Case 2576/2008/GG

Case 2576/2008/GG concerned procedural problems encountered by the complainant, a German city, when it submitted a grant application for a project under the Commission's 'Europe for Citizens' Programme 2007-2013. In a further remark to the Education, Audiovisual and Culture Executive Agency (EACEA), the Ombudsman pointed out that it could be useful to add boxes to the check list section of the application form, so as to allow applicants to tick the documents they enclose with their application. Alternatively, applicants could be invited to add a complete list of all the documents they enclose with their application.

¹¹ The Ombudsman's decision itself acknowledges that the deficiency to which the critical remark related was already corrected during the course of the merger control proceedings.

¹² Set up in the framework of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1 p. 1.



In its reply, the EACEA pointed out that it had taken measures to ensure that the Ombudsman's suggestion was complied with for the next calls for proposals for which a paper version of the applications was requested. The EACEA added that it was in the process of migrating to a system of electronic submission of applications. The system automatically sends an error message if an essential document is missing. This simplification will, it said, help avoid situations where an application is considered ineligible due to the absence of such documents.

The Ombudsman welcomes the fact that the further remark has been implemented. The additional measures taken by the EACEA are likely to lead to further improvements.

Case 491/2008/PB

Case **491/2008/PB** concerned an alleged failure by the European Data Protection Supervisor (EDPS) to reply to correspondence and, more specifically, to grant access to documents. The Ombudsman pointed out that the requirement to support refusals of access to documents with concrete and specific reasons is not merely aimed at guaranteeing a better understanding of the decision by the person being refused access. Such reasoning is also essential for the relevant reviewing bodies, which may be called upon to assess the case.

The EDPS noted that part of the background to the Ombudsman's further remark was that the EDPS did not seem to have adopted a clear and structured approach to the handling of document requests. The EDPS informed the Ombudsman that the Office had taken the opportunity to scrutinise its practices regarding access to documents. The EDPS noted that, during the first six years of the Office's existence, it had taken a case-by-case approach and that a more comprehensive approach was now needed. Specifically, the EDPS decided to (i) upgrade the internal regulatory framework, (ii) increase the active public and electronic dissemination of documents, and (iii) enhance the internal and external traceability of EDPS documents. The EDPS explained in some detail how these measures would be implemented.

The Ombudsman welcomes this detailed account of systemic measures that the EDPS will introduce in order to improve its handling and dissemination of documents, including its handling of applications for access to documents.

Case 244/2006/JMA

Complaint **244/2006/JMA** against the European Investment Bank (EIB) concerned the Bank's review of the environmental impact assessment (EIA) of the high-speed railway project to link Madrid to the French border via Barcelona. Following a thorough review of the EIA document, the EIB concluded that it had been carried out correctly. The fact that alternative routes had been considered by the responsible national authorities formed part of this assessment. After having inspected the file, however, the Ombudsman did not find any document which documented that review. He made a draft recommendation. The EIB noted, in reply, that it had instructed its services to



produce a note for the file setting out the actual status of the project. The Ombudsman concluded that the note for the file specifically referred to an "*analysis of alternatives*". In his view, this statement expressly confirmed that the EIB had verified that the EIA took alternative options into account. It did not expressly state, however, that the EIB had verified that reasons were given in the EIA for the decision of the national authorities. Since the EIB still had the option expressly to confirm, prior to the disbursement of funds, that reasons were in fact given in the EIA for the decision of the national authorities concerning the route chosen, the Ombudsman made a further remark suggesting that the EIB should consider recording its assessment of EIAs in a more systematic manner by using a comprehensive checklist of conditions which an EIA must comply with.

In response, the EIB expressed its appreciation for the Ombudsman's efforts to promote the best administrative practices and informed him that it had taken his further remark into account. It added that it had revised its internal processes and practices and that this revision exercise had led to the creation in 2010 of the Environmental and Social Practices Handbook. The EIB attached to its reply the new documents created, which pertain to the issue raised in the Ombudsman's further remark. The EIB used the proposed checklist system in these documents.

The Ombudsman welcomes the EIB's positive and constructive response.

B. Other cases by institution

1. The European Parliament

Case 344/2007/BEH

Case **344/2007/BEH** concerned the European Parliament's failure to carry out a proper comparative assessment of the merits of its staff members as part of a staff assessment procedure. Despite a ruling from the Civil Service Tribunal annulling an essentially identical decision by Parliament with regard to 2003, Parliament failed to reconsider its decision for the complainant as regards 2004.

In its reply to the Ombudsman's critical remark in this case, Parliament stated that it had followed applicable rules in assessing the complainant's merits and that a proper comparative assessment had been carried out. It asserted that a detailed comparative assessment includes an analytical assessment of staff reports, but also of tasks performed, achievements outside normal duties, participation in administrative committees, and extensive language skills. Having taken into account all these elements, Parliament concluded that the complainant's merits did not justify the award of a third merit point as they were inferior to those of his colleagues who received a third point.

The Ombudsman notes that, throughout the inquiry, Parliament asserted that, for the complainant to receive a third merit point, his merits would have had to



be superior to those of his colleagues who received a third point¹³. It also submitted that the complainant's merits were "*slightly inferior*" to those of his colleagues. In view of the clearly outstanding evaluation of the complainant's performance, the Ombudsman found this difficult to believe. In its follow-up reply, Parliament no longer appears to rely on its approach of requiring the complainant to have superior merits in order to deserve a third merit point, but instead submits that the complainant's merits were inferior. However, apart from referring to the relevance of aspects other than the staff report, Parliament did not submit any evidence which could credibly support its position.

The Ombudsman regrets that, in this case, Parliament has shown no readiness to co-operate with him to correct the shortcomings in its approach¹⁴.

Case 3004/2007/BEH

In case **3004/2007/BEH**, the Ombudsman made three critical remarks concerning Parliament's treatment of an official who had been seconded in the interests of the service before being transferred to another EU institution. These remarks concerned Parliament's failure: (i) to issue a decision on the award of merit points to the complainant for the year 2005 in line with the detailed timetable; (ii) to reply to the complainant's requests and his complaint pursuant to Article 90(2) of the Staff Regulations; and (iii) to provide a satisfactory explanation for its failure properly to conclude the procedure for the award to the complainant of merit points for the year 2005.

As regards the first and second critical remarks, Parliament responded by saying that it had sensitised the relevant Directorates-General to the particular situation of transferred officials. Closer cooperation has been established between the services involved, thereby ensuring respect for deadlines. Parliament thus appears to have adopted the necessary measures to avoid delays in the staff assessment procedure, in particular as regards officials transferred to other institutions. Where it cannot meet the statutory deadline, it has agreed to send holding letters to the officials concerned. In relation to the delay in the present case, Parliament apologised for the inconvenience which its administrative error may have given rise to.

Concerning the third critical remark, Parliament stated that the error was due to confusion as to the division of competences and responsibilities, and a lack of communication between the respective Directorates-General. It apologised for any inconvenience caused.

The Ombudsman welcomes Parliament's positive and constructive response.

¹³ On 17 March 2010, the General Court dismissed Parliament's appeal against the Civil Service Tribunal's judgment in Case F-148/06 *Collée v European Parliament*, thereby confirming the illegality of Parliament's approach.

¹⁴ The Ombudsman notes that Parliament was similarly uncooperative in case 3051/2005/WP, which also concerned the failure to conduct a proper comparative assessment of the complainant's merits. See follow-up to decision 3051/2005/WP, p. 21 of the follow-up study to critical and further remarks in 2008.



Case 310/2009/ELB

In case **310/2009/ELB**, the Ombudsman criticised Parliament for failing to inform the complainant of the possibilities of appeal concerning the use of Parliament's premises by outside bodies. Parliament replied that it had taken measures to ensure that a complainant is informed properly about the possibility of appeal against its decision not to grant the use of its premises.

Parliament's response to the Ombudsman's critical remark is satisfactory.

2. The European Commission

Case 224/2005/ELB

In case **224/2005/ELB**, the Ombudsman criticised the European Commission for failing properly to take due account of, and draw the appropriate conclusions from, a number of Court judgments that found a selection procedure organised by the Commission to be vitiated by errors. The complainant had twice taken part in the selection procedure and was unsuccessful both times.

In its follow-up to the critical remark, the Commission repeated that it could not annul the decision of the Selection Committee. It indicated, however, that the selection procedure which was in place at the time of the complaint had been changed. The Directorate-General in question no longer carries out selection procedures, having been replaced since the end of 2001 by either the European Personnel Selection Office (EPSO) or the Directorate-General responsible for human resources in the Commission.

The Ombudsman welcomes the Commission's assurance that the selection procedure which led to the maladministration no longer exists.

Case 3222/2005/IP

In case **3222/2005/IP**, the Commission's Evaluation Committee for the tender in question manifestly erred when it failed to exercise its power of discretion to ask for clarification as regards the complainant's bid. This failure resulted in the complainant's exclusion from the tender, thus depriving it of a "*serious chance*" to win.

In its reply, the Commission voiced its disagreement with the critical remark, referring to its previous replies to the Ombudsman. It, nevertheless, assured the Ombudsman that the situation encountered in this tender should not occur again. Since 2006, even more explicit clarifications for tenderers have been added to complement the already existing provision in the service contract's General Conditions.

The Ombudsman recalls that the purpose of the follow-up exercise is not to reiterate past arguments, but to secure improvements for the future. He welcomes the Commission's reassurance that the situation encountered in this tender will not occur again.



Case 2400/2006/JF

Case 2400/2006/JF concerned a consultancy firm which participated in an international tender for a road improvement project financed by the ninth European Development Fund. The Ombudsman criticised the passive approach of the Commission Delegation to the contracting authority's acceptance of the replacement of successful tenderers' staff. This approach did not take sufficient account of the Delegation's obligation to monitor the overall procedure and its commitment to ensure proper regard for the principles of transparency and equal opportunities. The Ombudsman also made a further remark to the Commission that its Delegations could, for complaints made in accordance with the applicable rules, ensure that they do all they can to facilitate amicable solutions between tenderers and contracting authorities.

The Commission replied that it understood the Ombudsman's critical remark and accepted it. It stressed that, since the relevant events, the Delegation in question had strengthened its operational links with the contracting authority and reinforced its monitoring capacity at the tender, contracting, and project implementation stages, thus reducing substantially the risk of similar events reoccurring.

As regards the Ombudsman's further remark, the Commission pointed to its *Practical Guide to contract procedures for EC external actions*, which includes, inter alia, an obligation to take steps to facilitate an amicable solution between an unsuccessful tenderer and a contracting authority. In light of this "*most essential working tool applied on a daily basis by [its] Delegations*", the Commission saw no need to take further action at this stage.

The Ombudsman welcomes the Commission's positive response to his critical and further remarks.

Case 3486/2006/RT

Case 3486/2006/RT concerned the Commission's alleged failure to provide the complainant with the documentation he had requested, namely, the date of employment of a Commission official. The Ombudsman filed the inquiry without further action, given that the official concerned brought an action before the General Court concerning the subject matter of the complaint. The Ombudsman made a further remark, however, to the effect that the Commission should inform the complainant about the outcome of the appeal submitted by its official.

The Commission replied that the appeal was still pending before the General Court (case T-164/09). It confirmed that, once the outcome is known, it will inform the complainant and the Ombudsman accordingly.

The Ombudsman welcomes the Commission's positive reply.



Case 226/2007/MHZ

In case **226/2007/MHZ**, the Ombudsman criticised the Commission for failing to respect the complainant's rights of defence and the principle of the presumption of innocence, and for failing to act fairly. This followed an audit carried out by the Commission as regards the grant provided to the complainant.

In reply to the first critical remark, the Commission maintained that it had always acted "*in the interest of sound administration of public money*". It stressed its commitment to good administration and informed the Ombudsman that it had taken good note of his remark in this particular case. It enclosed an internal note by the Director-General of the Directorate-General for Health and Consumer Protection, in which he provides instructions to his staff on the necessary balance to be struck between financial prudence, on the one hand, and the rights of defence and the principle of the presumption of innocence, on the other. In reply to the Ombudsman's second critical remark, which concerned the disclosure of confidential information to third parties, the Commission maintained that this case did not involve such practice. It took full note of the Ombudsman's critical remark but considered this to be an "*isolated incident*". Nevertheless, it informed its staff about the Ombudsman's decision and instructed them to be "*particularly careful in future contacts with third parties*". Furthermore, the Commission restated its commitment to the Code of Good Administrative Behaviour.

The Ombudsman welcomes the Commission's efforts to address the shortcomings identified in the two critical remarks in this case.

Case 429/2007/PB

In case **429/2007/PB**, the Ombudsman found that there was a serious delay (more than six weeks) on the part of the Commission in registering the complainant's initial request for public access to documents. He also found that the Commission wrongly failed to explain in detail to the complainant its decision to charge fees for the provision of documents.

In response to the first critical remark, the Commission recalled that it had acknowledged and apologised for the delay. It then explained that the delay was due to a temporary staff shortage in the period concerned and the fact that this coincided with the Christmas break. It again regretted the delay, but stated that it had been manifestly impossible for its services to register the application within the normal time frame (i.e., the first working day following receipt). With regard to the second critical remark, the Commission took the view that it imposed the fees in a reasonable manner, in particular taking into account that the complainant was a former category A Commission official. It stated that the complainant must have been aware that the administration was entitled to charge a reasonable amount for copying documents, and pointed out, as it had done in its opinion, that its rules foresee a fee of EUR 0.10 per page plus carriage costs. It added that it would nevertheless draw conclusions from the Ombudsman's critical remark and make sure that, when the request covers a very considerable number of documents, applicants are clearly informed about any potential costs of obtaining documents.

The Ombudsman was not satisfied with the follow-up given by the Commission



on either count. The object of the first critical remark was the *registration* of the initial application for access to documents, not its substantive handling. He recalled that (i) the registration of an application under Regulation 1049/2001¹⁵ is of particular importance because the statutory deadline for a substantive reply runs from the date of registration, and (ii) the Commission has in principle accepted that registration implies registration on the date of receipt or on the following working day¹⁶. In the absence of any information to the effect that the registration of applications was, at the time, an exceptionally complex and time-consuming task, and/or that a vast number of access applications were submitted during the period in question, it is not possible to accept that a modern administration like the Commission could simply not register, before 29 January 2007, the application sent to it on 10 December 2006.

The Ombudsman also noted that the Commission regrettably failed to address essential points on which his second critical remark was based. In particular, the Commission did not clarify *how* it calculates such fees, despite the fact that Article 10(1) of Regulation 1049/2001 provides that "[t]his charge shall not exceed the real cost of producing and sending the copies". It remains unclear whether the Commission considers that "producing" copies includes working hours, and/or whether the rate of EUR 0,10 per page is considered to reflect the purely material costs of producing the copies, and if so how.

The Ombudsman regrets that the Commission failed to respond adequately and appropriately to the two critical remarks in this case.

Case 488/2007/PB

In case **488/2007/PB**, the complainant asked the Commission for public access to documents of the European Regulators Group. Following a friendly solution proposal, a factually satisfactory outcome was achieved. However, some lack of clarity remained with regard to the rules and practices pertaining to the consultation of third parties under the relevant provisions of Regulation 1049/2001 on public access to documents¹⁷. This resulted, in part, from the combination of public and private actors involved in the regulatory activities here concerned. The Ombudsman therefore made the further remarks below.

1. It remains unclear whether the Commission now considers that Article 4(5) of Regulation 1049/2001 actually applied in this case ("Irrespective of the applicability of Article 4(5) ..."), or whether the Commission essentially consulted the private undertakings indirectly by contacting the national authorities ("these [undertakings] have a right to be consulted ... in accordance with Article 4(4)..."). The Commission is invited to clarify this in its response under the follow-up procedure.

2. It remains unclear whether the Commission accepts the Ombudsman's view that a refusal to provide access to a document with reference to confidentiality requests, made

¹⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

¹⁶ See follow-up to decision 3697/2007/PB, p. 52 of the follow-up study to critical and further remarks in 2008.

¹⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



spontaneously or in reply to consultation, by third parties or Member States should, in principle, be supported by a concrete reference to, and, where possible, through provision of copies of the relevant communications involved. The Commission is invited to clarify this in its response under the follow-up procedure.

In response to the first further remark, the Commission clarified that, following the judgment in Case C-65/05 P *Sweden v Commission*¹⁸, which laid down more precise rules with regard to the Member States' involvement in examining public access requests at the EU level, the Commission *re*-consulted the national regulatory authorities involved in this case. This contributed to the positive outcome of the case. Specifically, the Commission stated that the national regulatory authorities, which are involved in the European Regulators Group, must be considered to act within the scope of responsibility of the Member States when, in accordance with the EU legislation here concerned, they request confidentiality with regard to certain information.

In response to the second further remark, the Commission stated that, following the above-mentioned judgment in *Sweden v Commission*, it quotes the reasons given by the Member States for opposing disclosure of documents originating from it, when it refuses to grant access pursuant to Article 4(5) of Regulation 1049/2001. Consequently, the applicant is fully informed of the confidentiality request and of the reasons given by the Member State. As regards other third parties, the Commission itself has to provide the reasons for not disclosing a document, as the third party is only consulted.

The Ombudsman notes that the Commission has provided the clarifications he asked for and that its position on the important issues referred to is therefore known for future cases. It is a separate issue whether the Commission's position on the first further remark fully complies with Regulation 1049/2001. The Ombudsman does not consider it relevant to conclude on this point within the framework of the present study. With regard to the second further remark, the Ombudsman notes that the Commission does not appear to consider it necessary to aim at quite the suggested level of transparency in relation to consultation procedures under Regulation 1049/2001. The Ombudsman takes note of the Commission's position on this issue, which can usefully be explored in concrete ongoing and future inquiries.

The Ombudsman welcomes the clarifications provided by the Commission in this case.

Case 491/2007/PB

Case **491/2007/PB** concerned a call for proposals launched by the Commission Representation in Berlin and, more specifically, the alleged breach of certain tender rules relating to fairness, broad competition, absence of a conflict of interest (including favouritism), and transparency. The Ombudsman made two critical remarks relating to the Commission's use of a disputed condition in the Call and its failure to respond properly to the complainant's information requests. He made a further remark relating to the fact that the Commission did not respond to his request to be provided with "*specific information on its rules*

¹⁸ Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389.



and practices regarding the issue of conflicts of interest and the participation in tender or call procedures of both existing and former intra mural providers of services or other products". He understood this omission to mean that such rules or clearly defined practices have not been formalised and circulated within the institution. The Commission could examine the possibility of adopting such rules or guidelines, he concluded.

With regard to the further remark, the Commission provided a detailed overview of the notions, rules, and practices relevant to the issue of conflicts of interest in tender procedures and apologised for not providing this information during the inquiry. It took the view that additional specific rules on the issue would probably not be useful. It stated that the notion of a conflict of interest cannot be defined 'a priori', but should always be analysed in the specific context. Conflicts of interest in the context of a call for tender cannot be restricted to well-defined circumstances and regulated through specific written rules, it said. However, a number of existing rules and measures help to minimize problems in this area: the relevant rules in the Financial Regulations, the Staff Regulations, the Code of Good Administrative Behaviour, the Practical Guide to Staff Ethics and Conduct, and the Procurement Vademecum. More specific rules are found in standard declarations and model contracts. Moreover, the Commission takes systematic measures to train its staff in how to avoid conflicts of interest. The Commission also seeks to ensure a high level of transparency and independence in its procedures, precisely to avoid actual and perceived conflicts of interest. Specifically with regard to present and former *intra mural* providers of services or products — i.e., the specific issue raised in this case — the Commission recalls that these may not be the subject of discrimination when a tender is launched. They are allowed to participate like any other operator. Their situation shall simply be assessed in light of the general rules and guidelines on the issue of conflicts of interest.

The Ombudsman welcomes the Commission's very detailed and comprehensive account of the current rules and measures that seek to avoid conflicts of interest in procedures for calls for tenders. The Ombudsman will examine its conclusion — i.e., that it would not be meaningful to establish specific rules on the issue of conflicts of interest for *intra mural* providers of services and products — if the issue arises in future complaints.

The Commission's reply focussed on the Ombudsman's further remark and did not respond with regard to the specific issues raised in his critical remarks. The reply is therefore not satisfactory in terms of the critical remarks.

While the Ombudsman welcomes the Commission's reply to his further remark in this case, he regrets that the Commission failed to follow up on his critical remarks.

Case 706/2007/BEH

In case **706/2007/BEH**, the Ombudsman found that the Commission failed to deal with the complainant's infringement complaint as rapidly and diligently as possible. The complainant, an Austrian citizen, argued that, contrary to EU law, the limit value for particulate matter (PM₁₀) had been exceeded in Vienna in 2005.



In its follow-up to the critical remark, the Commission pointed out that (i) the complaint related to an instance of EU-wide lack of compliance with PM₁₀ limit-values in almost all Member States, which required a coherent approach. The Commission considered it good administrative practice to pursue a horizontal approach and took the view that taking action against an individual Member State would thus have been contradictory. It also stated that (ii) the problem had been tackled at EU level by the adoption of new legislation allowing for exemptions. It had, in the meantime, approved exemptions for 10 of the 11 air quality zones identified by Austria. It finally asserted that (iii) the complainant was not solely dependent on action to be taken by it, but could have invoked the relevant legislation before national courts, insisting on the adoption of an action plan concerning compliance with PM₁₀ limit-values.

In the Ombudsman's view, by merely insisting on the need to pursue a "*coherent approach*", which he had not questioned, the Commission had not addressed the issue of the delay. The Ombudsman, already in his decision, fully recognised the importance of a "*coherent approach*", but also emphasised that the Commission, when adopting such an approach, must take due account of citizens' interests and, in particular, public health. He insisted that a "*coherent approach*" must not lead to unnecessary delays in the Commission's decision on an infringement complaint relating to a particular Member State. On the Commission's point about new legislation, it emerges from point 8 of the Commission's Communication on relations with the complainant in respect of infringements of Community law ('the Communication')¹⁹ that the Commission's investigation of an infringement complaint is intended to result in one of two possible decisions. The Commission can either decide to issue a formal notice, i.e., to initiate formal infringement proceedings against a Member State, or decide to close the case. The Communication does not provide a basis for the Commission, in view of a proposal for amended legislation, to simply abstain from taking action. Finally, whereas it might be true that the complainant could have asked for the adoption of an action plan before national courts, this could not be construed to relieve the Commission of its obligation to deal with the infringement complaint as rapidly and diligently as possible.

The Ombudsman does not find the Commission's response to his critical remark to be satisfactory in this case.

Case 1906/2007/VIK

In case **1906/2007/VIK**, an American citizen alleged that the evaluation process set up by the Commission for the assessment of projects financially supported by an EU programme to promote human rights and democracy worldwide suffered from a number of problems and deficiencies. After a thorough inquiry, the Ombudsman found no maladministration and concluded that no further inquiries were justified. He, nevertheless, made the following further remark:

The Ombudsman notes that the ethical standards to be respected in the evaluation process at present appear to be spread across the General Conditions, the Global Terms of Reference, and the Commission's binding evaluation standards. The Commission could, therefore, consider drafting a single document, containing the evaluation

¹⁹ Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law COM/2002/0141 final, OJ 2002 C 244 p. 5.



standards and the specific rights, obligations and ethical rules pertaining to all the actors involved in its evaluation process.

The Commission responded that it did not see the need for the requested document, which, it said, is meant to cover two distinct, not easily reconcilable fields:

(i) The document should, on the one hand, refer to the contractual conditions to be complied with by both the contractors and the Commission. These are laid down in the contract's *General Conditions*, which are completed by the contract's *Terms of Reference* (ToR). In case of service contracts whose purpose is to carry out an evaluation, the ToR refer to the evaluation's expected results, as well as to the methodology to be used. All these conditions, both the general ones and those related to the implementation of the evaluation itself, are binding upon the Commission and its contractors, but are not intended to apply to the contractors' experts or subcontractors, who are not supposed to know the exact terms of these contractual arrangements.

(ii) The suggested document should, on the other hand, include the Commission's evaluation standards²⁰. These standards are linked to the Commission's Internal Control Standards and are applicable to Commission services. One of these standards bears the heading "*Conducting Evaluations*". In the Commission's view, ensuring the reliability, accuracy, and quality of reports constitutes an essential normative rule applicable to, and required from, any professional working in the field of evaluation. Apart from this, there is no other relevant information in the Commission's above-mentioned evaluation standards that could concern evaluations carried out by contractors.

In view of the above, the Commission expressed doubts as to the extent to which establishing the requested document in the field of evaluation would serve the purpose of avoiding possible disputes such as the one which gave rise to the present complaint. In addition, such a document would go against the harmonisation and simplification exercises in the field of contract procedures for external actions, to which the Commission's services have devoted so many efforts.

The Ombudsman recalls that his suggestion to draft a single document was motivated by the concern that evaluators need to be clearly informed about the rules that they need to respect. The Ombudsman would thus be ready to accept the Commission's position, if this aim could be achieved in another way. However, the Commission's reply that this can indeed be done is not sufficiently convincing, since (i) the Commission now seems to suggest that some of the relevant rules do not need to (or even should not) be brought to the attention of the evaluators and (ii) the case at hand has shown that a lack of clarity as to the applicable evaluation standards exists. It is, therefore, difficult to understand the Commission's reluctance to organise the information pertaining to all the actors involved in its evaluation process in a single document.

The Ombudsman regrets the fact that the Commission failed to respond convincingly to the suggestions contained in the further remark.

²⁰ Evaluation standards (Annex II to the Communication to the Commission from Ms. Grybauskaitė: "*Responding to Strategic Needs: Reinforcing the use of evaluation*" (February 2007 - SEC(2007)213).



Case 2449/2007/VIK

Case 2449/2007/VIK concerned the dismissal of a team leader after the Commission expressed its dissatisfaction with the work he had done. Although the Ombudsman found no maladministration as regards the substance, namely, the reasons provided by the Commission, he concluded that, as regards the procedure, the Commission failed to act in accordance with the principle of good administration laid down in Article 41 of the Charter of Fundamental Rights of the EU, when it failed to give the complainant the possibility to respond to the criticism it expressed before asking the contractor to replace him.

The Commission respectfully disagreed with the view taken by the Ombudsman, that is, that the Commission should directly inform a sub-contracted expert of its intention to request his or her replacement and give reasons for doing so. It noted that the Ombudsman had accepted in previous inquiries that no contractual relationship existed between the Commission and the expert and that hearing the contractor was enough, as the contractor would then hear the expert whose replacement was to be demanded and convey to the EU institution concerned any observations the latter might have made. The reason mentioned by the Ombudsman as the underlying rationale behind the contractor's alleged reluctance to convey the expert's observations to the Commission's services hints at potential retaliatory measures by the Commission with regard to future tender procedures. The Commission strongly rejects this allegation, arguing that there are strict procedures to be followed concerning the award of contracts and the exclusion of tenderers. The Commission further clarified that requests to replace an expert are an exception and that, in such cases, the requests are justified for the sake of the project. The new approach taken by the Ombudsman as regards sub-contracted experts' right to be heard would imply that the Commission must conduct adversarial proceedings with an expert, each time the Union (or a decentralised Contracting Authority) wants the contractor to replace this expert. Given the considerable number of EU-funded contracts awarded worldwide in both centralised and decentralised management bodies, this task would not only require an increase of the Commission's staff to cope with the rise in workload, but would also neutralise the added value provided by consultancy firms.

The Commission's services have, however, taken note of the Ombudsman's remark concerning experts' right to be heard and will consult the internal and external stakeholders on this suggestion on the occasion of the next modification of the *Practical Guide to contract procedures for EC external actions* (PRAG). It will await the finalisation of the review of the Financial Regulation before adopting changes to PRAG-templates. Any such change will, in any case, be preceded by a wide internal consultation involving the relevant services and the Delegations concerned.

In view of the fact that the Commission questioned the new approach he adopted in relation to sub-contracted experts' right to be heard, the Ombudsman wrote to the Commission. He welcomed its willingness to consult the internal and external stakeholders on this matter on the occasion of the next modification of the PRAG. He further noted that, in its reply, the Commission referred to a system of hearing the contractors, which would indirectly involve hearing the expert concerned. The Ombudsman pointed out that he had not been previously informed of such a system. If such a system were indeed put in place, it is possible that experts' right to be heard would be sufficiently guaranteed, provided that this procedure is completed before a decision to request the replacement of the expert is taken by the institution. The



Ombudsman drew the Commission's attention to his response to its public consultation on the review of the Financial Regulation, point 6 of which mentions that the sub-contractor should have a right to know of any criticism expressed by the Commission concerning his/her performance and the right to be heard in relation to that criticism. This does not imply that the Commission itself must communicate its criticisms to the sub-contractor and hear him/her. Both elements could be delivered by the contractor.

Finally, the Ombudsman noted that the Commission argued that its services only very rarely ask for the replacement of sub-contracted experts. He therefore trusts that ensuring full respect for these experts' right to be heard will not constitute a considerable extra burden on the Commission's staff.

The Ombudsman welcomes the Commission's constructive engagement with him on the issues raised in this case.

Case 3112/2007/MF

Case **3112/2007/MF** concerned a Belgian consultancy firm which participated in a tender procedure launched by the Commission for a project aiming to rehabilitate the *Zakouma* National Park in Chad. It alleged that the Commission had failed to take appropriate action to deal with an alleged conflict of interest. The Ombudsman found that the actions which the Commission had taken were not sufficient to eliminate the objective doubts concerning one individual's impartiality. Moreover, the Commission did not demonstrate that such actions were the only ones at its disposal.

The Commission replied by stating that it could only accept partially the Ombudsman's critical remark. It challenged the applicability of the case-law to which the Ombudsman had referred in his decision. In its view, there was no element in the complaint file which could have been considered as proof of a conflict of interest. In the absence of any such element, there was no reason for the Commission to challenge the declaration of impartiality of the relevant expert. Finally, the Commission argued that the Ombudsman had denied it its large margin of discretion as regards its choice of the type of measure to ensure the principle of equality of treatment in tender procedures.

The Ombudsman regrets that the Commission appears to have misunderstood the meaning of his critical remark, which was to point out that the Commission's actions did not appear to be *sufficient* to eliminate the objective doubts concerning the expert's impartiality in the circumstances of the present case.

Case 3199/2007/BEH

Case **3199/2007/BEH** concerned the grading of an individual who had been made an EU official. In a critical remark, the Ombudsman stated that it is good administrative practice for an Appointing Authority to base its decisions on the classification of staff on the relevant rules and, if necessary, to provide a convincing explanation as to how it applied these rules. The Ombudsman



considered that the Commission failed correctly to apply the relevant rules in the present case or sufficiently to explain its application of the relevant provision.

Referring to the requirement of the most favourable grading of an official, the Commission reiterated its view that the rules were correctly applied. It explained its application of the relevant provision to any new recruit in the same situation upon request. It agreed, however, to make available on its intranet general information and explanations which would allow staff members to inform themselves on this aspect.

While the Commission failed sufficiently to explain its application of the provision in question in its follow-up, the Ombudsman notes that the lack of adequate information on its application of that provision could possibly be remedied, as regards future cases, by making available relevant information on the Commission's intranet. Its announcement in this regard is therefore welcome.

The Ombudsman welcomes the Commission's announcement that it will make available relevant information on its intranet.

Case 443/2008/JMA

In case **443/2008/JMA**, the Ombudsman expressed the hope that the Commission would ensure the prompt handling of its horizontal infringement procedure against Spain – concerning urban waste water treatment in sensitive areas – in order to guarantee that citizens can rely on it as the guardian of the Treaties. This followed a complaint submitted on behalf of an environmental organisation, concerning the alleged failure of the Spanish authorities to comply with their EU law obligations regarding urban waste water treatment relating to water discharge into the Pontevedra Estuary.

The Commission informed the Ombudsman that it notified Spain in a reasoned opinion in December 2008 of its failure to fulfil its obligations under EU law concerning urban waste-water. The observations of the Spanish authorities, sent on 3 March 2009, were being assessed when the Commission sent its follow-up. The Commission also drew the Ombudsman's attention to the need to assess this procedure in light of the Court of Justice's findings in two horizontal cases²¹. The Commission is studying the two judgments before deciding on further steps to be taken in the present case.

The Commission has explained the importance of studying the Court's interpretation in the relevant cases before deciding further in the horizontal case in question. It therefore seems to be handling this case appropriately.

²¹ Case C-335/07 of 6 October 2009, *Commission of the European Communities v Republic of Finland*, OJ C 282, 21.11.2009, p. 3–3.

Case C-438/07 of 6 October 2009, *Commission of the European Communities v Kingdom of Sweden*, OJ C 282, 21.11.2009, p. 4–5.



Case 1179/2008/JF

In case **1179/2008/JF**, the Ombudsman recommended that Commission Delegations do their utmost to ensure that they allow departing staff sufficient time to comply with their local accommodation obligations. In particular, the Commission could inform the staff concerned about the termination of their employment contracts within a period of time that is sufficient for them to comply with the termination notices foreseen in their respective local leasing agreements, which have previously been approved by the Delegations in question.

The Ombudsman found the Commission's first reply to his further remark to be unsatisfactory. It appeared that the Commission had understood it to mean that it should encourage its staff only to conclude leasing agreements which are compatible with the termination dates of their contracts of employment. Moreover, the Commission's proposed solution did not take into due consideration cases involving the dismissal of staff, such as the one at the origin of the Ombudsman's further remark. It followed that, contrary to the Commission's proposal, it is the Commission which, when dismissing staff, ought to pay due regard to the provisions of the leasing agreements its Delegations have previously endorsed and approved. The leasing agreement at the origin of the Ombudsman's further remark corresponded to a Commission template.

In its final reaction to the further remark, the Commission, first, emphasised that it was the Conditions of Employment of Other Servants of the Communities that defined the notice periods for contract agents. These notice periods can vary from one to ten months, depending on the duration and the characteristics of the contract. In the Commission's view, such a system would not allow for the flexibility described by the Ombudsman. Notwithstanding this, the Commission pointed out that it had launched, in November 2009, an Interservice Consultation for a proposal for it to provide accommodation not only to its officials but also to contract agents assigned to its Delegations. Should this new approach be implemented, the leasing contracts would be signed directly between the Commission and the landlords, which would avoid situations such as that of the present case occurring in the future.

The Ombudsman welcomes the Commission's positive response to the further remark and to his comments on the Commission's first reply.

Case 1190/2008/DK

In his decision in case **1190/2008/DK**, the Ombudsman identified several shortcomings in the Commission's handling of the complainant's request for access to documents. Such shortcomings occurred in connection with (i) registering the request, (ii) complying with applicable time limits, and (iii) providing reasons for extending time limits. The Ombudsman noted that similar shortcomings occurred in complaint 3697/2006/PB, and that, in that instance, the Commission reacted positively to the Ombudsman's critical and further remarks. In its response, the Commission in fact stated that applications for access to documents are normally registered upon receipt or on the first working day following receipt, and that any delay in registration could only be due to exceptional circumstances. Further, it agreed that, when an applicant has



to be informed that the initial time-limit has to be extended, the Commission should do so before the relevant time limit actually expires. It also acknowledged that detailed reasons should be given for extending time-limits. In view of these statements, and the fact that they postdated the shortcomings identified in the present complaint, the Ombudsman did not consider it necessary to issue a critical remark. He made, however, the following further remark:

The Ombudsman welcomes the Commission's proactive approach in applying the provisions of Regulation 1049/2001 when dealing with a request made under the provisions of the Euratom Treaty. Implementing this approach might be made easier if greater clarity and precision were introduced into the rules or guidelines. This could perhaps be achieved through a revision of the Commission's existing internal rules on the application of Regulation 1049/2001. The Ombudsman welcomes the Commission's proactive approach in applying the provisions of Regulation 1049/2001 when dealing with a request made under the provisions of the Euratom Treaty. Implementing this approach might be made easier if greater clarity and precision were introduced into the rules or guidelines. This could perhaps be achieved through a revision of the Commission's existing internal rules on the application of Regulation 1049/2001.

The Commission replied to the effect that it fully shares the Ombudsman's view. It referred to its comments made in complaint 2335/2008/VIK, in which it clarified the relationship between the transparency rules and the Euratom Treaty, following the entry into force of the Lisbon Treaty. It further added that, with a view to clarifying the rules applicable with regard to access to Euratom documents, it would consider amending the relevant rules in the framework of the ongoing revision of Regulation 1049/2001.

The Ombudsman welcomes the Commission's constructive response.

Case 1289/2008/MHZ

In case **1289/2008/MHZ**, the Ombudsman found that by distributing a document, which the complainant had entrusted to the Commission on condition that it should not be distributed, the Commission failed to act fairly. He made a critical remark.

In its reply, the Commission clarified the rationale behind its decision to disclose the document in question. It stated that the document had been presented by the complainant to the Commission already in 2008 and that this had not been done on the condition that the latter should not distribute it to other interested parties. On the contrary, the complainant's decision to disclose the document to the Commission was intended to enable it to have a scientific debate. Moreover, the last section of the document reads as follows: "*Additional data will be available in mid-May and will be presented at a specification conference at the end of May to allow for deliberation*". Additionally, the Commission based its decision to disclose the document on the fact that the complainant considered it to be an important one and, because of that, decided to distribute it long before the Commission. The Commission pointed out that if it had not distributed the document, any interested party could have considered it as a lack of transparency and could have claimed that the Commission hides information that is important for its decision-making.



The Commission explained that it had not dealt with this aspect earlier, because it did not consider it to be an important one on the basis of the original complaint. In conclusion, it admitted that it should have informed the complainant about its intention to disclose the document. It reassured the Ombudsman that it would avoid this kind of situation in the future.

The Ombudsman welcomes the Commission's detailed explanation in this case.

Case 1561/2008/RT

Case **1561/2008/RT** concerned the exclusion of the complainant's bid from the call for tenders entitled "*Information and Visibility Services*". In a critical remark, the Ombudsman stated that, by failing to indicate, in the invitation to tender, (i) the Delegation's opening times and (ii) that the delivery of bids by private and official post could be attested to by the same kind of evidence, such as, for example, the date of a deposit slip, the Commission did not provide the tenderers with information which was as complete as possible.

In its reply, the Commission stated that there is room for improvement concerning the information included in the template "*Invitation to tenderers*" attached to the *Practical Guide to contract procedures for EC External actions* (PRAG). Therefore, and in order to complete this information as much as possible, the Commission will make a further modification in the next revision of the PRAG, namely, it will introduce two references regarding the Delegation's opening hours and the way tenderers should provide evidence of their bids' submissions.

The Ombudsman applauds the Commission for having taken steps to remedy the deficiencies highlighted in his critical remark.

Case 1628/2008/TS

In case **1628/2008/TS**, it was only after the Ombudsman opened his inquiry that the Commission registered the relevant correspondence as an infringement complaint and provided the complainant with the information it requested. The Ombudsman made a further remark that, by applying the criteria set out in its 2002 Communication²², the Commission could clearly separate (i) the process of identifying, registering, and acknowledging complaints from (ii) the process of deciding how to deal with each complaint. The Commission could promptly inform the complainant that his complaint has been registered and undertake to inform the complainant within a set time limit, which should not exceed two months, of the procedure it will use to investigate the complaint. If the complaint will not be investigated, reasons should be given.

The Commission replied by referring to the development of its system for the registration of enquiries and complaints concerning the correct application of

²² Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law COM/2002/0141 final, OJ 2002 C 244 p. 5.



EU law. It recalled that, in a letter from its Secretary General, the Ombudsman had been informed about the changes that were currently being introduced in this area. The Commission recalled that these changes are designed to continue to ensure that complainants receive a reply within 15 working days, or at least a holding reply. Moreover, the acknowledgement of receipt will contain the complaint reference number. The registration process which is now being tested allows for, but does not require, separate communications at different times on the act of registration and action envisaged on the issues raised. As regards the action to be taken on the complaint, in accordance with Article 7 of the Annex to the 2002 Communication, the complainant will be informed in writing after each Commission decision of the steps taken in response to their complaint. Whenever it is intended not to take any action, prior notice is to be given to the complainant in accordance with Article 10. The complainant is informed if the Commission intends to contact the Member State concerned through the EU Pilot.

The Commission pointed out that the variety of issues addressed to it in the form of complaints, the fact that the time required to deal with these issues varies greatly, and the advantages of communicating both substantive and procedural information at the appropriate moment, depending on the nature of each particular file, all point to the advantages of flexibility in the timing of communicating information to complainants. The Commission notes that there is no particular procedure to be followed on a specific issue. Furthermore, the more deadlines and procedural steps the Commission commits itself to, the higher citizens' expectation will be and the more attention will have to be paid to procedure over substance.

In the light of the above considerations and the current situation of testing the new method of enquiry and complaint registration in the field of application of EU law, the Commission concluded that it does not consider it appropriate at present to enter into any new formal commitments. Finally, it agreed that reasons should always be given in responses to complaints, when it is considered that the issues raised do not merit further investigation.

The Ombudsman welcomes the Commission's clear expression of its position regarding the application of the 2002 Communication in the context of the EU Pilot Programme.

Case 1890/2008/BU

Case **1890/2008/BU** concerned the Commission's handling of an infringement complaint about Portugal's alleged violation of EU law. The violation related to the allegedly unlawful cancellation of two large-scale tourist projects. The Ombudsman criticised the Commission for failing to inform the complainant of its decision to close the case, thereby violating its undertakings to complainants as provided for in the relevant Communication²³. He also made three further remarks aimed at improving the information made available to complainants in these cases. Firstly, he encouraged the Commission, when dealing with infringement complaints and responding to related requests from the European Parliament's Committee on Petitions, to address, in each of its reasoned

²³ Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law COM/2002/0141 final, OJ 2002 C 244 p. 5.



opinions, all the legal bases which it considers relevant. If the Commission wishes to focus on different legal bases in its reasoned opinions to the complainant and to the Committee on Petitions, it could make this clear in each of these opinions and ensure that the complainant/petitioner, as well as the Committee on Petitions, are informed accordingly. Secondly, when informing complainants about its intention to close infringement complaints and when inviting their comments, the Commission could consider sending the relevant letters by registered post, to ensure their proper delivery. Alternatively, the Commission could consider sending copies of the relevant letters also by e-mail or by fax. Finally, the Commission could consider amending its Manual of Procedures²⁴ so as to ensure that its provisions are fully in accordance with its undertaking to inform a complainant of the final decision closing an infringement case, as provided for in Articles 9 and 10 of the Annex to the Communication.

The Commission agreed that it should have sent its decision closing the infringement proceedings to the complainants. It expressed its regrets for the failure to do so. With regard to the need to ensure consistent treatment of the legal bases in Commission replies, it stated that its explanations in relation to the infringement proceedings were consistent as regards both the reasoning and the conclusions of its decision and were accurate enough to avoid any confusion. However, it announced that it would reinforce communication between the services in charge of cases and petitions in order to ensure that its reasoning in similar instances is communicated in an unequivocal and comprehensive way. On the use of registered mail for sending pre-closure letters to the complainant, the Commission reaffirmed that there is no obligation to do so and that it is up to the complainant to keep his/her contact details accurate and updated. It agreed, however, that, given the importance of the pre-closure letter, all proportionate means should be used to ensure the proper delivery of such letters. The Commission considers that the means of communication should be chosen on a case-by-case basis taking into account previous communications with the complainant. Where appropriate, it will consider using registered mail or electronic copies as suggested by the Ombudsman. Finally, on the idea of amending its Manual of Procedures on monitoring the application of Community law, the Commission promised to follow up to ensure that all services are fully informed of the need to send a pre-closure and a final letter, pending the intended wider re-casting of its procedures.

The Ombudsman welcomes the fact that the Commission appears to have accepted his critical and further remarks.

Case 1928/2008/TS

In case **1928/2008/TS**, the Ombudsman criticised the Commission on the grounds that its Evaluation Committee erred in its decision to reject the complainant's application as ineligible under the Call for Expressions of Interest. The complainant had applied for a scholarship under a European Community Scholarship Programme for 2008-2009, which was intended to assist Turkish-Cypriot students to study in universities throughout the EU. The

²⁴ SEC(2005)254/5.



Ombudsman noted that the Commission had agreed that the complainant would be eligible for the new Scholarship Programme 2009-2010, the eligibility criteria for which had been revised by the Commission.

In its response to the critical remark, the Commission explained that the problem underlying this particular case was the possible ambiguity in one of the clarifications circulated to applicants with a view to facilitating the application procedure. It acknowledged that the communications from the Contracting Authority to the applicants were not sufficiently precise. While it contested the Ombudsman's critical remark that the Evaluation Committee had erred in its decision, it indicated that the problem underlying this particular case was not likely to occur in the future.

The Ombudsman welcomes the Commission's reassurance that the problem underlying this case is not likely to occur in the future.

Case 1935/2008/FOR

Case **1935/2008/FOR** concerned procedural errors committed by the Commission during its anti-trust investigation of Intel. The complainant, Intel, argued that the Commission failed to take minutes of a meeting between the Commission and a buyer of Intel chips (the buyer was the computer manufacturer Dell), even though that meeting directly concerned the subject-matter of the anti-trust investigation of Intel by the Commission. The Ombudsman found that the meeting did concern the subject-matter of the Commission's investigation and that the Commission had not properly recorded the content of that meeting. He made a critical remark, stating that "*[b]y failing to make an adequate written note of the meeting of 23 August 2006, for the purposes of establishing agreed minutes of that meeting, the Commission infringed principles of good administration.*" He did not make a finding of maladministration in relation to the complainant's second allegation, which was that the Commission encouraged an information exchange agreement which, in the complainant's view, gave undue access to information contained in the Commission's investigation file. The Ombudsman did find, however, that the Commission failed to make a proper note of a telephone call in which the information exchange agreement was discussed. He thus recommended, in a further remark, that, in the future, proper notes should be made of any meetings or telephone calls with third parties concerning important procedural issues.

The Commission stated, in its reply to the Ombudsman, that principles of good administration give it discretion as regards which instrument to use in order to "*collect information*" in a competition investigation. Its choice includes the instruments set out in Regulation 1/2003²⁵ (Article 18 written requests for information, Article 19 interviews, and Article 20/21 inspections) and informal meetings with parties. It could also use other less formal means. The choice of instrument will, it stated, depend on the "*reliability and completeness*" of the information and the preferences of the information provider. It also stated that the notes taken of "*informal meetings*" are not accessible (to the parties under investigation). The Commission went on to state that the Ombudsman's

²⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1.



understanding of Article 19 would require the Commission to take an Article 19 note of *every* meeting concerning the "*subject matter of an investigation*". The Commission stated that it did not agree with this view. It argued that, since virtually every meeting within a competition investigation concerns the "*subject matter of an investigation*", the Ombudsman's view would imply that the Commission would have to use the formalised Article 19 procedure for every meeting, phone call, or video conference it holds with a third party.

The Ombudsman points out, in relation to the Commission's response that he is not in fact of the view that an Article 19 note should be made of *every* meeting concerning the "*subject matter of an investigation*". Rather, a meeting should be classified as an Article 19 interview only if its aim and content is to "*gather information*" concerning the subject matter of an investigation. In such circumstances, the information gathered should be appropriately recorded in an Article 19 note. However, meetings concerning the subject matter of an investigation, but which do not have the aim and content of *gathering* information (such as "*state of play*" meetings referred to below), are clearly not "*Article 19 interviews*".

The Ombudsman also underlines that, as concluded in his decision, even if there were no binding *legal* rule to make an Article 19 note of every meeting in which information is provided to the Commission relating to the "*subject matter of an investigation*", *principles of good administration* would require that a proper note of the content of the information obtained in a meeting be taken. Good administration goes, as the Ombudsman has long insisted, beyond legality.

It is interesting to note that, in January 2010, namely, at the same time as the Commission responded to the Ombudsman's decision, the Commission's Directorate-General for Competition published, for the purposes of obtaining comments from stakeholders, a Draft Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU. In the section of the Draft concerning "*Meetings and other contacts with the parties and third parties*" it is stated that DG Competition may hold "*informal meetings*" (or conduct phone calls) with the parties under investigation, with complainants, or with third parties. When such a meeting takes place at the request of the parties, complainants, or third parties, the Commission states that these parties must, as a general rule, submit in advance an "*agenda*" of topics to be discussed, as well as a memorandum or a presentation covering these issues in more detail. The parties, complainants, or third parties are invited, after meetings or substantive phone calls, to substantiate their statements or presentations in writing. The Draft states that a non-confidential version of any written documentation prepared by the undertakings which attend an informal meeting held by DG Competition, and a "*brief note*" of the meeting prepared by DG Competition's services, will be made accessible in due time to the parties subject to the investigation. This is, in the Ombudsman's view, encouraging, given that, in the Intel case, the Commission denied that it had *any* obligation to draft *any* notes of such meetings. It could, however, be viewed as less encouraging to observe that the Draft states that the note will be "*brief*", which might imply that the notes will not constitute *complete* records of the information relating to the subject matter of investigations communicated to the Commission in such meetings. While the Draft Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU were not part of the Commission's formal response to the Ombudsman's decision in case 1935/2008/FOR, the Ombudsman considers it appropriate to take this development into consideration when concluding that his critical remark and further remark were, as regards future



investigations, at least partially accepted.

The Ombudsman is satisfied with the action taken by the Commission.

Case 2007/2008/ELB

Case 2007/2008/ELB concerned the number of merit points the Commission awarded the complainant following his transfer from Parliament. The Ombudsman considered that the Commission had acted wrongly by awarding the complainant a fixed number of promotion points, for the periods of service he had worked in Parliament. It should have granted him a number of points corresponding to his merits, taking due account of his staff reports and the promotion points awarded by Parliament. The Ombudsman also stated, in a further remark, that when institutions design their promotion system, they should take into account their obligation to ensure inter-institutional mobility.

In response to the critical remark, the Commission noted that, until the end of the 2008 promotion exercise, the relevant rules provided for the allocation of a fixed number of promotion points in the case of a transfer to the Commission. On the basis of these provisions, which have never been challenged and declared illegal by the Civil Service Tribunal, the Commission correctly awarded a fixed number of points to the complainant.

With regard to the further remark, the Commission stated that the institutions must ensure that mobility does not impair the career progress of those officials subject thereto and, more specifically, that an official who has been transferred to another institution is not penalised in a promotions procedure because of that transfer. However, each institution also enjoys the power to design the system on the basis of which it undertakes a comparative consideration of the merits of the candidates for promotion, according to the method it deems most appropriate. In this context, the Commission notes that it is very difficult to translate merits that have been assessed according to different criteria and a different method into the Commission's system of quantification of merits. It is likewise difficult to ensure equality when comparing merits for promotion purposes on the basis of pieces of information, namely, staff reports, which, as such, are not entirely comparable.

In 2008, the Commission revised its promotion system and the relevant general implementing provisions. Officials who transfer to the Commission do not receive a fixed number of promotion points anymore, but receive a number of supplementary points by the Director-General responsible for Personnel and Administration, after analysis of their merits as evidenced by the reports established by the other institution.

Although it has indicated that its promotion system has been changed, the Commission refuses to admit that the Ombudsman's critical remark was justified. It unconvincingly makes reference to the absence of a court ruling against the award of a fixed number of points. The Ombudsman recalls, in this regard, that good administration goes beyond legality. As regards the further remark, the Commission made a general statement about mobility and career progress of a transferred official. However, it also insisted on the difficulty of



comparing staff reports drawn up by different institutions. It should be noted that, according to the case-law of the EU Courts²⁶, even if it may be more difficult to compare the merits of an official who has been transferred, it is not impossible. Doing so only requires an additional effort to ensure that evaluations are comparable.

The Commission's reply in this case is defensive and disappointing.

Case 2851/2008/TN

Case **2851/2008/TN** concerned the handling of a request for reimbursement of a candidate's travel expenses. The Ombudsman closed the case with critical remarks because the Commission unnecessarily delayed the reimbursement process and did not respect the deadline for responding to complaints set out in its Code of Good Administrative Behaviour. He also made a further remark suggesting that, in the future, the Commission could provide clearer information concerning supporting documents to be submitted with a request for reimbursement.

The Commission replied to the first critical remark by pointing out that the complainant did not send the original train ticket when requested in January 2008, but rather sent a copy. It also pointed out that the rules require it to pay 50 Euros per diem per 24 hours of travel time. In the present case, even though 24 hours were not reached, it still paid that amount. As regards the second critical remark, the Commission stated that it has already apologised for the delay. It pointed out that its initial intention was not to pay for the ticket. However, as it eventually made an exception for the complainant, it needed to undertake internal discussions to arrive at a decision as regards the application of that exception. As regards the further remark, the Commission agreed to make the necessary changes.

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

Case 2884/2008/GG

In case **2884/2008/GG**, the Ombudsman made a further remark to the effect that infringement complaints should be registered as such as rapidly as possible. It would be advisable if the Commission could review its practice so as to ensure that any possible delays concerning registration are avoided, he said.

In its reply, the Commission reiterated its view that there had been exceptional circumstances in this case. It wished to reassure the Ombudsman that infringement complaints are registered as rapidly as possible and that an acknowledgement of receipt is sent within 15 working days. The Commission further stated that, following an earlier review, it is now testing a revised registration system designed (in part) to improve the registration of complaints.

The Ombudsman welcomes the Commission's positive reply.

²⁶ Case T-167/97 *Skrikas v Parliament* [1998] ECR-SC II-857.



Case 2967/2008/FOR

Case **2967/2008/FOR** dealt with an allegation of improper disclosure of highly sensitive information during an investigation of allegedly illegal state aid granted to a company in the context of an agreement on airport charges between that company and the state-controlled operator of an airport. The Ombudsman found that the Commission published, in the Official Journal of the EU, precise details of certain discounts granted to the company by the airport, despite having made a clear written commitment to the national authorities not to do so. The Ombudsman found that the Commission did not intentionally release the information and that it had provided a plausible explanation as regards how the mistake had occurred. While he welcomed the Commission's explanation as regards how the mistake had occurred, this finding did not, in any way, alter the fact that a mistake had indeed occurred. This constituted maladministration. Given that, prior to the opening of the Ombudsman's inquiry, the Commission recognised that it had committed an error, and apologised, the Ombudsman did not consider it necessary to make a critical remark. He welcomed the new measures taken by the Commission with a view to ensuring that these types of errors do not occur again and, in addition, made the following further remark:

The Ombudsman is of the view that an apology should a) recognise the existence of an error, b) involve an apology for the error and any possible inconvenience or damage that it may have caused, and c) where possible, explain the steps that the public authority is taking to correct the error and to avoid similar errors from reoccurring again. An apology is not the appropriate forum to discuss or dispute the existence or the extent of damage which may have resulted from the error that has been recognised to exist.

In its reply, the Commission takes note of the Ombudsman's further remark and acknowledges that an apology does not constitute in itself proof that damage exists as a result of an error. The existence (or otherwise) of damage and its quantum requires a separate analysis. Accordingly, it notes that an apology is not the appropriate forum to discuss or dispute the existence or the extent of damage which may have resulted from an error the existence of which has already been acknowledged.

The Ombudsman welcomes the Commission's acknowledgement in this case.

Case 3085/2008/GG

Case **3085/2008/GG** concerned the handling of a request for access to documents under Regulation 1049/2001²⁷. The Ombudsman found that the Commission failed to deal with the complainant's confirmatory application within the period of 15 working days laid down by the Regulation. He issued a critical remark.

The Commission noted that it had already admitted that it failed to deal with the complainant's confirmatory application within 15 working days and had also expressed regrets in this regard. It accepted that it should have apologized

²⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



to the complainant. More generally, the Commission considered that no particular organizational measures needed to be taken since a system was already in place and was adequately organised to handle requests for access to documents within the deadlines. The Commission added that the complainant's case had been a particular one. Indeed, his request for access had been received after the Commission had informed him that it had decided to terminate further correspondence with him because of its repetitive nature. The Commission further noted that the complainant had sent regular correspondence to the Commission (sometimes on a weekly or even daily basis) and made frequent requests for access to documents. The handling of these requests entailed a heavy administrative burden.

The Ombudsman is pleased to note that the Commission has accepted that there was maladministration and that an apology would have been appropriate. The fact that the Commission had, at the relevant time, decided to terminate its correspondence with the complainant on another issue, would not appear to be relevant in this context. However, he notes that the complainant had indeed sent numerous letters and requests for access to the Commission. Moreover, the system for handling requests for access to documents did indeed (at least at the time of the relevant events) function well. It is therefore reasonable to say that no specific further measures needed to be taken by the Commission.

The Ombudsman finds the Commission's reply to be satisfactory in this case.

Case 80/2009/BU

Case **80/2009/BU** concerned the Commission's alleged failure to provide information on its decision not to register a communication dated 2006 as a complaint and its reasons for not doing so. The Commission also failed to provide any follow-up on the progress of the matter. The Ombudsman criticised the Commission for having violated Article 17 of the European Code of Good Administrative Behaviour and point 4 of the Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public. He also called on the Commission to consider adopting a general policy, whereby it provides information about its handling of a registered infringement complaint to both the complainant(s) who submitted the complaint in question and to those interested citizens and associations whose complaints, although not formally registered, are added to the file of the registered complaint.

The Commission took good note of the Ombudsman's critical remark. It assured him that it would undertake to deal with correspondence in accordance with the standards provided for in the Code of Good Administrative Behaviour. The delay in taking the decision on this complaint was due to the fact that it had to wait for national court rulings. This delay did not, however, affect the handling of the case, it said.

With regard to the further remark, the Commission recalled that, following the September 2009 improvement of the complaint handling system, (new recording system - *Complaints Handling- Accueil des Plaignants* 'CHAP'), each complaint relating to an infringement of EU law is registered separately from other incoming correspondence. If the correspondence is registered as an infringement complaint, the acknowledgment of receipt is accompanied by a



description of the procedure. The Commission keeps all complainants informed of the main steps taken on the file. If a complaint is to be treated as part of another file, because it raises the same issues, the complainant is informed directly in the same way as the complainant on the 'principal' complaint. By way of exception, the Commission underlined that, in the case of a large scale, organised campaign relating to one and the same infringement, only the first correspondence is recorded in the CHAP. An acknowledgement of receipt and all subsequent information on the management of the file are published in the Official Journal and on the Europa server.

The Commission's reply is satisfactory. It explained the delay criticised in this case and, following the introduction of the recording system, CHAP, appears to apply the good administrative practice to which the further remark refers.

Case 271/2009/VL

Case 271/2009/VL was submitted by an employee of an office of the European Consumer Centre (ECC) in Germany. Her contract could not be renewed on time because the Commission, which finances the Centre with a grant, could not complete the necessary procedures to renew the grant on time. The Ombudsman agreed that the Commission did not breach any legal obligations. However, he was not convinced that the Commission dealt with the application for the grant as rapidly as it should have for him to consider that it had acted in accordance with good administrative practice. Given that the Commission accepted that grant applications are best dealt with before the end of the year preceding the one for which the grant is requested, the Ombudsman closed the case with a critical remark.

In its follow-up reply, the Commission stressed its commitment to good administrative practice and reiterated that ECC grant agreements should be signed by the end of the year preceding the one in which the funds relating to the grant will be expended. It mentioned a number of measures it had taken to provide a long-term solution to that end. However, it took the view that the case at hand had been an isolated incident and maintained that it did not breach any of its obligations.

The Ombudsman finds it regrettable that the Commission maintains its view that there was no maladministration in the present case and that it repeats arguments that the Ombudsman has already rejected. However, he notes that the reply is positive as regards the changes that have been effected with an eye to avoiding such problems arising in the future, namely, (i) the transfer of the financial management of applications to the Executive Agency for Health and Consumers and (ii) a stricter application of the deadlines for submitting applications for grant agreements. The first measure could be a solution to ensure that agreements are concluded on time. This would seem to be supported by the fact that a relevant obligation has been inserted in the Executive Agency's annual work programme and that it has the necessary resources to carry out that task. With regard to the second measure, the Ombudsman takes the view that it is for the Commission to organise its work in a way that allows it to take decisions on ECC grants before the start of the year to be covered by the grant agreement. From a systemic point of view, he believes that such a measure could constitute an appropriate response insofar



as the applicants are given a reasonable time to prepare their proposals.

While the Ombudsman notes that the Commission maintains its view that there was no maladministration in the present case, he welcomes the action it has taken to avoid similar problems from occurring in the future.

Case 1087/2009/MHZ

In case **1087/2009/MHZ**, the Commission failed to register an infringement complaint, which concerned the refusal by the Italian authorities to register the double-barrelled name of the complainant's son. The Ombudsman found that the Commission should have registered the correspondence as a complaint. If it considered otherwise, it should have informed the complainant accordingly. He made a further remark that the Commission should inform the complainant of the results of its actions undertaken in relation to the Italian authorities.

In its follow-up reply, the Commission explained that it had contacted the Italian authorities to inform them of the complainant's problem and to request clarifications. The Italian authorities acknowledged their mistake and informed the Commission of the means of redress available to the complainant, i.e., that he could again request the correction of his son's birth certificate following the procedure established by the relevant circular. The Commission duly informed the complainant of the Italian authorities' reply.

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

Case OI/4/2005/GG

In case **OI/4/2005/GG**, the Ombudsman criticised the Commission for failing properly to handle an NGO's application to sign the Framework Partnership Agreement (FPA). In addition to the deficiencies that the Ombudsman already identified in his previous inquiries, the present inquiry led to the conclusion that there was evidence to show that ECHO (the Commission's Directorate-General for Humanitarian Aid) deliberately concealed the truth and thus misled the NGO in question. It was also clear that the way in which ECHO handled this application seriously disadvantaged the NGO. The Commission thus committed serious instances of maladministration.

In reply, the Commission said that, having examined with utmost attention the reasons put forth in the decision, it respectfully disagreed with the critical remarks made by the Ombudsman. The Ombudsman had interpreted the Commission's position as a deliberate refusal to cooperate with him. The Commission had, however, in its comments on the Ombudsman's draft recommendation, admitted that the relevant application should have been handled with more diligence. The Commission regretted the deficiencies that occurred in answering the NGO's inquiries and that it did not meet the administrative standards currently applied by it. However, the Commission had explained to the Ombudsman the particular administrative circumstances and reasons at that time, and the fact that the system had since been considerably improved. With regard to the finding of a deliberate concealment



of the truth and misleading of the NGO, the Commission expressed its concern over such a severe and unjustified criticism. It respectfully submitted that no further evidence had been presented, since the Ombudsman's earlier decision on this issue, to substantiate such a requalification of the facts.

As regards steps taken, the Commission informed the Ombudsman that the system for the assessment of FPA applications had been considerably modified in order to ensure transparency and its commitment to apply the best practices to the procedure. The improvements that had been made were confirmed by the fact that the Ombudsman had only received one further complaint concerning the assessment procedure in relation to the FPA and had found no maladministration in that case.

The Commission's reply is unsatisfactory. The way in which the Commission handled the NGO's application was deplorable. It is regrettable that the Commission seems to be unable to admit this.

Case OI/7/2006/JF

In case **OI/7/2006/JF**, the Ombudsman investigated a complaint from a former local agent of the Commission's Hong Kong Office concerning the "*inhumane and humiliating*" dismissal she had been subjected to by the Office. He criticised the institution for not presenting any sincere, full, and meaningful apologies to the complainant. He added that this was particularly regrettable, given that the complainant was simply seeking an apology and did not seek any financial compensation.

The Commission replied that it took note of the Ombudsman's decision and stated that it would take all the necessary measures in order to avoid similar situations in the future. In this regard, it mentioned that it would prepare and communicate to all its Delegations rules concerning ethics and welfare for its staff.

The Ombudsman welcomes the Commission's constructive response.

Case OI/3/2007/GG

In case **OI/3/2007/GG**, the Ombudsman criticised the Commission for failing to respect principles of good administration when dealing with a particular NGO. He interpreted a note by ECHO (the Commission's Directorate-General for Humanitarian Aid) as an attempt to blacklist the NGO in question. This constituted a failure to comply with the duty to refrain from discrimination, since the blacklisting resulted mainly, or at least also, because of the fact that the NGO had raised allegations of maladministration against the Commission. The Ombudsman further considered that ECHO had acted disproportionately, unfairly, and had abused its powers in the present case, thereby committing serious instances of maladministration. He also criticised the Commission on the grounds that a letter it had sent was misleading and prone to deceive the MEP concerned.



The Commission replied by recalling its regret if part of ECHO's note could have created an incorrect assumption as to its position regarding the NGO. It stressed that the said text was neither written with any intent to blacklist it nor could it have been in a position to create, in those circumstances, negative effects for the NGO. With reference to the letter to the MEP, the Commission, whilst taking due note of the Ombudsman's analysis and sharing his concerns as to providing correct information to MEPs or any other persons or entities, respectfully continued to be of the opinion that the contents of the letter in question represented the status of the matter at that time. As regards steps taken, the Commission wished to assure the Ombudsman that it acts with the greatest care to ensure that, while fulfilling its duty of sound administration, its actions and internal or external communications do not erroneously create a presumption of unfair or non-transparent treatment of both partner and non-partner NGOs.

The Commission's reply is unsatisfactory. The Ombudsman regrets that the Commission missed an opportunity to show its good intentions by acknowledging the Ombudsman's findings and apologising for its behaviour.

Case OI/2/2009/MHZ

Case **OI/2/2009/MHZ** concerned the Commission's rules for handling citizens' requests for access to documents related to infringement procedures. The aim of the own-initiative inquiry was to ensure that (i) citizens know how to obtain access to documents relating to infringements, and, (ii) if access is refused, they can find out whether it is the Commission or a Member State which is responsible for the refusal, and whether the refusal is based on national or EU law. During the inquiry, the Ombudsman invited Member States to provide comments. He closed the inquiry with a finding of no maladministration, encouraging the Commission, however, to inform citizens that they can gain access to such documents by applying either to the Commission, or to the authorities of the Member State concerned, or both. Furthermore, citizens could be informed that, if they submit their request for access to Member State authorities, it is national law that applies. The Commission could include such information on its excellent and citizen-friendly website concerning infringements.

In its follow-up reply, the Commission agreed that informing citizens of the possibility to get access to documents related to infringement procedures under national law would enable them better to exercise their rights. However, the Commission pointed out that it is necessary to *"avoid creating expectations that such documents would be easily accessible, whereas there may be reasons for withholding them, at least at the point in time when the request is made"*.

In its response, the Commission included, as the Ombudsman had suggested in his further remark, a draft of a text which it intends to put on its infringement website under the heading *Exercise your rights*. The draft informs complainants that they have a right to apply for access to documents regarding infringement proceedings. The complainant can lodge an application for access either to the Commission or to the Member State concerned. The Commission informs the complainant that the outcome of such applications depends on the handling authority under the applicable law. Moreover, the draft contains information that national law concerning access to documents has not been harmonised.



Apart from that, complainants must bear in mind that their requests will be examined in the same way as those of other applicants.

The Ombudsman is satisfied with the Commission's reply in this case.

Case 1748/2006/JMA

In case **1748/2006/JMA**, the Ombudsman found that, by failing to word appropriately certain requests for information concerning the complainant, the European Anti-Fraud Office (OLAF) did not comply with the principles of fairness, impartiality, and the presumption of innocence. OLAF also failed adequately to justify its refusal to provide the complainant with information on the allegations against him and on the facts on which these were based. It also failed to explain to the complainant in any detail why it was not possible to provide information as to when the investigation would be completed. In a further remark, the Ombudsman called on OLAF, once it completes its investigation, to use appropriate means to report on its findings to the third parties contacted during its inquiry.

In response, OLAF invited the Ombudsman to reconsider the critical remarks made in his decision or, at the very least, to take into account, in any future inquiry into OLAF's investigations the issues of principle referred to in its reply.

In a reply to OLAF's follow-up, the Ombudsman pointed out that neither his inquiry nor his decision on the case sought to instruct OLAF on the way it ought to pursue its investigation against the complainant. His inquiry in this case was directed at establishing whether OLAF's actions towards the complainant constituted maladministration²⁸. The Ombudsman further recalled that the procedure for the follow-up to critical and further remarks is aimed at avoiding similar cases of maladministration from occurring again in the future. From that perspective, this procedure is a means for the responsible institution to show that it takes seriously its commitment towards a more citizen-oriented European administration. The procedure cannot be seen as an opportunity to bring forward new evidence or arguments.

In view of the Ombudsman's first critical remark, OLAF announced that it would look even more carefully at exactly how future correspondence is worded so as to reduce the risk that the explanation which it is required by law to make might be misinterpreted as prejudicial to the presumption of innocence. With regard to the failure to provide information as to when the investigation would be completed, OLAF replied that it felt it inappropriate to provide a person under investigation with an estimated duration of the inquiry which, given the many factors beyond its control, might prove inaccurate. However, it accepted that it may sometimes be possible to provide more information as to the reasons why OLAF cannot indicate a deadline for an investigation. As regards the "*appropriate*" means that OLAF should use to

²⁸ As laid down by the Treaty and the Ombudsman's Statute, the Ombudsman is empowered to investigate maladministration in the activities of any EU institution, body, office, or agency, with the exception of the Court of Justice of the EU acting in its judicial role. He thus has the mandate to make recommendations to any of these institutions and bodies, without exception, with a view to putting an end to maladministration.



report its findings to the third parties contacted during its investigation, OLAF noted that, once it had concluded its inquiries, it informed the third parties of its findings and its recommendations.

The Ombudsman welcomes OLAF's commitment to look even more carefully at exactly how future correspondence will be worded. With regard to the failure adequately to justify its refusal to provide the complainant with information on the allegations against him and on the facts on which these were based, the Ombudsman notes that, further to his critical remark, OLAF provided the requested information to the complainant. The Ombudsman welcomes both this development and OLAF's acceptance of the principle that, in some cases, it may be possible to provide more information as to the reasons why it cannot indicate a deadline for an investigation. Finally, the Ombudsman finds it commendable that, once it concluded its investigation, OLAF took appropriate steps to inform the third parties involved in the inquiry of its findings and recommendations.

The Ombudsman welcomes OLAF's agreement to implement some of his suggestions.

3. The European Economic and Social Committee (EESC)

Case 1016/2008/JMA

In case **1016/2008/JMA**, the Ombudsman criticised the failure of the European Economic and Social Committee (EESC) to respond to the complainant's correspondence. By failing to reply, the EESC did not comply with Article 14 of the European Code of Good Administrative Behaviour, which requires that every complaint sent to an institution should receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period.

The EESC thanked the Ombudsman for his remark and stated that it has adopted the necessary measures to ensure optimal respect for the Code of Good Administrative Behaviour. For example, the Code has been made available on the EESC's website since August 2009.

The Ombudsman welcomes the actions that the EESC has taken to avoid similar maladministration in the future.

4. The Education, Audiovisual and Culture Executive Agency (EACEA)

Case 1537/2008/GG

Case **1537/2008/GG** concerned the handling by the Education, Audiovisual and Culture Executive Agency (EACEA) of an application for a grant under the EU's town-twinning programme. In a further remark, the Ombudsman pointed out that it would be useful if the EACEA could consider disclosing to the complainant the detailed comments made by the two experts in their evaluation sheets and to do likewise in possible future cases where the result of the



evaluation of proposals for town-twinning projects is challenged.

In its reply, the EACEA explained that the comments made by the experts in this case had been forwarded to the complainant. It added that in future cases where the evaluation of proposals is challenged, it would make sure that the reasons for the rejection are well explained to the applicant, based on the experts' comments

The Ombudsman welcomes the EACEA's citizen-friendly and co-operative reply.

5. The European Data Protection Supervisor (EDPS)

See above under "*Star cases*".

6. The Centre for the Development of Vocational Training (Cedefop)

Case 1874/2008/BB

In case **1874/2008/BB** against the European Centre for the Development of Vocational Training (Cedefop), the Ombudsman made a further remark that authors and contributors should, before publication, be afforded the possibility of reading work that has been edited by Cedefop. Cedefop replied that, in the case of substantial contributions, this indeed reflects the general practice at Cedefop. In light of the Ombudsman's further remark, project managers will again be reminded and asked to follow this procedure, it said.

The Ombudsman welcomes Cedefop's positive response.

7. The European Investment Bank (EIB)

See above under "*Star cases*".

8. The European Personnel Selection Office (EPSO)

Case 1303/2007/KM

Case **1303/2007/KM** concerned the European Personnel Selection Office's (EPSO) alleged failure to schedule an interview before the date on which the candidate was due to give birth. Although a completely satisfactory solution could not be found, the Ombudsman acknowledged EPSO's openness to tackle the general problem. However, he made the following critical remark:

EPSO wrongly refused to schedule the complainant's examination, on a date prior to 9



February 2007, and failed properly to deal with her correspondence by not responding adequately to her specific arguments regarding the rescheduling of her oral examination.

In response, EPSO stated that notices of competition have been changed and now inform candidates of the possibility to change the test dates. Candidates could thus request, where they had a reason to do so, that their examination date be changed, and such requests could exceptionally be accepted. EPSO would then try to find a date to suit the candidate, within the limits of its organisational constraints (availability of translators, examinations to take place during a certain period). If it could not accept the date proposed by the candidate, it would provide reasons and propose an alternative date. Furthermore, EPSO underlined that it had changed its rules and now reimbursed travel costs also for babysitters and other people accompanying candidates in need of support. Finally, EPSO stated that the timetable for a given competition will be clearly set out on its website to inform candidates as early as possible.

The Ombudsman welcomes EPSO's positive response.

Case 2116/2007/IP

Case **2116/2007/IP** concerned EPSO's decision not to admit the complainant to the practical and oral tests of an open competition because she did not possess a diploma relevant to the secretarial field. Nor did she have the three years of professional experience required by the Notice of Competition. In his decision, the Ombudsman concluded that the evaluation carried out by the Selection Board was within its margin of discretion. He considered it useful, however, to make a further remark that it would have been helpful for the complainant, and in conformity with the principles of good administration, if EPSO had provided the complainant with the same information it submitted to the Ombudsman in the framework of another inquiry he had carried out²⁹.

EPSO replied that the further remark in question relates to the general issue of the information that candidates to open competitions are entitled to receive. In this regard, EPSO underlines that it is absolutely aware of the importance of providing candidates who request it with detailed information about their non admission and/or exclusion from open competitions. This is why EPSO included the issue of communication with candidates as an objective of its Development Programme³⁰.

The Ombudsman welcomes the fact that EPSO recognises the importance of providing candidates with clear and detailed information concerning the assessment of their academic and professional experience carried out by the selection board. In light of the above, and of the new practices described by EPSO in its September 2008 Development Programme, no further action appears to be necessary.

The Ombudsman welcomes the steps taken by EPSO to improve the information provided to candidates in open competitions.

²⁹ Case 1993/2007/RT available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/3361/html.bookmark>

³⁰ See: http://europa.eu/epso/doc/epso_development_plan.pdf



Case 99/2008/VIK

In case **99/2008/VIK**, the complainant contested the content of four questions in the verbal reasoning test of a competition. The Ombudsman found that by including a question in the verbal reasoning test without ensuring that the correct answer could be derived from the underlying text without leaving room for reasonable doubt, EPSO had committed an instance of maladministration.

In its follow-up to the Ombudsman's critical remark, EPSO's comments were mostly aimed at contesting the Ombudsman's finding. For example, EPSO pointed out that, in accordance with the relevant case law, a question may only be criticised if it is manifestly inappropriate in view of the purpose of the competition in question. EPSO further stated that the problem identified by the Ombudsman did not, in its view, constitute maladministration, as it did not concern an instance of administrative irregularity, an abuse of power, or discrimination against candidates.

EPSO nevertheless wished to assure the Ombudsman about the quality of the questions in the open competitions it organises. To that end, it explained that it has set up an independent Advisory Board on Quality Control of Test Items. This is a permanent board, entrusted with the tasks of verifying the content and the level of difficulty of new questions, verifying the quality of translation of the three language versions, and giving its opinion on whether to cancel or keep questions criticised by candidates. The Board is competent not only *ex-ante* for checking sample questions, but also *ex-post* for requests for review submitted by candidates. In the case at hand, the Advisory Board confirmed EPSO's initial position with regard to the validity of the question at issue. EPSO concluded that, in view of the existence of the Advisory Board, which is independent from EPSO, any parallel mechanism (such as the European Ombudsman) for monitoring the content of questions might create confusion among candidates and, in some cases, could result in contradictory opinions which would be difficult for the Appointing Authority to reconcile.

The Ombudsman replied by saying that EPSO's decision to set up an Advisory Board seemed to be eminently sensible. Such an independent control mechanism would indeed be likely to help ensure a high quality of test questions in EPSO competitions. He said that he would be interested in obtaining further information about this Board. The Ombudsman pointed out, however, that the existence of the Board did not in any way limit the Ombudsman's mandate. He explained that, when dealing with complaints concerning competitions, he was mindful of, and fully respected, the discretionary powers of selection boards. The present case, however, did not concern these discretionary powers but the question whether the correct answer to a test question could be found without leaving room for reasonable doubt. He did not consider it to be good administrative practice to include questions that could not be answered without leaving room for reasonable doubt. The Ombudsman added that he fully understood EPSO's concerns that its Advisory Board and the Ombudsman might reach diverging conclusions. However, the Ombudsman would of course take into account the views of an independent expert body such as the Advisory Board when dealing with cases like the present one. It would therefore be most useful if EPSO could inform him of the Board's position in such cases when answering a request for an opinion on a complaint of this type.

EPSO sent a further reply to the Ombudsman, in which it took note of his request to be informed of the position of the Advisory Board concerning



possible future complaints. As regards the present complaint, EPSO added that it maintained its position concerning the quality and precision of the contested test question and the role of the Advisory Board in providing *ex-ante* and *ex-post* control of the quality of the test questions.

EPSO's reply to the remark in this case is unsatisfactory, challenging, as it does, the Ombudsman's mandate as regards the evaluation of test questions. While the Ombudsman considers EPSO's decision to set up an Advisory Board to be sensible, the existence of the Board does not limit the Ombudsman's mandate.

Case 1150/2008/CK

In case **1150/2008/CK**, the Ombudsman made a further remark to EPSO concerning its handling of a confirmatory application under Regulation 1049/2001³¹. This concerned the fact that the Commission deals with confirmatory applications for access to documents held by EPSO. The Ombudsman expressed doubts as to whether the Commission could be considered competent, in a formal legal sense, to issue decisions on confirmatory applications made against EPSO's rejection of initial applications. He invited EPSO to take all necessary steps, such as submitting a relevant proposal to its Management Board, in order to establish its autonomy in the area of processing requests for access to documents held by its services.

In response, EPSO informed the Ombudsman that, in order to establish the above-mentioned autonomy, its basic texts as well as the Commission's internal regulation would need to be revised. Moreover, EPSO expressed its wish to continue to use the Commission's services and experience in this field. In its view, the Commission's intervention in the procedure offers additional guarantees of objectivity. Nevertheless, EPSO noted that it was ready to discuss this issue further. Subject to the Ombudsman's agreement, EPSO proposed to include this issue on the agenda of a future meeting of the Management Board in order to allow the Ombudsman's representative to present his arguments in favour of future autonomy in the area of processing requests for access to documents.

The Ombudsman welcomes EPSO's positive reaction to his further remark.

Case 1943/2008/BB

Case **1943/2008/BB** dealt with access to the admission tests of an open competition for nurses, organised in the various Member States. A Maltese citizen complained because only four dates were available to take the admission tests at the test centre in Malta. The Ombudsman made a further remark to EPSO that it could, in the context of future open competitions, consider adding a clarification to the Notices of Competition, indicating that the availability of

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



dates at certain test centres may be limited where the number of candidates requesting that test centre is low.

EPSO informed the Ombudsman that it had added the following clarification to a draft Notice of Competition: *"The availability of testing dates at certain test centres may be limited where the number of candidates requesting that test centre is low"*³². At the time of submitting its follow-up response, the institutions were still discussing the approval of this draft. EPSO hoped to be able to include it in the Notices of Competition published from 2010.

The Ombudsman welcomes EPSO's helpful follow-up to his further remark.

Case 397/2009/CK

In case 397/2009/CK, EPSO apologised to the complainant for delays in the payment of travel expenses incurred while participating in a competition and committed itself to revising its procedures for making such reimbursements. The Ombudsman made a further remark, inviting EPSO to inform him about the outcome of the revision of the reimbursement procedure and of the time frame for its implementation, including concrete information on the sharing, if any, of responsibilities and tasks between EPSO and the Commission.

EPSO informed the Ombudsman that, in mid-March 2010, together with the launch of the new general cycle of competitions, the decision on *"Financial contribution towards travel and subsistence expenses for persons invited to sit tests in an assessment/test centre, to take written tests, oral tests and to take part in a selection procedure organised by EPSO"* would be published on the EPSO website. In EPSO's view, the fact that the new rules, such as the introduction of a flat rate, are more simplified and clearer should also lead to a reduction in the time needed to handle requests for financial contribution. The Ombudsman's attention was especially drawn to Article 4 which gives the appointing authority the opportunity to grant exceptions in particular cases of candidates with disabilities or special needs. On the sharing of responsibilities and tasks between EPSO and the Commission, EPSO pointed out that no concrete information was yet available as discussions on this issue were still on-going.

The Ombudsman notes that the new rules relating to reimbursement appear to be clearer and more user-friendly, and can lead to a speedier and less bureaucratic handling of requests for financial contribution towards travel and subsistence expenses.

The Ombudsman welcomes EPSO's positive response in this case and trusts that it will communicate to him concrete information on the sharing, if any, of responsibilities and tasks between EPSO and the Commission in this area.

³² Original document only available in French. The relevant sentence reads as follows: *"La disponibilité de certaines dates dans certains centres pourrait être limitée si le nombre de candidats prévus pour ces centres est peu élevé."*



9. The European Medicines Agency (EMA)

Case 2617/2009/ELB

In case **2617/2009/ELB**, the complainant, a French journalist who studies conflicts of interest in the public health sector, requested access to the declarations of interest submitted by experts of the European Medicines Agency (EMA). EMA offered to send the complainant, by normal mail, all declarations of interest, since no pdf version of these documents existed. EMA indicated that the documents in question would be available on an electronic support at the earliest in 2010.

Although the Ombudsman did not open an inquiry into this case, he stated that he would follow EMA's progress in implementing its undertaking to provide electronic access to experts' declarations of interest in the future and envisage the possibility of an own-initiative inquiry on this issue at an appropriate time. In this context, he encouraged EMA to consider seriously the complainant's suggestion that, in the interest of transparency, EMA should publish online both a database of experts' declarations and a pdf document summarising all current declarations. The Ombudsman subsequently asked EMA to inform him of progress made in providing electronic access to experts' declarations of interest.

In July 2010, EMA replied that the Agency believes that a high-level of transparency of its activities is of the utmost importance to fulfil its public health mission and to ensure good governance. In this context, it has committed itself to making the experts' declarations of interests publicly available on the Internet in electronic format. This exercise will be implemented together with the launch of the Agency's new website. The electronic format of experts' declaration of interests should be completed as soon as possible and included on EMA's website within the next six months.

The Ombudsman welcomes EMA's efforts to make these declarations available electronically and applauds its stated commitment to transparency.

II. List of cases in which a critical remark was made

<u>Case reference</u>	<u>Link to text (EN)</u>	<u>Link to text (original language)</u>
224/2005/ELB	<u>EN</u>	<u>FR</u>
3222/2005/IP	<u>EN</u>	-
OI/4/2005/GG	<u>EN</u>	-
1748/2006/JMA	<u>EN</u>	-
2400/2006/JF-CONFIDENTIAL	<u>EN</u>	-
OI/7/2006/JF	<u>EN</u>	-
226/2007/MHZ-CONFIDENTIAL	<u>EN</u>	<u>FR</u>



Case reference	Link to text (EN)	Link to text (original language)
344/2007/(WP)BEH-CONFIDENTIAL	EN	DE
429/2007/PB	EN	DE
491/2007/PB	EN	DE
672/2007/(WP)PB	EN	DE
706/2007/(WP)BEH-CONFIDENTIAL	EN	DE
819/2007/PB-CONFIDENTIAL	EN	DE
1303/2007/(WP)(BEH)KM	EN	DE
1342/2007/FOR	EN	-
2449/2007/VIK	EN	-
3004/2007/BEH-CONFIDENTIAL	EN	DE
3112/2007/MF-CONFIDENTIAL	EN	FR
3199/2007/(WP)(VL)BEH	EN	DE
OI/3/2007/GG	EN	-
70/2008/TS	EN	-
99/2008/VIK	EN	-
1016/2008/JMA-CONFIDENTIAL	EN	-
1059/2008/(WP)VL	EN	DE
1289/2008/MHZ-CONFIDENTIAL	EN	-
1561/2008/RT-CONFIDENTIAL	EN	RO
1890/2008/(CHM)BU	EN	-
1928/2008/TS	EN	-
1935/2008/FOR-CONFIDENTIAL	EN	-
2007/2008/ELB-CONFIDENTIAL	EN	FR
2851/2008/TN	EN	-
3085/2008/GG-CONFIDENTIAL	EN	DE
80/2009/BU	EN	CS
271/2009/VL-CONFIDENTIAL	EN	DE
310/2009/ELB-CONFIDENTIAL	EN	FR



III. List of cases in which a further remark was made

<u>Complaint reference</u>	<u>Link to text (EN)</u>	<u>Link to text (original language)</u>
791/2005/(IP)FOR	EN	IT
244/2006/(BM)JMA	EN	ES
1748/2006/JMA	EN	-
2400/2006/JF	EN	-
3486/2006/(GK)(ID)RT	EN	EL
488/2007/PB	EN	DE
491/2007/PB	EN	DE
819/2007/PB	EN	DE
834/2007/TN-CONFIDENTIAL	EN	-
1342/2007/FOR	EN	-
1906/2007/VIK	EN	-
2116/2007/IP	EN	IT
2350/2007/RT	EN	-
443/2008/JMA	EN	ES
491/2008/PB	EN	-
1150/2008/(ID)(BU)CK	EN	EL
1179/2008/JF-CONFIDENTIAL	EN	-
1190/2008/DK	EN	-
1537/2008/(TJ)GG	EN	-
1628/2008/TS	EN	-
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2967/2008/FOR-CONFIDENTIAL	EN	-
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<u>Complaint reference</u>	<u>Link to text (EN)</u>	<u>Link to text (original language)</u>
1087/2009/(JMA)MHZ-CONFIDENTIALE	EN	-
OI/2/2009/MHZ	EN	-



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