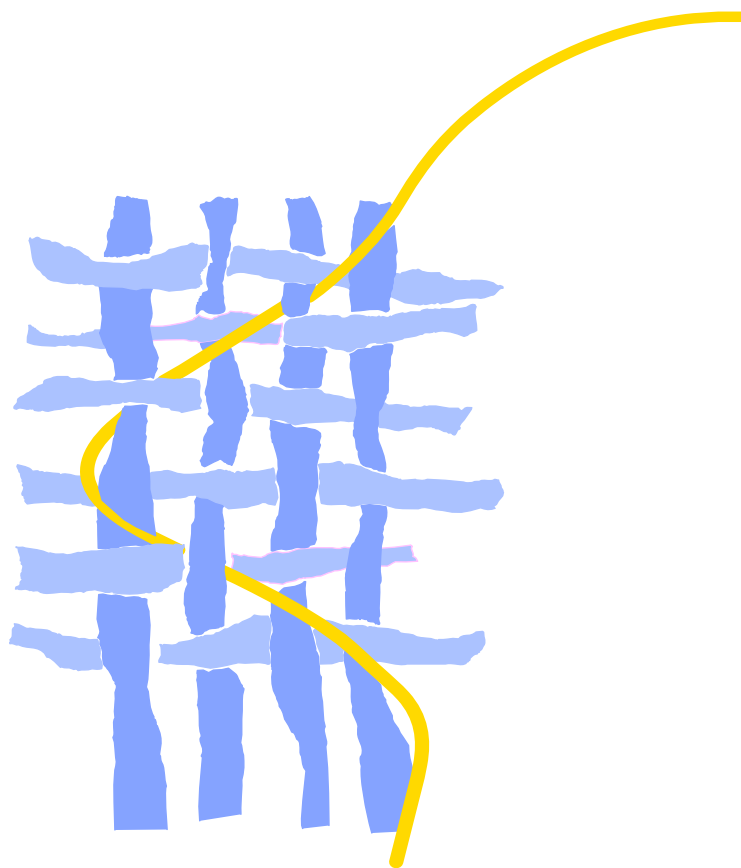


THE EUROPEAN OMBUDSMAN

STUDY OF FOLLOW-UP GIVEN BY INSTITUTIONS TO CRITICAL REMARKS AND FURTHER REMARKS MADE BY THE OMBUDSMAN IN 2006



22 May 2008

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FOREWORD

My Annual Report for 2006 announced that a study would be made of the follow-up given to the critical remarks and further remarks contained in the European Ombudsman's decisions closing cases in 2006. The present report contains the result of that study. It explains how constructive criticism and suggestions from the Ombudsman, resulting from inquiries conducted on the Ombudsman's own initiative or following complaints, can help the institutions to serve Europe's citizens better and win their trust.

Critical remarks and further remarks are important instruments, but they represent only part of the Ombudsman's activity to combat maladministration, promote good administration and improve relations between the European Union and its citizens. As well as responding to complaints, for example, the Ombudsman also works proactively to encourage good administration and respect for rights, suggest appropriate solutions to systemic problems, spread best practice and promote a culture of service to citizens. My Annual Reports provide a more complete picture and include "star cases" in which the Institution's handling of a complaint was exemplary. The concept of star cases has been well received by the Institutions and it seems useful to apply it also in the present context. I therefore identify six star cases in which the follow-up given to a critical remark or further remark has been exemplary.

As regards critical remarks, the study is focused not on the specific instance of maladministration that led to the criticism, but on the lessons that have been learned for the future. Although the Annual Report for 2006 envisaged that the follow-up of critical remarks and of further remarks would be studied separately, it is therefore more useful to deal with them together: in both cases, the study is oriented towards follow-up in terms of systemic improvements that raise the quality of administration, thus making maladministration less likely to occur in the future.

A single decision may contain more than one critical remark or further remark, and both kinds of remark may be included in the same decision. In total, 49 critical remarks were made, in 41 cases. The comparable figures for further remarks were 48 and 38. It should be noted that two further remarks were made in each of nine cases that were the subject of a joint inquiry. The further remarks concerned the same issue and were identical in the nine cases. Furthermore, six of the critical remarks concerned the same issue and were substantially identical¹.

¹ The Ombudsman's current practice in this regard is to make a single critical or further remark in such circumstances.

The following table shows the distribution of critical and further remarks by Institution:

Institution or body	Number of critical remarks made in 2006	Number of further remarks made in 2006
European Parliament	3	2
Council of the EU	1	-
European Commission	24	35*
European Central Bank	-	1
European Investment Bank	1	1
Committee of the Regions	3	1
CEDEFOP	1	-
European Defence Agency	-	1
EPSO	16**	7
TOTAL	49**	48*

* *This figure includes 2 further remarks in each of nine cases dealt with in a joint inquiry.*

** *This figure includes six substantially identical critical remarks concerning the same issue.*

The present study explains the purpose of critical remarks and further remarks and the different kinds of circumstance in which they are made. It then analyses the follow-up given to critical remarks and further remarks made in 2006 and identifies the six star cases. Finally, conclusions are drawn as regards the main lessons of the study for the future.

Annex A contains a detailed analysis of each of the cases in which one or more critical remarks and/or further remarks were made. It is organised by Institution and by complaint reference.

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

P. Nikiforos Diamandouros, 22 May 2008

STUDY

1 INTRODUCTION

The European Ombudsman serves the general public interest by helping to improve the quality of administration by the Institutions and bodies of the European Union¹. At the same time, the Ombudsman provides the Union's citizens and residents with an alternative remedy to protect their interests. That remedy does not necessarily have the same objective as judicial proceedings and is complementary to legal protection by the Community Courts.

A key difference between the Ombudsman and the Courts is that only the latter 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. A further remark is made when an inquiry finds no maladministration, but the Ombudsman identifies an opportunity for the Institution to improve the quality of its administration in the future. Since a further remark is premised on a finding of no maladministration, it should not contain express or implied criticism of the Institution to which it is addressed.

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 circumstances of the case.

Thus constructed, a critical remark also explains and justifies the Ombudsman's finding of maladministration and thereby strengthens the confidence of both the citizens and the Institutions in the fairness and thoroughness of the Ombudsman's work. Moreover, by showing that the Ombudsman is willing publicly to censure the Union Institutions when necessary, critical remarks strengthen public trust in the Ombudsman's impartiality.

¹ Article 195 of the EC Treaty empowers the Ombudsman to inquire into maladministration in the activities of the "Community Institutions and bodies with the exception of the Court of Justice and the Court of First Instance acting in their judicial role". The Treaty of Lisbon would amend that to read "Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role". For simplicity, the present report refers hereafter to "Union Institutions", or simply to "Institutions".

A critical remark also confirms to the complainant that his or her complaint was justified, at least in part. In some cases, the complainant's only claim, express or implied, is a public acknowledgment that there was maladministration. In such cases, a critical remark provides adequate redress to the complainant. However, a better outcome from the perspective of improving relations between citizens and the Union Institutions is for the Institution concerned itself to acknowledge and apologise for the maladministration. Such action also shows that the Institution knows what it has done wrong and can thus avoid similar maladministration in the future. When the Institution takes the initiative to acknowledge and apologise for maladministration, therefore, a critical remark by the Ombudsman is normally unnecessary. Instead, the case is closed on the ground that no further inquiries are justified.

If there is a suspicion, however, that the individual case may result from an underlying systemic problem, the Ombudsman may decide to open an own-initiative inquiry, even if the specific case has been satisfactorily resolved by the acknowledgement and apology.

3 CRITICAL REMARKS IN CASES WHERE A FRIENDLY SOLUTION OR DRAFT RECOMMENDATION IS NOT APPROPRIATE

From the foregoing, it can be seen that some critical remarks represent a missed opportunity for the European Union. The most appropriate action for the Institution concerned would have been to acknowledge that maladministration had occurred and offer an apology. If it had done so, no critical remark would have been necessary. The Ombudsman has made efforts to persuade the Union Institutions not to adopt a defensive approach to complaints. In particular, the Ombudsman has emphasised that a culture of service to citizens is not a culture of blame. Mistakes occur in any administration. When a mistake occurs, matters should be put right if possible and an apology given if appropriate. Then the matter is dealt with and one can move on.

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 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 to the satisfaction of the complainant as well) 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 considers that there is maladministration, a critical remark provides a fair and efficient way of closing the case, if nothing can be done to remedy the maladministration.

A critical remark is fair because the Ombudsman's procedures ensure that the Institution is informed of the complainant's precise allegations and claims and of the evidence and arguments submitted by the complainant. The Institution thus has the opportunity to state its point of view in full knowledge of the case against it.

A critical remark is efficient because, as regards the specific case, no remedy is possible, and, as regards the public interest, the remark itself provides the necessary educative dimension. The Institution to which the critical remark is directed should draw the appropriate lessons for the future, if necessary. What is appropriate will depend on the maladministration in question. An isolated incident, for example, may need no follow-up action.

4 CRITICAL REMARKS FOLLOWING REJECTION OF A FRIENDLY SOLUTION OR A DRAFT RECOMMENDATION

When action should be taken to remedy maladministration, the Ombudsman proposes a friendly solution, or if that is not appropriate in the particular case, makes 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 that has been accepted by the Institution, 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 different outcomes.

First, it should be noted that a friendly solution proposal is normally based on a provisional finding of maladministration. It is, therefore, possible that the Ombudsman may take the view, after considering the Institution's response, that there is no maladministration.

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.

Finally, the Ombudsman may decide to close the case with a critical remark, either at the stage of rejection of 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 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 having been made.

Unfortunately there are also cases in which the Institution refuses the Ombudsman's suggestions for unconvincing reasons. Indeed, there are even 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. In political cultures where those conditions are not fulfilled, however, the ombudsman institution may struggle to establish its moral authority.

If the detailed opinion of the Institution to which a draft recommendation has been addressed is unsatisfactory, the Ombudsman may submit a special report to the European Parliament. As was pointed out in the 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.

5 FOLLOW-UP GIVEN TO CRITICAL REMARKS AND FURTHER REMARKS MADE IN 2006

The present study is the first systematic examination of the follow-up to all the critical and further remarks made during a particular year. In mid-2007, the Ombudsman wrote to the Institutions which had not yet responded to all the remarks concerning them made in 2006 and invited them to respond by 31 July 2007. Reminders were sent, where necessary, in September 2007. Eventually, responses were received to all the remarks, with the exception of the two critical remarks made in case 617/2003/IP concerning the Commission's handling of an application for access to documents.

It is important to note that the follow-up to critical and further remarks is part of a process of on-going dialogue between the Ombudsman and the Institutions. For example, the Council's response to the critical remark in case 817/2006/TN provided the occasion for the Ombudsman to suggest that the Council designate a member of its secretariat to help resolve complaints as rapidly and effectively as possible, whenever appropriate. The Council responded positively and designated a contact person. As mentioned in the Annual Report for 2006, the Ombudsman has begun to make wider use of informal procedures to promote rapid solutions to problems, where appropriate. The result should be to reduce the need for critical remarks in the future.

Another example of on-going dialogue concerns the Commission's responsibility for the European Schools and, in particular, the competence of the Schools' Complaints Board. The Commission's response to the critical remark in case 3403/2004/GG showed that it had made considerable further efforts to defend the complainants' interests and that it had succeeded in bringing the issue before the Board of Governors of the Schools. The Ombudsman accepted that the Commission could not be held responsible for the fact that the Board of Governors did not adopt the proposal submitted by the Commission. Furthermore, the Commission has recently accepted a draft recommendation in another case (2153/2004/MF), which could lead to further clarification of the competence of the Complaints Board.

The Commission's role as Guardian of the Treaty is also a continuing subject of dialogue with the Ombudsman. In case 3369/2004/JMA, the Ombudsman welcomed the Commission's statement that the requirements of its 2002 Communication on relations with the complainant in respect of infringements of Community law¹ also apply in the period following the sending of a letter of formal notice to the Member State. In its response to a critical remark in case 1037/2005/GG, the Commission argued, in summary, that a divergence of views between the Ombudsman and the Commission as to the interpretation of the law could not be considered as maladministration, since that would put in question the division of competencies established by the Treaty. The Ombudsman's position remains that, in a society governed by the rule of law, any public administration must follow the law and that errors of legal interpretation can, therefore, constitute maladministration. However, the Ombudsman has always made clear that the Court of Justice is the highest authority as regards the interpretation of Community law. It should also be noted that a difference of views on legal interpretation need not always give rise to a critical remark, as is illustrated, for example, by the Ombudsman's decision of 16 July 2007 in case 3269/2005/TN.

The final case to mention as regards the Commission's role as Guardian of the Treaty is 880/2005/TN. The Commission's response to the remarks in that case put in question one of the key elements of its 2002 Communication on relations with the complainant. The Commission insisted that no provision of the Communication requires it to communicate to the complainant the reasons why it has taken a concrete decision on the substance of a complaint submitted to it, nor why it is not able to arrive at a decision to issue a formal notice or to close the case after one year. According to the Commission, its sole obligation is to inform the complainant of the state of play after one year and that only if the complainant makes a request for such information. The Ombudsman has recently made a critical remark to the Commission in another case (3737/2006/JMA) concerning the same issue. Furthermore, following an exchange of correspondence with the Commission², the Ombudsman is considering the potential usefulness of an own-initiative inquiry into aspects of the implementation of the Commission's Communication *A Europe of Results – Applying Community Law*³.

In some cases, issues that have not been satisfactorily resolved through the follow-up to a critical or further remark could be dealt with effectively through an own-initiative inquiry by the Ombudsman. For example, many of the critical remarks addressed to EPSO concern the same issue of principle (the extent of the information provided in evaluation sheets), which is being dealt with in the framework of an on-going own-initiative inquiry OI/5/2005/PB. Similarly, an own-initiative inquiry into the management of human resources at the Commission's Joint Research Centre is dealing with the issues raised in further remarks arising out of a joint inquiry into a number of complaints. Future own-initiative inquiries could examine (i) the Commission's refusal

¹ 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.

² The Ombudsman's letter of 6 February 2008 to President Barroso and the latter's reply of 10 April 2008 are both available at <http://www.ombudsman.europa.eu/letters/en/default.htm>

³ COM(2007) 502.

to recognise that failure to give a reasoned reply to an appeal under Article 90 (2) of the Staff Regulations is maladministration (2227/2004/MF) and (ii) the operation of the Early Warning System (281/2004/JMA).

Other unresolved issues could be solved through the forthcoming legislative procedure for the amendment of Regulation 1049/2001 on public access to documents; in particular, the duty to provide a public register of documents, which gave rise to a critical remark in case 1764/2003/ELB.

Star cases

Six 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 *European Parliament* introduced a new model for declarations of conflict of interest that takes into consideration previous contacts with, or activities in relation to, tenderers (3732/2004/GG). The *Commission* took a number of constructive steps to improve its communications with applicants for traineeships (2471/2005/BU); and to ensure that its external Delegations were fully informed of a further remark concerning the role of the Commission in ensuring that the Contracting Authorities in delegated procedures respect their obligations as regards prompt preparation and transmission of contract award notices (3706/2005/MHZ). The Commission also responded to a critical remark by offering compensation to a complainant, despite the fact that it disagreed with the Ombudsman’s finding of maladministration (495/2003/ELB)¹. Further examples of good practice include the *European Investment Bank*’s improvements to its policies and procedures to deal with requests for access to information and complaints (994/2004/IP and 3501/2004/PB) and the *European Defence Agency*’s decision to amend its recruitment procedures to include written evaluation forms for each candidate (2044/2005/BM).

6 CONCLUSIONS

In general, the follow-up given by the Institutions to critical and further remarks in 2006 has been satisfactory, showing that the Ombudsman’s efforts to reach out to the institutions and to promote a culture of service to citizens are bearing fruit. Furthermore, the study itself has proved to be a useful exercise, since it has encouraged the Institutions to inform the Ombudsman of what they have done in this regard. In some cases, however, the response has been slow: the last response received was that of the Commission to the critical remark and further remark in 3531/2004/TN, which was sent on 12 March 2008, nearly 20 months after the remarks were made and ten months after the Ombudsman informed the Commission that the study was to be carried out.

The Ombudsman intends to repeat the study for 2007 and subsequent years. In order to improve the speed and efficiency of the process, future critical remarks and

¹ The Commission also agreed to modify its rules on seconded national experts to ensure equal treatment with staff as regards leave to appear as a witness in court (760/2005/GG). This would also have been a star case, but for the fact that, at the end of April 2008, the Commission had still not modified its relevant decision and did not envisage doing so before the end of 2008.

further remarks will invite the Institution concerned to report on the follow-up given within six months. In the case of critical remarks, the Ombudsman will specifically invite the Institution concerned to report on what steps, if any, it has taken to avoid similar maladministration in the future.

ANNEXES

A DETAILED ANALYSIS OF CASES BY INSTITUTION

1 The European Parliament

In case **1219/2004/IP**, the European Parliament was criticised for failing to inform the complainant that certain information which it had requested from him concerning a proposed exhibition on Parliament's premises was no longer necessary.

In response, Parliament informed the Ombudsman that the Secretariat of the Quaestors put in place a monitoring process to supervise the dissemination of information, through the Secretariat, in order to control the handling of dossiers and to avoid conflicting or unclear information being given to third parties. Furthermore, coordination between Parliament's administration and the Quaestor responsible for exhibitions had also been strengthened in that the decision-making process is only activated after due consultation.

In **3732/2004/GG**, the Ombudsman invited Parliament to consider requiring all persons who deal with tenders not only to declare any potential conflict of interest but also to provide information on any previous dealings with, or activities involving tenderers, which might be relevant to the outcome of the tender.

In response, Parliament informed the Ombudsman that it had introduced a model for declaration of conflict of interest which also takes into consideration previous contacts with or activities in relation to tenderers.

In **287/2005/JMA**, Parliament was criticised because its letters rejecting the complainant's tenders did not provide information about possibilities to appeal. In response, Parliament informed the Ombudsman that it now systematically informs unsuccessful tenderers that they have the possibility to bring judicial proceedings to contest the decision.

The Ombudsman notes that the European Parliament's positive response to the critical remark brings its procedures into line with those adopted by the Commission following the Ombudsman's own-initiative inquiry OI/2/2002/IJH.

In **1315/2005/BB**, the Ombudsman made a further remark concerning the powers of Authorising Officers to decide whether or not to contact tenderers in order to ask for supplementary documentation or certification.

In response, Parliament explained that it has subsequently published a *Vademecum* on public procurement procedures which provides additional guidelines on how to deal with requests for additional clarifications. The guidelines underline the principle of equal treatment of tenderers.

In **1919/2005/GG (DR)**, the complainant requested access to the lists of admissible candidates concerning three selection procedures organised by Parliament. All these candidates already worked for Parliament or for other Community institutions. Parliament refused to grant access to the complete lists on the grounds that doing so would undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data, and that the exception set out in Article 4(1)(b) of Regulation 1049/2001 therefore applied. After the European Parliament had rejected a draft recommendation, the Ombudsman criticised Parliament for having failed to deal correctly with the request for access. In the Ombudsman's view, Parliament had failed to establish how disclosure of the relevant documents could have these negative effects, particularly as regards those candidates who were already working for Parliament. Moreover, the Ombudsman considered that Parliament ought at least to have consulted the candidates concerned before deciding on the request for access.

Parliament's response acknowledged the public interest in the disclosure of the names of applicants for vacancies in a public institution. It pointed out that that interest may become stronger the more important politically the post to be filled is. A vacancy in an institution, at least up to the level of head of unit, could not be compared to the application for a mandate such as that of the European Ombudsman, the European Data Protection Supervisor (EDPS) or a Commissioner.

Parliament also acknowledged that the relevant data could be disclosed with the consent of the person concerned. However, Parliament considered that a proactive approach was to be preferred, whereby consent would be requested on application for a vacancy, not after receipt of a request for access to the relevant list. Parliament had sought advice from the EDPS who had fully endorsed this approach. Following inter-institutional consultations, however, no consensus had been reached on the practical implementation of a proactive approach. Parliament will further explore the possibility of applying a proactive approach by means of the introduction of a clause in the application form, which would allow candidates to authorise or oppose disclosure of their names.

The Ombudsman notes that this case was dealt with before the Memorandum of Understanding between the Ombudsman and the EDPS was concluded¹. In any similar cases in the future, the Ombudsman would consult the EDPS during the course of the inquiry, in accordance with the provisions of the Memorandum.

2 The Council of the European Union

Case **817/2006/TN** concerned the way in which the Council had handled a telephone request for information. The Ombudsman made a critical remark, stating that if the reason why the Council's press officer could not provide an answer to the complainant's question was that a Council position on the matter did not yet exist, the

¹ 2007 *Official Journal*, C 27 p. 21. The Memorandum of Understanding was signed on 30 November 2006.

press officer could and should have provided this information to the complainant. If the reason why the press officer was unable to provide an answer was that he or she did not have the necessary knowledge, it would have been appropriate to advise the complainant to make a written request for information, in accordance with Article 22(2) of the European Code of Good Administrative Behaviour.

In response, the Council argued that the Ombudsman had concluded that the Council had committed maladministration without providing the Council with an opportunity to comment on that finding. The Council also argued more generally that the procedure laid down in Article 4 (5) of the Ombudsman's Implementing Provisions violates Article 195 of the EC Treaty to the extent that it deprives the Council of a procedural guarantee provided by that Treaty provision. The Council also noted that the finding of maladministration was based, at least in part, on an alleged violation of the European Code of Good Administrative Behaviour. The Council argued that it was only bound by its own code and that other institutions cannot adopt texts binding upon the Council without a proper legal basis allowing them to do so. Moreover, the Council stated that Institutions cannot adopt such rules whilst circumventing the existing Treaty procedures and referred, by analogy, to the decision of the Court of Justice in Case C-27/04.

The Ombudsman considered it important to clarify the issues raised by the Council's letter and therefore wrote to Mr Solana. The Ombudsman first pointed out that, by forwarding the complaint to the Council with a request for an opinion, the Ombudsman had given the Council an opportunity to state its point of view in full knowledge of the case against it. The decision to close the case with a critical remark did not deprive the Council of the opportunity to respond to the finding of maladministration. On the contrary, the European Parliament has often encouraged institutions and bodies to follow up the Ombudsman's critical remarks. The Ombudsman therefore took the view that the interpretation of Article 195 of the EC Treaty which the Council had put forward in its letter was not necessary to protect the Council's legitimate rights of defence. Moreover, that interpretation would, if adopted, substantially diminish the useful effect of the Ombudsman institution by prolonging many inquiries unnecessarily. Finally as regards this point, the Ombudsman stated that Article 4 (5) of the Implementing Provisions is not inconsistent with Article 195 of the EC Treaty. On the contrary, it implements Article 3 (1) of the Statute of the Ombudsman¹, which provides for the Ombudsman to conduct "all the enquiries which he considers justified to clarify any suspected maladministration".

As regards the European Code of Good Administrative Behaviour, the Ombudsman emphasised that he has always made clear that it is not a legally binding text, but that it serves as a useful guide and a resource for civil servants and tells citizens what they can expect from the European administration. In fact, the provisions of the European Code of Good Administrative Behaviour to which the decision referred (Articles 12.1, 12.2 and 22.2) do not differ in substance from corresponding provisions

¹ European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994, L 113 p. 15.

of the Council's code (Articles 5, 6 and 8.2). By applying the European Code of Good Administrative Behaviour, the Ombudsman helps mitigate unnecessary confusion for citizens arising from the parallel existence of different codes. Finally as regards this point, the Ombudsman encouraged the Council, if it should take the view, either in the present case, or in any future case, that its own code does not, in substance, correspond to the European Code of Good Administrative Behaviour, to say so expressly. Such information would be valuable for the Ombudsman and also for the European Parliament.

In conclusion, the Ombudsman repeated his readiness to work with the Council to resolve complaints as rapidly and effectively as possible, so as bring the European Union closer to its citizens and strengthen confidence in the Union's institutions and bodies.

3 The European Commission

The complainants in **495/2003/ELB** were a married couple who were both working as Seconded National Experts. Their complaint concerned the wife's entitlement to allowances. Taking into account inconsistencies in the different language versions of the applicable Commission Decision C(2002)1559, which had meanwhile been replaced by a new and corrected decision (Decision C(2004)577), the Ombudsman proposed as a friendly solution that the Commission could consider paying the wife the allowances in question. After the Commission rejected the proposal, the Ombudsman addressed a letter to the responsible Commissioner asking for his personal involvement in seeking a satisfactory outcome to the complaint, indicating that this could take the form of an *ex gratia* payment to the complainants. The Commissioner's reply took the view that the Commission had correctly interpreted the applicable rules and rejected the Ombudsman's proposal. The Ombudsman closed the case with a critical remark to the effect that the Commission had acted unfairly by treating the complainants, in substance, as if Decision C(2004)577 rather than the defective Decision C(2002)1559 had been in force at the relevant date.

In response, the Commission disagreed with the finding of maladministration. However, the Commission wished to act in a conciliatory manner, displaying concern for the interests of the complainants, who were affected by the error in the French translation. Therefore, it offered to pay them the sum of EUR 1 500 for the inconvenience caused to them by such error. This offer is exceptional and will be valid only in the context of the current procedure brought by the Ombudsman. The Commission subsequently informed the Ombudsman that the sum of EUR 1 500 had been paid to the complainants.

In **617/2003/IP**, the Commission rejected the complainant's application for access to certain documents on the grounds that their disclosure would undermine the protection of commercial interests of a natural or legal person (Article 4(2), first indent of Regulation 1049/2001). The Ombudsman made a draft recommendation that the Commission should reconsider its decision and either grant access, or partial access, to the documents, or provide sufficiently detailed explanations to show that some or all of these documents, or parts of them, are covered by the above exception.

The Commission's detailed opinion recognised that some of the documents requested were, in accordance with Italian law, public documents. However, since they were not available to the public free of charge in Italy, the Commission took the view that it would have been inappropriate and contrary to the principle of loyal co-operation between the institution and the Member State concerned for it to provide the complainant with free copies. It therefore proposed, as a fair solution, to allow the complainant to consult the relevant documents at the premises of the Joint Research Centre in Ispra.

Concerning the possibility of granting partial access to the other documents, the Commission argued that the examination, page by page, of the relevant documentation and the extraction of limited fragments thereof would have created a totally disproportionate administrative burden and that the public interest in obtaining access to fragmentary parts of the document did not justify the administrative work involved.

The Ombudsman did not find the Commission's position convincing. However, since he considered that it was not apparent what kind of action the European Parliament could have taken in order to assist the Ombudsman and the complainant, he concluded that it was not appropriate to submit a special report and closed the case with two critical remarks.

In the first critical remark, the Ombudsman pointed out, in particular, that Regulation 1049/2001 does not contain an exception that would oblige a Union Institution to refuse access to documents purely because the disclosure of the documents in a Member State is not free of charge. The Ombudsman also recalled that the Court of First Instance had established that the institutions might, in particular cases, balance the public's interest in having partial access to the requested documents against the burden of work so caused. The Ombudsman also noted, however, that the Court made this principle dependant on a concrete and individual examination of the documents in question. No such concrete and individual examination appeared to have been carried out in the present case.

The second critical remark concerned the substantial delay by the Commission in handling the complainant's confirmatory application.

No response from the Commission was received.

Complaint **1419/2003/JMA**, concerned the Commission's handling of a complaint made to it concerning the low prices of sea bass and sea bream sold by Greek aquaculture enterprises and alleged lack of control by the Greek authorities. The Ombudsman criticised the Commission's failure to register the complainant's letters as complaints. In a further remark, he suggested that if the complainants were to lodge a new complaint with the Commission, enclosing with it all the evidence they have as to the current situation and the possible responsibility of the Greek authorities in that regard, the Commission should register and deal with such a new complaint in accordance with its 2002 Communication to the European Parliament and the European

Ombudsman on relations with the complainant in respect of infringements of Community law.¹

In response to the critical remark, the Commission recognized that it could have registered the complainants' letters of 18 October 2001 and of 28 March 2002 as complaints and confirmed its availability to proceed to a review of the situation if a new complaint would bring elements likely to justify such a review.

In **1537/2003/ELB**, the Commission had launched a disciplinary procedure against the complainant, who was subsequently acquitted of the charges against him. Following his acquittal, the complainant requested compensation, including the costs of preparing his defence.

The Ombudsman made a proposal for a friendly solution suggesting that, taking into account the seriousness of the charges made against the complainant and the length of time which had elapsed before it decided not to turn to the Disciplinary Board, the Commission could consider reimbursing the complainant for the expenses he reasonably incurred for his defence during the disciplinary procedure. In reply to the Ombudsman's proposal, the Commission took the view that, regardless of the seriousness of the charges made against him and the length of time which elapsed before it decided not to invoke the Disciplinary Board, the Staff Regulations prevented it from paying expenses reasonably incurred by the complainant for his defence.

After further correspondence, in which the Ombudsman unsuccessfully sought to persuade the Commission that the Staff Regulations did not prevent it from responding positively to his proposal on an *ex gratia* basis, the Ombudsman concluded that the Commission's refusal to pay the complainant's expenses, regardless of the seriousness of the charges against him and the length of time which elapsed before the Commission decided not to turn to the Disciplinary Board, was an instance of maladministration and made a critical remark.

In response, the Commission argued that its refusal to accept the proposal for a friendly solution was the inevitable result of legal constraints and did not result from an overly legalistic approach, as the Ombudsman seemed to imply. The Commission did not share the Ombudsman's reading of the Staff Regulations and of its financial provisions that, according to settled case-law, are to be strictly interpreted. Furthermore, as regards compensation for the length of the procedure, the Commission repeated that it could only be held liable for damages if a number of conditions were satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered. The Commission considered that the disciplinary proceedings against the complainant, because of the involvement of other persons against whom disciplinary proceedings were also launched, were long but not disproportionate in view of the complexity of the file. Thus, the condition of the illegality of an act committed by

¹ COM/2002/0141 final, OJ 2002 C 244 p. 5.

the Commission is not met. The Commission could not, therefore, agree to the Ombudsman's proposal to offer an *ex gratia* payment to the complainant.

The Ombudsman continues to believe, and regrets, that the Commission has adopted an overly legalistic approach in this case.

Case **1764/2003/ELB** concerned public access to an audit report and the Commission's register of documents. As regards access, the Commission responded positively to a proposal for a friendly solution, by giving partial access to the audit report. The Ombudsman concluded that there was no maladministration as regards the extent of the access given by the Commission. As regards the Commission's register of documents, the Ombudsman pointed out in a critical remark that sound financial management is of great concern to the public and audit reports are valuable sources of information on the way Community funds are used. Hence, principles of good administration require that audit reports and relevant documents held by the Commission should receive high priority in the Commission's setting up of a register of documents, in accordance with Article 11 of Regulation 1049/2001. In this case, the complainant found only two documents related to the audit at issue in the Commission's register. However, during the Ombudsman's inquiry, the Commission provided a list of 46 documents concerning this audit. Furthermore, the Commission only made general remarks regarding the contents of its register, which could not adequately justify the shortcomings pointed out by the complainant.

In response, the Commission maintained its view that the prime objective of Regulation 1049/2001 was to increase transparency in the legislative process of the EU. The Commission's registers provide full coverage of the Commission's legislative activity. The Commission confirmed that this was only a first step and that it intended to further extend the scope of its registers. It acknowledged that, where documents were not referenced in a register, citizens might have difficulties in identifying documents that could be of interest to them. Therefore, when the Commission receives a request for access where the applicant indicates the subject matter in which he is interested, it draws up a list of relevant documents indicating which documents may or may not be disclosed. In his confirmatory application, the complainant requested access to the audit report and did not reiterate his request for a list of documents. Such a list was provided with the Commission's reply to the Ombudsman. The Commission agreed that sound financial management was of great concern to the public and recalled that the Commission's management of the Community budget was scrutinised by the European Court of Auditors and by the European Parliament through the discharge procedure. According to the Commission, the public interest in sound management of public funds does not necessarily mean that audit reports should be made public in all cases or that all administrative documents relating to the management of specific projects should be referenced in a public register.

The Ombudsman notes that the question of the adequacy of the Commission's register of documents is the subject of another complaint 3208/2006/GG, in which a draft recommendation was made to the Commission on 7 April 2008. Furthermore, the legislative procedure for the amendment of Regulation 1409/2001 is due to be launched

in 2008. It could provide the opportunity for the duty to register to be focused more precisely by laying down principles as to what kinds of documents must be registered and requiring each institution to adopt and publish more specific internal rules to implement those principles.

In case **2177/2003/PB**, the complainant was a private sector adviser working for a third country receiving EDF-funding. The Commission criticised the complainant's performance as inadequate on a number of grounds. The Ombudsman considered some of these criticisms to be unfounded and made a critical remark to the Commission.

In response, the Commission essentially repeated its views as to why its criticisms of the complainant had been justified.

Case **281/2004/JMA** was the second complaint from a Spanish environmental NGO, which submitted a request for financial assistance in the framework of a Community action programme for the promotion of environmental organisations. The Commission excluded the organisation from the procedure for 2002 on the grounds that there appeared to be serious concerns regarding its legal standing. The NGO complained to the Ombudsman. In December 2004, the Ombudsman issued a decision on the first complaint (278/2003/JMA) in which he took the view that the Commission had not acted properly, and made both a critical remark and a further remark.

In July 2005, the Commission replied, stating as regards the critical remark that its decision to exclude the complainant's application resulted from the findings of both its services' audit and those of a report by OLAF. As regards the further remark, the Commission explained that it had updated its 1997 Early Warning System (EWS), aimed at alerting the responsible services of potential financial problems involving third parties seeking EU assistance or already benefiting from it. The result had been a reinforced monitoring of third parties, and the eventual referral of the matter to the Internal Audit Service, DG Budget or the responsible Commissioner.

Meanwhile, at the end of 2002, the complainant had made a new request for financial assistance for the year 2003. The Commission rejected his new request, using the same arguments as it had put forward to reject the complainant's 2002 request. The present complaint was against that rejection. In the decision on the case, the Ombudsman repeated the critical remark already made in case 278/2003/JMA:

The Ombudsman considers that, in taking measures to protect the Community's financial interests, the Commission should seek to strike a fair balance between the interests of private persons and the general public interest, so that potential beneficiaries of its financial assistance are treated both fairly and with due respect to the presumption of innocence. The Ombudsman also pointed out that it is difficult to envisage how the Commission could strike a fair balance unless it communicates to an applicant for a grant any doubts that it may have as to the applicant's legal standing and is then prepared to listen and respond to information provided by the applicant in order to clarify those doubts. Having reviewed the facts of the case, the Ombudsman found that the Commission had not been able to show that, in this instance, it struck a fair balance between the

need to pursue sound financial management of its grants, and the complainant's right to be treated both fairly and with due respect to the presumption of innocence. By exclusively relying on the formal existence of a legal inquiry against the complainant without further verifying that information, the Commission did not treat the complainant fairly, in breach of Article 6 (2) of the European Code of Good Administrative Behaviour.

The Ombudsman also recalled the further remark already made in the earlier case and the Commission's response thereto:

As already stated in case 278/2003/JMA, the Ombudsman believes that similar types of problems could be averted if the Commission were to take the initiative to provide its services with guidance or instructions on how to respect a fair balance between the interests of private persons and the general public interest in cases involving on-going judicial or administrative inquiries regarding the legal and financial standing of potential beneficiaries of Community assistance.

In its response to the further remark, the Commission mentioned updating of its "Early Warning System" (EWS). However, it is not obvious to the Ombudsman how this updating might relate to the concerns expressed in the further remark. The Ombudsman will therefore consider the possibility of an own-initiative inquiry into the EWS, based on the need to strike a fair balance between the competing interests at stake in its operation.

In response to the critical remark, the Commission said that its reply to the critical remark in case 278/2003/JMA also applied to this case.

As regards the further remark, the Commission explained that the reference to an improved EWS in its reply in case 278/2003/JMA, had not addressed the problem encountered by the complainant, since the Commission's decision on an improved EWS was adopted on 3 February 2004, well after its services had refused to grant financial assistance to that NGO in 2002 and 2003. The Commission noted, however, that its reference to the improved EWS system aimed at replying the Ombudsman's general statement that similar types of problems could be averted if the institution were to take the initiative to provide its services with guidance or instructions. The Commission explained in detail the mechanics of the improved EWS and enclosed with its reply a copy of the latest Commission Decision on the EWS (C(2004) 193/3 as amended by the 2007 internal rules).

The Ombudsman notes that the European Data Protection Supervisor has examined aspects of the EWS. The Ombudsman is currently considering the potential usefulness of an own-initiative inquiry into the operation of the EWS.

In case **2227/2004/MF, (DR)** the Ombudsman made a draft recommendation that the Commission should give a reasoned reply to the complainant's appeal made under Article 90 (2) of the Staff Regulations. The Commission rejected the draft recommendation and the Ombudsman closed the inquiry with the following critical remark:

According to Article 90(2) of the Staff Regulations, the Appointing Authority shall notify the person who has lodged an internal complaint of its reasoned decision within four months. This is in line with the principles of good administration. It is true that Article 90(2) of the Staff Regulations provides that the lack of reply within the period of four months laid down in this provision is deemed to constitute a negative decision. This rule is meant to protect the citizen where an administration does not comply with its legal obligations. It does not in any way give the administration the right to depart from the obligations resulting from the principles of good administration.

In response, the Commission maintained its view that lack of reply is expressly foreseen by Article 90 of the Staff Regulations. The Commission considered that the Ombudsman's critical remark was unfounded.

The Ombudsman considers that the Commission's position confuses two fundamental rights: (i) the right to effective judicial protection, the protection of which is the purpose of the provision that failure of a public authority to respond within a period of four months is deemed to give rise to an implied refusal and (ii) the right to good administration, which includes the obligation of the administration to give reasons for its decisions.

The Ombudsman is considering whether to open an own-initiative inquiry into this matter.

Case **2437/2004/GG** concerned, among other things, public access to documents. This aspect of the case gave rise to two critical remarks.

The first remark criticised delays that had occurred in registering and in replying to the complainant's confirmatory application. The Commission had explained these delays by the fact that the application was submitted in a holiday period. The Ombudsman did not find this argument convincing. Even if it was understandable that registration of a confirmatory application that arrives in the holiday period might take a little longer than usual, the delay that occurred in the present case (application faxed on 30 July, but not registered until 12 August) went beyond what could be considered acceptable. The Ombudsman also took the view that the absence of several officials on holidays cannot be considered to constitute an "exceptional" case within the meaning of this provision that would justify an extension of time for replying to the application.

The second critical remark concerned the fact that it was still far from clear whether the documents that the Commission had released to the complainant constituted all the documents to which the complainant had sought access.

In response, the Commission explained that it had taken note of the Ombudsman's criticism but did not share his view that there had been maladministration. The Commission also submitted that it had presented its apologies to the complainant. As regards the substance of the case, the Commission explained its approach and provided a list of the documents on its file.

The Ombudsman notes that the Commission did not, in fact, apologise to the complainant but merely expressed its “regrets”. As regards the substance of the case, the Commission response finally provided pertinent explanations and a list of the documents on its file. If the Commission had provided this information at an earlier stage, there would have been no need for a critical remark. The Ombudsman also thanks the Commission for pointing out an error in point 4.9 of the Ombudsman's decision which referred to the “absence of a reply” to the initial request for access to documents, whereas the request had, in fact, been rejected in a letter sent on 19 July 2004. However, since this error concerned the initial request for access, it was without any relevance for the Ombudsman's findings, which concerned only the handling of the confirmatory application.

Case **2944/2004/ID** concerned the Commission’s handling of an Article 226 complaint relating to the implementation of Directive 2003/88. The Ombudsman made a further remark encouraging the Commission regularly to inform the complainant about the status of her complaint. In response, the Commission stated that it would do its utmost to keep the complainant informed about the development of the inter-institutional discussions concerning amendment of the Directive.

Case **3369/2004/JMA** concerned the handling by the Commission of an Article 226 complaint. One of the issues raised in the complaint to the Ombudsman was the length of time taken by the Commission to issue a reasoned opinion following its letter of formal notice to the national authorities. Following the opening of an inquiry by the Ombudsman, the Commission proceeded to address a reasoned opinion. The Ombudsman, therefore, considered no further inquiries were justified. However, a further remark was made as follows:

The Ombudsman notes that the Commission’s Communication on relations with the complainant in respect of infringements of Community law¹ specifies neither a normal time limit for the investigation of complaints following the issuing of a letter of formal notice, nor the information to be given to complainants in the period after such a letter has been sent. The Ombudsman points out, however, that Article 41 (1) of the Charter of Fundamental Rights of the European Union states that “*(e)very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*”. The Ombudsman has carefully studied the case law of the Community courts concerning the discretion that the Commission enjoys in handling infringement cases. The Ombudsman takes the view that the case law does not exclude the application of the principles of good administration to relations between the Commission and complainants in the period following the sending of a letter of formal notice. The Ombudsman, therefore, considers that the Commission should respect the principles of good administration in relations with the complainant in the period following the sending of a letter of formal notice.

¹ COM/2002/0141 final, OJ 2002 C 244 p. 5.

In response, the Commission emphasised that the primary objective of the infringement procedure is to cause the offending Member State to come into line with Community law and not to provide individuals with a means of redress. In the Commission's view, Article 41 (2) of the Charter embodies the rights of individuals who are parties to the proceedings. However, the parties to the infringement proceedings under Article 226 are only the Commission and the Member State, not the complainant, who cannot invoke any right in this context, in particular the right to a fair hearing.

The Commission acknowledged, however, that the principles of good administration do apply the Commission's relations with complainants in the framework of possible infringements of Community law. As well as the Commission's Code of Conduct, which is generally applicable to the Commission's relations with the public, the Commission's 2002 Communication further elaborates the principles of good administration with respect to infringements of Community law. The Communication's requirements also apply to relations between the Commission and complainants in the period following the sending of a letter of formal notice.

The Ombudsman welcomes the Commission statement that the requirements of the 2002 Communication also apply to relations between the Commission and complainants in the period following the sending of a letter of formal notice.

In case **3403/2004/GG**, the complainants appealed against certain marks awarded to their son in his school-leaving examination by the European School in Brussels. The Complaints Board of the European School considered that it was not competent to deal with the case. It took the view that, although Article 27 of the Convention defining the Statute of the European Schools envisaged such appeals, the existing implementing provisions did not allow for an appeal in a case like the present one. The complainants then turned to the Ombudsman. Given that the European Schools are not themselves Community institutions or bodies, the Ombudsman's inquiry focused on the Commission's role.

After an unsuccessful attempt to achieve a friendly solution, the Ombudsman made a draft recommendation, urging the Commission to ensure that a proposal for an amendment of the implementing provisions was presented to the Board of Governors of the European Schools so that the Complaints Board could examine the complainants' case.

Although the Commission's detailed opinion demonstrated its constructive and sustained efforts to assist the complainants, the Ombudsman found maladministration by the Commission. The finding was based on the following considerations. The importance of the Commission's involvement in the European Schools System is such that it must play an active role in order to ensure that the European Schools comply with principles of good administration. In the present case, the Commission tried to bring about a retroactive extension of the competences of the Complaints Board so as to enable the complainants' case to be dealt with by the latter. However, the Commission stopped these efforts when its proposal to that effect was rejected by the Administrative and Financial Committee, one of the Board of Governors' preparatory committees. Given the

clear-cut nature of the deficiency that the proposed amendment was meant to tackle and the importance of the issue concerned, the Ombudsman considered that the Commission should have insisted that its proposal be brought to the attention of and discussed by the Board of Governors. The Ombudsman noted that the European Parliament had called on the Commission to report to it after each meeting of the Board of Governors. It could not, therefore, be excluded that the Board of Governors would have paid better attention to the arguments put forward by the Commission in support of this amendment than the Administrative and Financial Committee appears to have done. In these circumstances, the Ombudsman considered that the Commission has not done everything that was reasonably possible in this case.

In response, the Commission informed the Ombudsman in January 2007 that, given the importance of the issue, it had asked the Secretary-General of the European Schools to put the Ombudsman's decision on the agenda of the Board of Governors. It also informed the Ombudsman that the European Schools had adopted a Code of Good Administrative Behaviour. The Ombudsman thanked the Commission for its rapid and constructive reaction.

In January 2008, the Commission made further comments on the critical remark in case 3403/2004/GG and also on the Ombudsman's decision of 27 November 2007 in case 3323/2005/WP¹, which dealt with a similar issue. The Commission explained that the issue of granting a limited retroactive extension of the competences of the Complaints Board had been submitted to the Board of Governors, which dealt with it by way of a written procedure on 16 November 2007. The Commission pointed out that the result of this procedure showed how isolated it had been on this issue. It emerged from the information provided by the Commission that 29 members of the Board of Governors had opposed the proposal and that only the Commission had supported it.

The Commission submitted that it had constantly asked for a limited retroactive extension of the competences of the Complaints Board so as to make it possible for the complainants' cases to be dealt with by the Complaints Board. In the Commission's view, the fact that the decision of the Board of Governors had been delayed by one year could not be attributed to the Commission, since it was the Secretary-General of the European Schools who set the agenda of the Board. The Commission therefore firmly rejected the critical remark.

The Ombudsman replied to the Commission, underlining that the decision was based on the situation prevailing at the time when the decision was adopted on 6 November 2006. The Ombudsman noted that since then, the Commission had made considerable further efforts to defend the complainants' interests and that it had succeeded in bringing the issue before the Board of Governors. The Ombudsman considered it clear that the Commission cannot be held responsible for the fact that the Board of Governors has not adopted the proposal submitted to it by the Commission.

¹ No maladministration by the Commission was found in this case.

The Ombudsman notes that in case 2153/2004/MF, a draft recommendation was made to the Commission in a case concerning the competence of the Complaints Board to deal with an appeal against increases in the level of fees. At the time of writing, the Ombudsman's decision on the case is at an advanced stage of preparation, the Commission having accepted the draft recommendation.

Case **3531/2004/TN** concerned the Commission's refusal to grant public access to certain documents under Regulation 1049/2001. The decision closing the case contained a critical remark and two further remarks.

The critical remark concerned the fact that the Commission's reply to the second confirmatory application was sent shortly after the relevant deadline had expired. Although the delay in replying was limited, the fact remains that the Commission failed to comply with the deadlines set out in Regulation 1049/2001. In the Ombudsman's view, it is clear that the tight deadlines foreseen in Regulation 1049/2001 are meant to ensure that the right of access is fully respected and failure to respect these deadlines thus constitutes maladministration.

The first further remark concerned the Commission's practice of ignoring a confirmatory application that was made in the absence of a reply to the initial application if it crosses with a reply to the initial application. Despite the Commission's good intentions in establishing this practice, the Ombudsman pointed out that there is no provision in Regulation 1049/2001 that suggests that a confirmatory application loses its *raison d'être* if the institution replies after the prescribed time-limit. The Ombudsman asked the Commission to review its general practice in this field.

The second further remark pointed out that the Commission had appeared to suggest that for the purposes of applying Article 4(2), third indent, of Regulation 1049/2001, an investigation could still be considered as pending even though the decision closing it had already been taken. The Ombudsman thought this interpretation doubtful and invited the Commission to reconsider its position.

In reply to the critical remark, the Commission acknowledged that its reply to the complainant's confirmatory application was sent one working day after the extended time limit had expired and that the Ombudsman's finding of maladministration was formally correct. However, the Commission pointed out that it approached the UK authorities on three occasions in order to ensure the widest possible access to the requested documents. The delay in replying to the complainant was entirely due to these consultations. In the end, the complainant obtained the requested document. However, if the Commission had replied within the time limit, the result would have been less favourable for the complainant. The Commission therefore considered that the Ombudsman's conclusion did not take into account its efforts to obtain the best possible outcome for the complainant. In its view, the fact that the time-limit was exceeded by one working day is outweighed by the positive outcome of the Commission's handling of the complainant's request for access.

In reply to the first further remark, the Commission argued that when a confirmatory application following the Commission's failure to reply crosses with a

substantive reply, in particular when partial access is being granted, the confirmatory application becomes devoid of purpose. In the case at hand, the Commission could have simply confirmed its reply to the initial application, thus depriving the complainant of the opportunity to submit a substantive confirmatory application. This would have been contrary to the wording and the spirit of Regulation 1049/2001. An applicant should be given the opportunity to challenge a negative or partially negative decision on the basis of arguments, thus ensuring that a genuine reassessment of the application is carried out. The Commission therefore explicitly opens the possibility for applicants to submit a new confirmatory application on substantive grounds. This is in the applicant's interest who would otherwise have to take the matter further to the Ombudsman or to the Court.

In reply to the second further remark, the Commission pointed out that the exception laid down in Article 4(2), third indent of Regulation 1049/2001 (the protection of the purpose of investigations) was invoked by the Director-General for Competition in his reply of 20 July 2004 to the initial access request. The reply to the confirmatory application was based on Article 4(5) of the Regulation. The Director-General correctly stated that the State Aid case was still pending. In fact, the complainant had brought an action to the Court for the annulment of the Commission's decision. In case the Court annuls a Commission decision in a State Aid case, the Commission must reopen its investigation in order to take a new decision. In this regard, the Commission recalled that in Case T-126/99¹, the Court held: "so long as the Commission has not taken a decision approving it and so long as the period for bringing an action against that decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone is capable of giving rise on the part of the recipient to a legitimate expectation." Therefore, as long as such a decision has not become irrevocable, the need to protect the investigation remains. This interpretation is consistent with the case law of the Court of First Instance in the *Franchet and Byk* joined cases T-391/03 and T-70/04.

As regards the critical remark, the Ombudsman is grateful to the Commission for the explanation of the reasons for the delay in replying to the confirmatory application and welcomes the Commission's efforts to ensure the widest possible access for the complainant to the requested documents.

As regards the first further remark, the Ombudsman considers that the Commission has provided a convincing explanation of its practice and endorses the Commission's approach.

As regards the second further remark, the Ombudsman notes the Commission's position as regards the interpretation of Article 4(2), third indent of Regulation 1049/2001. The Ombudsman does not find the Commission's position convincing, but the purpose of the present study is not to debate issues of legal interpretation in the abstract. The Ombudsman will therefore examine the position *in concreto* if the occasion arises in dealing with a future complaint.

¹ Case T-126/99 *Graphischer Maschinenbau GmbH v Commission* [2002] ECR II-2427 paragraph 42.

Case **142/2005/BB** concerned the decision of the European Commission to reject the complainant's tender without requesting further clarifications. The Ombudsman found no maladministration. However, one of the arguments put forward by the Commission seemed to be that it might have an obligation to request clarification regarding a tender when there is a particularly obvious error, even if this would entail a modification of the terms of the tender. The Ombudsman made a further remark pointing out that this argument would be inconsistent with the principle of equal treatment of tenderers, which is a general principle of Community law, and with the second paragraph of Article 99(h) of Regulation 3418/93.

In response, the Commission explained that its original position (that a request for additional clarification to a tenderer may only be imposed when the contracting authority detects a particular obvious error) is subject to respect for the principles of transparency, equal treatment and sound administration and the original terms of the tender.

Case **146/2005/GG** was closed since no further inquiries appeared to be necessary. However, a further remark was made encouraging the Commission in future cases, to send an addendum to its opinions if it emerges that relevant information, which had been in the possession of the Commission at the time of sending the opinions, has not been taken into account in these opinions. The Ombudsman considers that this would not only facilitate his task but also be in the Commission's interest, given that the provision of this information might make further inquiries unnecessary.

In response, the Commission informed the Ombudsman that it wholeheartedly accepted the Ombudsman's remark.

Case **582/2005/PB** concerned a request from an international environmental NGO for access to a submission made by the Commission to a dispute panel of the World Trade Organisation (WTO). The Commission had rejected access to this document under the exception in Regulation 1049/2001 concerning the protection of "court proceedings" (Article 4(2), second indent, of that Regulation).

The Ombudsman criticised the Commission for having adopted an impermissibly extensive interpretation of the said exception. He recalled the legal obligation to apply narrowly the exceptions to public access to documents. The Commission had failed to respect this obligation by taking the position that the WTO settlement procedures can be "assimilated to" court proceedings.

In reply to the Ombudsman's critical remark, the Commission elaborated further on its position that the WTO dispute settlement procedures can be 'assimilated' to court proceedings. It also argued that the Community legislator had not intended to limit the scope of the "court proceedings" exception to documents submitted to court *strictu sensu*.

The Ombudsman notes the Commission's position as regards the interpretation of Article 4(2), second indent of Regulation 1049/2001. The Ombudsman does not find the Commission's position convincing, but the purpose of the present study is not to debate

issues of legal interpretation in the abstract. The Ombudsman will therefore examine the position *in concreto* if the occasion arises in dealing with a future complaint.

Case **760/2005/GG** concerned the position of seconded national experts ("SNEs") as regards special leave to appear as witnesses before a court. The Ombudsman criticised the Commission for failing to treat officials and SNEs alike in this regard.

In response, the Commission informed the Ombudsman that the critical remark would be taken into account when drafting a new decision on SNEs. A precise timetable could not yet be given, but a decision was envisaged for October 2007. In this framework, the Commission would allow special leave for SNEs for the purpose of appearing as witnesses, wherever appropriate proof was provided.

The Ombudsman thanked the Commission for its constructive and helpful approach.

Case **818/2005/PB** concerned a contractual dispute. The Ombudsman criticised the Commission for (i) failure to reply to a request for information and (ii) unjustified delay in handling a payment request.

In response, the Commission recognised and offered its apologies for not replying to the request for information within the deadline of 15 working days contained in the Commission's code of good administrative behaviour. The Commission added that the staff concerned had been reminded of the importance of respecting the deadlines in the code. As regards the second critical remark, the Commission maintains that from a strictly legal contractual point of view, the payment concerned could not have been made earlier. However, it also expressed regret that its communication with the coordinator was not sufficiently clear during the exchange of e-mails regarding the cost statements and the final payment in the second half of 2004 and at the beginning of 2005.

The Ombudsman forwarded the Commission's response to the complainant for information, drawing attention to the apology.

Complaint **0880/2005/TN** concerned the European Commission's alleged failure to inform the European Emergency Number Association about the status of its Article 226 complaints. In his decision of 30 November 2006 on the case, the Ombudsman noted that the Commission's 2002 Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law¹ states that, as a general rule, the Commission will investigate an Article 226 complaint with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. The English version of the second paragraph of Point 8 states that "*[w]here this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing*". The Ombudsman noted, however, that there is a discrepancy between this language version and most other language versions² in that the

¹ COM/2002/0141 final, OJ 2002 C 244 p. 5. , See Point 8, first paragraph, of the Annex.

² The Ombudsman notes, however, that the Swedish version corresponds to the English version.

latter state that "[w]here this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing at his request"¹. In the present case, the Commission had based its reasoning on the latter versions, arguing that at no point did the complainant request information from the Commission as to the status of EENA's complaints after the one-year deadline.

As regards the information to be provided by the one-year deadline, the Ombudsman recalled that, according to Article 21 of the EC Treaty, every citizen of the Union may write to the EU institutions and bodies in one of the Treaty languages and have an answer in the same language. This right of the European citizens to have their requests for information replied to by the EU institutions and bodies is further developed in, for instance, the European Code of Good Administrative Behaviour and the Commission's own Code of Good Administrative Behaviour. It is thus abundantly clear that principles of good administration require the Community institutions and bodies to reply to requests for information. Accordingly, if the Commission's interpretation of Point 8, second paragraph, of the Annex to the Communication were to be accepted, that provision would only state the obvious. In order to preserve the *effet utile* of this provision, the Ombudsman considered that the relevant information has to be provided on the Commission's own initiative and without any need for a request to that effect being made by the complainant. The Ombudsman therefore took the view that the English-language version of the second paragraph of Point 8 properly reflects what the Commission committed itself to do in this field in 2002. Furthermore, this interpretation of the Commission Communication was accepted by the Commission itself in other cases dealt with by the Ombudsman². The Ombudsman therefore considered that he needed to examine whether the Commission, in the present case, had properly informed the complainant of the reasons why the handling of his complaint could not be completed within the one-year time-limit.

The Ombudsman took the view that informing the complainant in writing when the one-year time-limit referred to in Point 8 of the Annex to the Commission Communication is exceeded is not an end in itself. In the Ombudsman's view, it is clear that the rationale behind this provision is to inform the complainant of the status of his complaint and to explain the reasons as to why the Commission cannot arrive at a decision to issue a formal notice or to close the case within one year. It is therefore conceivable that there might be no need for a written communication if the complainant is clearly aware of the fact that the Commission's inquiry cannot be completed within one year and of the reasons for the delay.

Having analysed the circumstances in the present case, the Ombudsman made a critical remark, since the Commission had not provided a convincing explanation as to why it was not in a position to inform EENA about the reasons for not being able to arrive at a decision to issue a formal notice or to close the cases concerned by the end of the one-year time-limit.

¹ Emphasis added.

² See the Commission's opinion in case 289/2005/(WP)GG. This case gave rise to a special report to the European Parliament, which is available on the Ombudsman's website (www.ombudsman.europa.eu).

As regards the discrepancies in the different language versions of the Commission Communication, the EO made the following further remark:

The Ombudsman considers that the *effet utile* of Point 8, second paragraph, of the Commission Communication requires the Commission to inform the complainant on its own initiative whenever it finds itself unable to complete its examination of an Article 226 complaint within a period of one year. However, the present text of the Communication gives the impression, in many language versions, that information will only be provided on the complainant's request. In order to clarify this issue and thereby to provide complete transparency as regards citizens' rights in this area, it would therefore be most useful if the Commission could consider bringing all the language versions of Point 8 of the Communication in line with the English version¹.

In July 2007, the Commission responded to the Ombudsman's critical remark and further remark.

As regards the critical remark, the Commission argued that no provision of the Communication requires it to communicate to the complainant the reasons why it has taken a concrete decision on the substance of a complaint submitted to it, nor why it is not able to arrive at a decision to issue a formal notice or to close the case after one year. According to the Commission, its sole obligation is to inform the complainant of the state of play after one year if the complainant requests such information. The fact that, in the present case, the complainant was informed, by letter of 25 May 2005, that the Commission needed supplementary information, did not constitute an instance of maladministration but went beyond the obligation set out in the Communication.

As regards the further remark, it stated that “*[i]t is unfortunate that the English and Swedish versions of the Communication lack the explicit requirement of an enquiry by the complainant, and that this discrepancy between the language versions may lead to different readings of the text in question. Nevertheless, the French version of the Communication ('à sa demande'), requiring an enquiry of the complainant, was the working document (drafting version) of the Communication in the course of its adoption by the College of Commissioners in 2002. In addition, as demonstrated by the exchange of correspondence of 18 November 2004 between the Complainant and the Commission services, the Complainant was provided with the French version of the Communication by the Commission services.*”

As regards the discrepancy in the different language versions of the Commission Communication, the Commission adds that “*[a]s the obvious error in [the] English translation (leading to the erroneous Swedish translation) should not prejudice, in any case, its correct and coherent application and in order to clarify this issue and therefore to provide more transparency, the Commission has started its preparation to bring the erroneous English and Swedish versions in line with the other nine language versions*”.

¹ The Ombudsman noted that the Swedish version already reads along the lines of the English version.

The Ombudsman notes that the Commission's response to his remarks fails to address the Ombudsman's argument as to why the English and Swedish versions of Point 8 of the Annex to the Commission Communication have to be the correct ones, as well as his argument that the Commission has accepted these versions of Point 8 in earlier cases. The Commission merely states that the French version was the working document.

On 3 March 2008, the Ombudsman made a critical remark to the Commission in another case (3737/2006/JMA) concerning the same issue.

More generally, the Ombudsman is considering the potential usefulness of an own-initiative inquiry into aspects of the implementation of the Commission's Communication of 5 September 2007, *A Europe of Results – Applying Community Law*¹.

In **1037/2005/GG**, the complainant alleged that the Commission had failed to take the necessary action in order to make Germany comply with the judgments of 14 December 2004 in Case C-463/01 (*Commission v Germany*) and in Case C-309/02 (*Radlberger and others v Land Baden-Württemberg*). The Ombudsman closed the case with the following critical remark:

The Commission has wrongly interpreted the obligations incumbent on it pursuant to Article 228 of the EC Treaty by failing to provide convincing arguments to show that no further steps to make Germany comply with the judgment of the Court of Justice in Case C-463/01 were necessary.

In response, the Commission informed the Ombudsman that it wished to take issue with his decision in a number of respects. The relevant comments made by the Commission can be summarised as follows:

- (1) The Commission could not pursue the infringement found in Case C-463/01, since the infringement had ceased.

The Court had criticised the fact that the German rules did not grant a sufficiently long transitional period. However, between July 2002 (when the deposit was announced) and 14 December 2004 (the date of the judgment), operators *de facto* disposed of a period of almost 30 months to adapt to the new system. Consequently, the Commission did not consider that Germany needed to take further measures to comply with the judgment in Case C-463/01.

- (2) The findings in Case C-309/02 could not be used for the purpose of a possible procedure under Article 228(2)

The findings of the Court in Case C-463/02 had no value in the evaluation as to whether or not Germany had taken the necessary steps to comply with the judgment in Case C-463/01. It was inconceivable that the Commission could go beyond the subject-matter of a judgment of the Court in an infringement case.

¹ COM(2007) 502.

Otherwise the Commission would infringe a fundamental principle of procedural law.

- (3) The Commission did not interpret Article 228(2) wrongly.

When the Commission considered that Germany was not required to take further steps to comply with the judgment in Case C-463/01, it certainly did not interpret Article 228 wrongly, as the Ombudsman maintained in his critical remark.

- (4) Article 228(2) confers discretionary powers on the Commission.

Even if the Commission had come to the conclusion that Germany had not yet complied with the judgment in Case C-463/01, it would have enjoyed discretionary powers on the appropriate action to take in that situation. Article 228(2) was worded in exactly the same way as Article 226. The Court has consistently held that the Commission enjoys a discretionary power in deciding whether or not to commence infringement proceedings and to refer a case to the court. The Court had in the meantime transposed this case law to Article 228(2).

It followed that the Ombudsman was wrong in considering, at point 2.10 of his decision, that Article 228(2) did not grant the Commission a discretionary power as regards the first stage of the procedure laid down in this provision.

- (5) A different interpretation of the law in infringement procedures cannot amount to maladministration.

The interpretation of Community law and Court judgments by the Commission, when acting as Guardian of the Treaties with regard to infringement proceedings, was a matter that could only be reviewed by the Court of Justice and which was, in general, outside the notion of maladministration.

A mere difference in the interpretation of the law between the Ombudsman and the Commission, resulting from a decision of the college, could not be considered an instance of maladministration. Otherwise, the division of competencies as entrusted by the Treaty would be put in question.

The Ombudsman notes that the first three points made by the Commission concern the substance of the case. Given that the Ombudsman set out his position at some length in the decision, it would not appear to be useful to enter into a new discussion concerning the merits of the case. The Ombudsman remains convinced that his approach in the present case was both correct and appropriate.

As regards point (4), point 2.10 of the decision is worded as follows:

"(...) *Second*, Article 228(2) appears to grant the Commission a discretionary power only as regards the second stage (as regards the decision as to whether to submit the case to the Court) but not the first stage (as regards the determination whether a Member State fails to comply with a judgment). Given that the

Commission effectively argues that Germany did not fail to comply with the judgment in Case C-463/01, the Commission's (undisputed) discretionary powers are however without relevance for the present case.

The Ombudsman shares the view of the Commission that the latter's discretion under Article 228(2) is the same as that under Article 226. However, the Ombudsman considers that the Commission's undoubted discretion to decide whether or not to open infringement proceedings (under Article 226) or to refer the case to the Court again (under Article 228) only arises if and when the Commission forms the view that there is an infringement. As the context makes abundantly clear, the remark made in point 2.10 of the Ombudsman's decision in this case was meant to convey the view that the exercise of a discretion can only make sense once the Commission has come to the conclusion that there is (or appears to be) an infringement.

As regards point (5), the Ombudsman's view is that in a society governed by the rule of law, any public administration must follow the law and that errors of legal interpretation can, therefore, constitute maladministration. However, the Ombudsman has always made clear that the Court of Justice is the highest authority as regards the interpretation of Community law. The Ombudsman, therefore, does not understand how the approach taken in the present case could risk putting into question the division of competencies foreseen by the Treaty, as suggested by the Commission.

The Ombudsman also notes that a difference of views on legal interpretation need not always give rise to a critical remark, as is illustrated, for example, by the Ombudsman's decision of 16 July 2007 in case 3269/2005/TN.

Case **1463/2005/TN**, concerned the Commission's refusal to grant access to documents relating to the national plans for the allocation of greenhouse gas emission allowances ("NAPs") notified to the Commission by the United Kingdom, France and Slovakia. The refusal was based on Article 4(2), third indent, and Article 4(3), first subparagraph, of Regulation 1049/2001. During the course of the Ombudsman's inquiry, the complainant was granted access to the requested documents after the NAP approval procedure for all Member States had been finalised. However, the Ombudsman criticised the Commission's original refusal to give access. The critical remark pointed out that:

Article 4(3), first paragraph, of Regulation 1049/2001 applies to documents drawn up by an institution for internal use. The documents covered by the request for access were communications sent to and received from the authorities of certain Member States. In the Ombudsman's view, they could not, therefore, be considered as documents meant for internal use.

Article 4(2) of the Regulation requires that, in order for access to be refused, it has to be established that disclosure would undermine the protection of the purpose of the investigations. The purpose of the investigations in the present context was to make sure that the Member States' NAPs were in conformity with Community law. In order for the exception in Article 4(2) to be applicable, the Commission had to establish that the disclosure of the documents in question would undermine that purpose. It had not done so. The Ombudsman therefore found that the Commission had wrongly refused

access to the documents during ongoing negotiations and that its refusal constituted an instance of maladministration. The Ombudsman made a critical remark in this regard.

In response, the Commission made the following points as regards the applicability of Article 4(2) third indent:

The Commission maintains that disclosing the exchange of communications with the British, French and Slovak authorities regarding their NAPs would have adversely affected the procedure leading to the approval of the remaining NAPs.

The NAP approval procedure laid down in Directive 2003/87/EC ensures that NAPs established by Member States meet the criteria set out by this Directive. It is therefore similar to other Community law enforcement procedures, which fall within the Commission's role as "Guardian of the Treaties", such as infringement proceedings or State aid procedures.

Even if the NAP approval procedure is of a preventive nature, whereas infringement proceedings concern alleged violations of Community law, both procedures aim at achieving Member State compliance with EU legislation. The approval of a NAP is not a mechanical act, but leaves a margin of appreciation to the Commission in assessing its compatibility with the Directive. For a NAP that has not been concluded yet, setting up a NAP and answering open questions from the Commission is at times a sensitive process for Member States. Thus there is an interest to disallow disclosure of any communication between the Member States and the Commission to keep the participation in this process limited to the Member States concerned and the Commission until the NAP assessment process is fully concluded. But even in cases where a NAP has already been approved it is important to disallow the disclosure of communications with a Member State until the last NAP has been assessed, because revealing the dialogue with that Member State could interfere with the ongoing assessment of the not yet approved NAPs to achieve a coherent EU-wide framework.

As regards the applicability of Article 4(3) first subparagraph, the Commission made the following points:

This exception was invoked in addition to Article 4(2) third indent. The Commission maintains that the first subparagraph of Article 4(3) may cover documents received from the Member States, since it also concerns documents "received by an institution" relating to "a matter where the decision has not been taken by the institution". The Commission considers that due to the need to ensure overall coherence, the NAP approval procedure was not completed as long as all NAPs of Phase II had not been approved. Therefore the communications from the British, French and Slovak authorities were linked to a matter where the Commission had not taken a final "decision" in the sense of the above wording of Article 4(3) first subparagraph, even if the NAPs of these three Member States had already been approved. Moreover, ongoing disclosure of communications during the whole NAP assessment exercise could jeopardise the whole NAP assessment process in view of the very tight deadline allowed to the Commission for performing this task: once the

NAP is complete the Commission has only three months for its assessment, otherwise the NAP will be automatically regarded as approved. This puts the Commission already under severe time pressure, taking into account that the mere translation of a NAP could take a large share of this time limit.

The Commission acknowledged, however, that it should have clarified that it invoked the exception laid down in Article 4(3) first subparagraph only with regard to the communications received from the Member States.

The Ombudsman welcomes this clarification.

The Ombudsman also notes the Commission's explanations as regards the application of Article 4(2) third indent. Since the purpose of the follow-up of critical remarks and further remarks is not to re-open an inquiry that has already been closed, the Ombudsman does not consider it appropriate or useful to re-evaluate the Commission's refusal of access in the light of the additional information provided by the Commission.

Case **1555/2005/MHZ** concerned a selection procedure for the recruitment of a contractual agent during a period when the Commission was applying transitional rules. In a further remark, the Ombudsman suggested that the Commission might wish to consider whether it would be useful, during the remainder of the transitional period, for its first communication to candidates for contract agent posts to contain information about the criteria applied in the pre-selection stage.

In response, the Commission stated that it found the Ombudsman's remark to be constructive and helpful and accepted that pre-selection criteria may not always be apparent to potential candidates. With this in mind, DG ECFIN had decided (i) to draw the attention of potential candidates to the job requirements, making it more explicit that they will be used as pre-selection criteria and (ii) to cite explicitly any additional or secondary criteria which may be applied for a specific job.

Case **1599/2005/MHZ** concerned the allocation of European funds for information campaigns in Poland concerning the Treaty Establishing a Constitution for Europe. The following further remark was made:

In its answer to the Ombudsman's further inquiries, the Commission stated that Member States must respect the provisions of national constitutional law and their obligations resulting from the European Convention of Human Rights, to which they are party. The Ombudsman considers it useful to point out that the Commission could also have referred in this context to Articles 6 and 7 of the Treaty on European Union.

In response, the Commission stated that it took note that the Ombudsman had not found any maladministration and has therefore closed the case.

Case **1707/2005/GG** concerned recruitment to the Commission. The complainant was invited to and underwent the medical examination. Her application was subsequently excluded as ineligible because she did not possess the necessary

educational qualifications. The Ombudsman closed the inquiry into this complaint with the following critical remark:

It is good administrative practice to avoid causing citizens to waste their time unnecessarily. The Ombudsman fully understands that in competitions involving hundreds or thousands of candidates it is not always possible or even appropriate to check the eligibility of candidates at the very outset. However, the present case cannot be compared to competitions involving a multitude of candidates. The complainant was the only person who had been proposed for the relevant post. It should also be noted that the complainant had already worked for the Commission. DG ADMIN thus already possessed a file concerning this candidate. Furthermore, DG SCIC had asked DG ADMIN to proceed to the recruitment of the complainant already in January 2004, more than three months before the medical examination took place. Even if the handling of the request made by DG SCIC had had to be postponed until the announcement of new provisions concerning the recruitment of temporary agents on 24 March 2004, it had to be noted that nearly a month passed after that date before the complainant was invited to the medical examination and that another two weeks passed before the medical examination was carried out. The Commission's services thus had more than enough time to familiarise themselves with any new approach that might have been adopted. In these circumstances, the Ombudsman considers that it could have been expected of a service-minded administration to check the eligibility of the complainant's application and not to ask the complainant to undergo a medical examination in case her application was considered to be ineligible. The Commission's failure to act accordingly constitutes an instance of maladministration.

A further remark pointed out that the information supplied by the Commission during the course of the inquiry gave rise to doubts as to what the Commission's actual position is as regards the possibility to rely on Article 5(3) (a) (iii) of the Staff Regulations in relation to the recruitment of temporary agents under Article 2(b) of the Conditions of Employment. The Ombudsman envisaged an own-initiative inquiry to clarify the matter.

In response to the critical remark, the Commission stated that it regretted the Ombudsman's critical remark, that there was no factual basis for it and that it did not intend to act on it. The Commission insisted that the practice criticised by the Ombudsman was justified for reasons of efficiency and economy and that these considerations outweighed any perceived inconvenience for candidates. According to the Commission, they are even in the candidates' interests, to the extent that the procedures can thereby be run faster and more efficiently.

The Ombudsman regrets that the Commission's response ignores the fact that the critical remark expressly pointed out "the present case cannot be compared to competitions involving a multitude of candidates".

1726/2005/TN concerned the Commission's decision to recover money granted to a project under the Fifth Framework Programme. The decision contained a further

remark encouraging the Commission to improve the clarity of the contracts providing Community funding by explaining, in explicit terms, the conditions that have to be fulfilled in order for sub-contracting costs to be considered.

In response, the Commission referred to the guidelines for the Fifth Framework Programme and those for the Sixth Framework Programme, which provide explanations and examples of the financing conditions under the model contract. In the Commission's view, the provisions of the contract are therefore already clear and further explanatory provisions exist, for instance in the Guide to Financial Issues relating to Indirect Actions of the Sixth Framework Programmes.

Nine complaints concerning the procedure leading to the establishment of temporary agents as permanent officials in the Joint Research Centre of the Commission (JRC) were dealt with in a joint inquiry (**2075/2005/MHZ**, **2349/2005/MHZ**, **2274/2005/MHZ**, **2275/2005/MHZ**, **2276/2005/MHZ**, **2079/2005/MHZ**, **2354/2005/MHZ**, **2666/2005/MHZ** and **3685/2005/MHZ**). The Ombudsman found *prima facie* evidence of maladministration in the general arrangements for the competitions concerned, but considered that no further inquiries were justified because, in the circumstances of the case, a finding of maladministration could not lead the Ombudsman to suggest that the Commission accept the complainants' claim that it organise a further internal competition for their recruitment as officials. A first further remark welcomed Commissioner Potočník's initiative to review in detail the past practice of recruitment in the JRC. The Ombudsman also announced that he would consider whether it could be useful to open an own-initiative inquiry into the management of human resources at the JRC. A second further remark welcomed the Commission's statement that it may organise, on a case-by-case basis, internal competitions should the interests of the service require it. In this context, the Ombudsman took the view that the Commission could usefully review the status of the members of the JRC research staff, who occupy, as temporary agents, permanent posts with contracts of indefinite duration.

In response to the first further remark, the Commission stated that improvements in the practices for recruitment in the JRC have been implemented, which have resulted in better quality control of vacancy notices and the establishment of clear guidelines on their drafting. The Commission noted that the Appointing Authority with respect to officials is now exercised jointly by DG ADMIN and the JRC, which includes, *inter alia*, the new recruitment of officials within the JRC. Furthermore, the Commission remained at the Ombudsman's disposal as regards the possibility of an own-initiative inquiry.

As regards the second further remark, the Commission confirmed that the Commission could plan the organisation of internal competitions on a case-by-case basis, though such competitions would not be organised at the request of the temporary staff, but solely if the interest of the service so requires.

The Ombudsman opened an own-initiative inquiry into the management of human resources at the JRC on 17 December 2007 (OI/6/2007/MHZ).

Case **2471/2005/BU** concerned the Commission's traineeship programme. The Ombudsman's decision contained a further remark which pointed out that the people who apply to the Commission for in-service training are, by definition, interested in active participation in the European project. Such applications could therefore represent a valuable opportunity for the Commission in the context of its "long-term plan to reinvigorate European democracy and help the emergence of a European public sphere, where citizens are given the information and the tools to actively participate in the decision making process and gain ownership of the European project"¹. The Ombudsman therefore suggested that the Commission could usefully examine whether it could communicate more effectively with all applicants for in-service training, including those whose applications are not successful.

In response, the Commission informed the Ombudsman that the website of the Traineeships Office was reviewed in depth in 2006 in order to make the information clearer to all applicants (successful or not) during the application and selection process. Furthermore, the texts of the automatic e-mails sent to unsuccessful candidates have also been personalised and are now more detailed. The Traineeships Office is considering whether, and what, further information could be sent in certain cases where this could be felt necessary. Finally, the staff of the Traineeships Office has been reminded of its obligation to reply to all mail within a deadline of 15 days of the registration of the correspondence, as mentioned in the Code of good administrative behaviour.

Case **3172/2005/WP**, concerning late payment of a town twinning grant, was closed as settled by the institution. A further remark was made as follows:

The Ombudsman is pleased to note that the Commission has taken measures that appear to have significantly improved its administration in the town twinning sector. However, he also notes that the Commission acknowledged that, in the present case, a certain delay in the payment of a grant had arisen. Given that applicants for funding in this sector are likely to be bodies with relatively limited financial means, the Ombudsman would consider it to be a further improvement of its administrative standards if the Commission could consider paying interest for late payment in such cases.

In response, the Commission clarified that interest for late payment is already fully applicable to town twinning grants, following Article 83 of the Financial Regulation and Article 106 of its implementing rules, which stipulate that "*the beneficiary may, within two months following the date of receipt of a late payment, request payment of interest on the late payment (...)*". The Commission was unwilling to take a pro-active approach by providing for automatic payment of interest since this would increase the administrative burden considerably and slow down payments, which could in fact have a counter-productive effect.

¹ "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions - The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate", 13 October 2005, COM(2005) 494 final, page 2.

The Ombudsman welcomes the fact that the Commission has given serious thought to the suggestion made in the further remark and has no reason to doubt that the Commission deals properly with requests for payment of interest in relation to late payment of town twinning grants. However, beneficiaries of town twinning grants may not be familiar with the Financial Regulation, especially if they are not trained in law. Furthermore, since delays constitute misbehaviour on the part of the Commission, it is not obvious that the beneficiary should be required to make a request for payment.

Moreover, the Commission's view that automatic payment of interest would have detrimental effects on its efficiency in such cases is difficult to understand. Since the Commission has all the necessary information at its disposal, it is not obvious why its automatic payment of interest would require disproportionate time and effort.

The Ombudsman's views were communicated to both the Commission and the complainant.

Case **3706/2005/MHZ** concerned the Commission's Europe Aid webpage concerning tenders and grants. A further remark was made suggesting that the Commission could consider whether, in view of the fact that the contracts concerned are financed by the Community, it could take a more active role in ensuring that the Contracting Authorities in delegated procedures respect their obligations as regards prompt preparation and transmission of contract award notices.

In response, the Commission stated that following the Ombudsman's observation and for purposes of transparency of tender procedures, the Commission has decided to forward the Ombudsman's decision in this complaint to all Delegations in order to encourage "*an even more active role of the Commission in ensuring that the Contracting Authorities in delegated procedures respect their obligations as regards prompt preparation and transmission of contract award notices.*"

The Commission attached a copy of the relevant note sent to all EC Delegations. The Commission also stated that EuropeAid envisaged the possibility of including a short operational summary of this decision together with a link to the internet site on which this full decision can be read in the intranet made available to all EC Delegations.

The own-initiative inquiry **OI/1/2006/TN** concerned the extent to which the Commission has acted to promote the availability of alternative methods of dispute resolution ("ADR"), and in particular mediation, in relation to contracts financed by the Commission.

In its opinion, the Commission made a commitment to encourage ADR in the future through the insertion of an optional mediation clause in its standard procurement contracts. As regards disputes between contractors and sub-contractors, the Commission said that it could only recommend, not impose, recourse to ADR. The Commission also referred to grants, stating that it is obliged to be very cautious not to relinquish its prerogatives as a public authority resulting from the EC Treaty, notably in order to protect its financial interests, and thus to protect taxpayers' money.

In the decision closing the inquiry, the Ombudsman welcomed the introduction of an optional mediation clause in Commission standard procurement contracts as well as the Commission's intention to follow-up the use of the clause.

As regards sub-contractors, the Ombudsman underlined that mediation could be a way of solving disputes between the Commission's contractors and their sub-contractors and thus of preventing the sub-contractors from turning to the Commission for assistance that it is not in a position to provide. In line with the Commission's endeavours to bring Europe closer to citizens and to inspire them with confidence in the EU and its institutions, the Ombudsman considered it useful for the Commission to take measures to avoid situations that leave citizens with an unjustified negative impression of the EU institutions.

As regards grants, the Ombudsman pointed out that if mediation is successful, the parties come to a voluntary agreement on how to solve their dispute. No solutions are imposed on either party. Accordingly, mediation in a dispute related to a grant agreement would not imply a risk for the Commission of being forced to agree to a solution that would be contrary to Community law or the Community's financial interests.

The Ombudsman found no maladministration by the Commission. However, he made a further remark, asking the Commission to communicate to him, by 30 June 2007:

1. The outcome of its follow-up on the use of the mediation clause in procurement contracts and on the concrete results arising from such use;
2. Any future considerations as regards the possibilities of recommending to its contractors recourse to mediation in their relations with their sub-contractors; and
3. Any future considerations concerning the possibility of extending the use of mediation to cover grant agreements as well, perhaps in light of the outcome of the follow-up of the application of the mediation clause in its procurement contracts.

In response, the Commission agreed that a follow-up of the mediation clause in procurement contracts would be useful. However, the clause in question will only be applicable as from late 2007 or early 2008 and disputes subject to mediation will not necessarily occur in the early stages of the contracts' execution. The Commission therefore considers that a period of at least two years from the date of entry into force of the first contracts containing the clause is needed in order to analyse its effect. The Commission will inform the Ombudsman of its implication and results in due time.

The Commission further explained that it has drafted a recommendation to its contractors to have recourse to mediation in their relations with their sub-contractors, to be integrated into the model invitation to tender.

However, as regards grant agreements, the Commission maintained that the introduction of a mediation clause would not be appropriate. Mediation would imply a possibility of mediators' interference with the Commission's exclusive right to decide

upon grants and their implementation. In addition, mediation launched before the Commission's decision is taken could cause unnecessary delays in the day to day management of grant agreements since each grant agreement is subject to a large number of administrative acts which do not necessarily take the form of a formal decision. Furthermore, the new Article 108(1), second paragraph, of the Financial Regulation, as revised by Council Regulation No 1995/2006 of 13 December 2006, mentions expressly the concept of “grant decision”. This confirms that a unilateral legal act in form of a Commission decision can fulfil the same purpose as a grant agreement and reinforces the public law nature of EU grants.

The Ombudsman understands and accepts the Commission’s explanation of why more time is needed for a follow-up of the mediation clause in procurement contracts. The Ombudsman thanks the Commission for its good co-operation in offering to inform the Ombudsman of the results in due time.

The Ombudsman welcomes the information that the Commission has drafted a recommendation to its contractors and that this will be integrated into the model invitation to tender.

As regards grants, the Ombudsman points out that mediation in relation to disputes arising under grant agreements or decisions would not necessarily imply that the Commission would have to relinquish its power to decide on whether the conditions of the grant decision have been fulfilled, or that the mediator would interfere with the exercise of this power. Mediation could, therefore, be useful for the quick and effective resolution of disputes and help the Commission improve its relations with the beneficiaries of grants, without undermining the Commission's responsibilities as regards the proper use of public money. In this context, the Ombudsman notes that the Commission has established its own staff mediator, without depriving itself of its power of decision as Appointing Authority.

In **163/2006/MHZ**, the Commission acknowledged and expressed regret for its failure to reply to the complainant's letter. However, a critical remark was made because the Ombudsman did not consider that an expression of regret constitutes an unambiguous apology that could reasonably be expected to satisfy the complainant.

In response, the Commission acknowledged the Ombudsman's finding that the failure to acknowledge or reply to the complainant's letter was an instance of maladministration. Furthermore, the Commission emphasised its intention to correctly apply its own Code of Good Administrative Behaviour, and in particular to ensure that letters addressed to the Commission are replied to within 15 days of receipt by the responsible Commission department.

In **866/2006/SAB**, the Commission rejected the complainant’s pre-proposals under the Socrates programme as having been sent after the deadline. The Ombudsman criticised the Commission for its initial decision and for its rejection of the complainant’s appeal.

In response, the Commission stated that it could not have been expected that the Evaluation Committee was acquainted with the particular practice of DHL in Athens which, by removing all evidence that the pre-proposals were dispatched in Patras on 1 November 2005, gave rise to the problem. As regards the complainant's appeal, the Commission considered (i) that the text of the application form was sufficiently clear and that it was the responsibility of the applicants to make sure that their pre-proposals bore a postmark or equivalent proof of timely dispatch; (ii) that *in any case, the decision on the eligibility of the proposals could not at that stage be changed, since the timeframe was too limited for any full proposals to be submitted by the deadline of 1 March 2006*; and (iii) that an ad hoc treatment of the complainant's pre-proposals would have been incompatible with the principle of equal treatment. Consequently, the Commission again rejected the pre-proposals.

The Commission also pointed out that it was aware of the complainant's good faith and had, therefore, made an effort to find the best possible solution and advice that would help the complainant in the future. It could not be held responsible for practices of certain express mail companies.

The Commission also stated that it would lodge a complaint with DHL in Greece about their practice of removing the original date of dispatch. The Commission also changed its procedures; it was now contacting all applicants as soon as possible after receipt of their proposals if there was any doubt as regards timely submission. Hopefully these new procedures would prevent similar cases from happening in the future.

Finally, the Commission asked the Ombudsman to reconsider the conclusion in his decision.

It should be noted that the critical remark only concerned the Commission's decision to reject the complainant's pre-proposals and its subsequent confirmation of that appeal. The Ombudsman acknowledges and welcomes the Commission's efforts to find a solution to the complainant's problem. The Ombudsman also welcomes the action taken by the Commission to prevent similar problems arising in the future.

4 The European Central Bank (ECB)

1440/2005/MHZ concerned a procedure for selection of staff at the ECB. In a further remark, the Ombudsman suggested that it would be in the interests of good relations with citizens, as well as in conformity with principles of good administrative behaviour, for the ECB, in future, to inform each candidate who is excluded from a recruitment procedure because he or she does not satisfy the conditions laid down in a notice of vacancy of precisely which condition or conditions that candidate does not fulfil.

In response, the ECB stated it has now fine-tuned its standard replies to applicants, so as to inform them how to request individual reasoning in their case.

5 The European Investment Bank (EIB)

In **994/2004/IP**, the Ombudsman criticised the EIB's failure to reply to the complainant's fax. In **3501/2004/PB**, a further remark was made encouraging the EIB to improve its handling of future requests for information from the public.

In response, the EIB gave a detailed account of its policies and procedures to deal with requests for access to information and complaints. A note dated 11 July 2006 informs the EIB's staff of the updated Public Disclosure Policy and states that all public enquiries should be transmitted to the InfoDesk without delay, to ensure strict application of the Policy, including respect for deadlines. The EIB emphasised that both the InfoDesk and the Complaints Office endeavour to reply in as detailed a way as possible on the EIB's reasons for non-disclosure and to clearly explain its policies and procedures. This reflects the EIB's interest in transparency towards its stakeholders and the public as well as a conscious effort to avoid complainants escalating the issue to the Ombudsman. The EIB also explained that it fully supports the Ombudsman's efforts to promote transparency and good administrative conduct and welcomes his intervention.

6 The Committee of the Regions

The critical remark in **786/2006/JF** concerned failure to provide information to a contractor and to answer his letters. The Committee of the Regions informed the Ombudsman of measures to avoid similar maladministration in the future. In particular, induction training for new staff includes information on the Code of Good Administrative Behaviour and targeted annual sessions will be held to remind staff of the importance of good administrative behaviour.

The Committee settled complaint **800/2006/WP**, which concerned non-reimbursement of travel expenses after a job interview. The further remark encouraged the Committee systematically to follow-up payment files in future cases, by contacting applicants if required documents are missing and informing them of the reasons for any delays. The Committee instructed the service concerned to act in accordance with the Ombudsman's observations.

7 The European Centre for the Development of Vocational Training (CEDEFOP)

In **1429/2005/JF**, the Ombudsman criticised CEDEFOP's failure to respond to a request from its Staff Committee as not being in accordance with principles of good administration as they apply to the relationship between the administration and public servants in a Community body.

The Director of CEDEFOP subsequently informed the Ombudsman that she had read the Ombudsman's decision with great interest.

8 The European Defence Agency (EDA)

In **2044/2005/BM**, the Ombudsman made a further remark suggesting that it would be in the interests of good relations with citizens, as well as in conformity with principles of good administrative behaviour, for the EDA, in future selection procedures, to use individual written evaluation forms for each candidate indicating which, or any, of the conditions for eligibility or the selection criteria for the specific position are not fulfilled. This practice would help the EDA to rapidly inform each candidate who is excluded from a recruitment procedure, because he or she does not satisfy the conditions or criteria specifically laid down in the vacancy notice, which of them have not been fulfilled.

In response, the EDA informed the Ombudsman that it had amended its recruitment procedures in accordance with the suggestions in the further remark.

9 The European Personnel Selection Office (EPSO)

Case **1953/2003/PB** also concerned the information provided to a complainant in a recruitment competition. The Ombudsman made two critical remarks, the first of which was essentially the same as those in cases 674/2004/PB and others, which are discussed below. It received a similar response from EPSO. The Ombudsman also criticised the lack of adequate reasoning for refusal to provide the complainant with information on his ranking in the competition. In response, EPSO pointed out that the information requested had not been established for this competition, hence it failed to see how it could respond to the complainant's request.

The Ombudsman notes that EPSO's reply does not take account of the fact that the production of information requested by citizens is one of the normal functions of a service-minded administration, provided that it does not constitute an excessive and disproportionate administrative burden. This principle was applied in, for example, case 3436/2004/ELB in which the Ombudsman found no maladministration by the European Anti-Fraud Office (OLAF)¹.

In case **75/2004/BB**, the Ombudsman made two critical remarks. The first concerned the fact that the reply to the complainant's Article 90 (2) complaint was given more than three months after the deadline established in the Staff Regulations. The second concerned the lack of adequate reasoning to justify a refusal to provide statistical information on the successful candidates who had worked for DG Justice and Home Affairs in any capacity during the two years preceding the test.

In response, EPSO contested the Ombudsman's findings of maladministration, essentially repeating the views and arguments it had put forward during the inquiry.

In cases **674/2004/PB**, **2961/2004/PB**, **1733/2005/BU**, **1744/2005/IP** and **2053/2005/IP**, the Ombudsman made essentially the same criticisms of the information

¹ See the Ombudsman's Annual Report for 2006, page 67.

provided to candidates on evaluation sheets. The critical remarks pointed out that the adequacy of the information provided in the evaluation sheet is to be appraised in view of the purpose of providing a candidate with a copy of his or her marked examination paper, as indicated in the Ombudsman's special report of 18 October 1999 to the European Parliament, which was accepted by the European Commission on 7 December 1999. Thus, the evaluation sheet should provide the candidate concerned with sufficiently clear and detailed information in light of those purposes. Where the evaluation sheet concerns a translation test, it must provide information not only on the types, but also on the seriousness and the extent of the errors or weaknesses identified by the Board in the candidates' paper, without, however, imposing an unreasonable administrative burden on Boards. In response, EPSO essentially rejected the criticism. It repeated the description of the marking procedure and the Selection Boards' competence that it had given during the inquiries and argued that compliance with the Ombudsman's suggestion would involve too much work and delay the procedures.

The Ombudsman notes that these cases arose before EPSO's adoption of more informative evaluation sheets. Furthermore, the issue of principle concerning the extent of the information provided in evaluation sheets is now being dealt with in the framework of the Ombudsman's own-initiative inquiry OI/5/2005/PB.

The further remark in **1217/2004/OV** welcomed EPSO's statement that it tries to reply to all appeals under Article 90(2) of the Staff Regulations within four months. The Ombudsman also encouraged the Appointing Authority, whenever it expects that its reply will be sent after the expiry of the four-month deadline, to send a holding letter to the complainant. In this way, the complainant can also be prepared for the situation foreseen in Article 91(3) of the Staff Regulations which provides that "where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired (i.e. before the period of three months since the implied rejection decision), the period for lodging the appeal shall start to run afresh".

EPSO's response stated that complainants are already sent a letter informing them of the date of registration of the complaint; that a reasoned reply should be sent within four months from the date of registration; and that absence of a reply within this period is considered as an implied rejection decision, against which an appeal can be made on the basis of Article 91 of the Staff Regulations. EPSO considered that this letter deals perfectly with the Ombudsman's concern to help the complainants to prepare themselves for introducing an appeal.

The Ombudsman notes that EPSO's response does not address the issue raised in the further remark concerning the situation foreseen in Article 91(3) of the Staff Regulations (i.e. where the Appointing Authority's reply is sent after the expiry of the four-month deadline).

In **3399/2004/OV**, the Ombudsman criticised EPSO for failing to treat the complainant fairly and reasonably. After re-marking the complainant's written test, the Selection Board had admitted the complainant to the oral test having initially excluded

him. The Ombudsman considered that it would have been reasonable and would have demonstrated solicitude and diligence, if EPSO had proposed the last possible date for the oral test so as to minimise the loss of preparation time resulting from the complainant's initial exclusion. The Ombudsman also made a further remark welcoming the fact that the Selection Board had carried out a genuine re-evaluation of the complainant's test and encouraging EPSO and the Selection Boards in all competitions to duly consider requests for re-evaluation presented by candidates and to make corrections in their previous assessments where they consider it appropriate. Such an approach would demonstrate the rigour and thoroughness of the Selection Boards' work and enhance the confidence and trust of citizens in the selection procedures organised by EPSO. In its response, EPSO put forward legal arguments essentially contesting the Ombudsman's finding of maladministration. It made no substantive comment on the further remark.

In **3553/2004/WP**, the Ombudsman criticised EPSO's failure to notify the complainant of its decision on his complaint under Article 90(2) of the Staff Regulations in the language in which he lodged his complaint within the relevant deadline. In its response, EPSO stated that it requested translations only once a decision had been signed and that, in the complainant's case, there had been a certain delay because the translation service had to cope with an increased workload, given that the translation of certain legal documents, such as the new Staff Regulations, had to be prioritised. EPSO also recalled that, according to case law, officials and candidates in selection procedures could not impose on the administration the use of a certain language. It added that the applicants' rights of defence were not affected even if they did not receive the decision (in their main language or in another language) within the relevant deadline because, pursuant to Article 91 (3) of the Staff Regulations, "where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired, the period for lodging the appeal shall start to run afresh".

The Ombudsman notes that EPSO's response to the critical remark does not indicate that EPSO has taken action to ensure that candidates in selection procedures receive the decision on an Article 90(2) complaint within the relevant deadline and in the language in which they lodged their complaint.

In **32/2005/ELB**, the Ombudsman criticised an inconsistency in the information on which candidates in an open competition were required to base their answers to a series of multiple-choice questions. The Ombudsman also criticised EPSO for failure to deal with the complainant's request for information within a reasonable time. In a further remark, the Ombudsman suggested that EPSO could envisage including a clarification as to whether a test question might contain inconsistent information such as the one here concerned in future Notices of Competition.

In response, EPSO said that it had taken due note of the Ombudsman's remarks.

In **1459/2005/GG**; the Ombudsman criticised EPSO's failure to keep a proper record of outgoing correspondence to the complainant, as well as the provision of incorrect information to the complainant in a telephone conversation. The Ombudsman

considered that the case showed that there were internal administrative inadequacies within EPSO.

In its response of 15 October 2007, EPSO informed the Ombudsman that it would take all necessary measures to ensure that such errors and problems would not arise again in the future.

In **1587/2005/BB**, the further remark suggested that EPSO could clarify in future notices of competitions whether paper copies of webpages and/or simple references to websites or webpages might constitute “documents” in support of applications.

In response, EPSO stated that Selection Boards have no duty to consult websites cited by candidates and that it is up to the candidate to evaluate whether it is valid to forward paper copies of webpages. In order to clarify to future candidates which supporting documents are required from them, EPSO will add relevant clarifications to candidates in its future Notices of Competition.

In **2616/2005/SAB**, the Ombudsman made a further remark suggesting that EPSO should only use a clause prohibiting candidates from applying for more than one of parallel competitions when, for reasons related to sound and timely management and organisation of competitions, it is certain that the tests will indeed be held simultaneously, thereby making multiple participation impossible. Only under unusual and unexpected circumstances that would make it impossible or extraordinarily difficult for the tests to be carried out simultaneously, should EPSO deviate from its announced intention, which justifies the prohibition on candidates from applying for more than one of parallel competitions.

In response, EPSO informed the Ombudsman that it would only have recourse to the clause prohibiting candidates from applying for more than one of parallel competitions if it has a firm intention to organise the test simultaneously. EPSO also takes all the necessary measures to organise the test simultaneously, as announced to the candidates.

Case **2747/2005/IP** concerned the complainant’s request to know his ranking among the 105 candidates who had been invited to the oral test of a particular open competition. EPSO provided the information to the complainant during the course of the Ombudsman’s inquiry. In a further remark, the Ombudsman encouraged EPSO, in the future, to provide complete and accurate information without the need for a complaint to the Ombudsman. The Ombudsman also pointed out that, it was not for EPSO to assess whether or not the information could be useful for the complainant.

In response, EPSO pointed out that the information finally disclosed to the complainant is not, at present, generated automatically and that, in order to guarantee equal treatment of candidates, the computer software currently used would need to be modified.

In **2924/2005/OV**, the Ombudsman criticised EPSO because the information contained its convocation letter to the complainant was not correct and did not

correspond to the information contained in the Notice of Competition. In its response, EPSO stated that it took due note of the Ombudsman's remark concerning the conformity of the convocation letters with the provisions of the notice of competition.

In **3509/2005/JF**, the Ombudsman criticised EPSO for not providing the complainant with a more detailed answer to her question about the reasons for the linguistic regime applying to a competition. In its response, EPSO stated that it took due note of the Ombudsman's critical remark concerning the quality of its answers to candidates.

In **17/2006/MHZ**, the further remark suggested that, in order to avoid possible misunderstandings and to improve relations with candidates in the future, EPSO could ensure that, in future notices of competition, the terms used in headings concerning the admission requirements correspond to those used in the text.

In response, EPSO referred to the need to take into account the different structures of education in the European Union and the fact that some certificates are equivalent to a diploma.

In **1085/2006/MHZ**, the Ombudsman criticised EPSO for not having acted proportionately and fairly. EPSO had refused to accept the complainant's confirmation of his registration for an open competition. The confirmation was slightly delayed because the complainant became ill. The illness was certified by medical certificates. In its response, EPSO acknowledged the Ombudsman's concerns, but put forward a variety of arguments seeking to justify its refusal to alter its position.

B LIST OF CASES IN WHICH A CRITICAL REMARK WAS MADE

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
0495/2003/ELB	<u>EN</u>	<u>FR</u>
0617/2003/IP	<u>EN</u>	<u>IT</u>
1419/2003/JMA	<u>EN</u>	<u>ES</u>
1537/2003/ELB(CONF)	<u>EN</u>	<u>FR</u>
1764/2003/ELB	<u>EN</u>	-
1953/2003/PB(CONF)	<u>EN</u>	<u>IT</u>
2177/2003/PB(CONF)	<u>EN</u>	-
0075/2004/BB(CONF)	<u>EN</u>	-
281/2004/JMA(CONF)	<u>EN</u>	<u>ES</u>
0674/2004/PB	<u>EN</u>	<u>FR</u>
0994/2004/IP	<u>EN</u>	<u>IT</u>
1219/2004/IP	<u>EN</u>	<u>IT</u>
2227/2004/MF(CONF)	<u>EN</u>	<u>FR</u>
2437/2004/GG	<u>EN</u>	<u>DE</u>
2961/2004/PB(CONF)	<u>EN</u>	-
3399/2004/OV(CONF)	<u>EN</u>	<u>NL</u>
3403/2004/GG(CONF)	<u>EN</u>	-
3531/2004/TN	<u>EN</u>	-
3553/2004/WP(CONF)	<u>EN</u>	-
0032/2005/ELB(CONF)	<u>EN</u>	<u>FR</u>
0287/2005/JMA(CONF)	<u>EN</u>	<u>ES</u>
0582/2005/PB	<u>EN</u>	-

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
0760/2005/GG	<u>EN</u>	<u>DE</u>
0818/2005/PB(CONF)	<u>EN</u>	<u>DE</u>
0880/2005/TN	<u>EN</u>	-
1037/2005/GG	<u>EN</u>	<u>DE</u>
1429/2005/JF	<u>EN</u>	-
1459/2005/GG(CONF)	<u>EN</u>	<u>DE</u>
1463/2005/TN(CONF)	<u>EN</u>	-
1707/2005/GG	<u>EN</u>	<u>DE</u>
1733/2005/BU(CONF)	<u>EN</u>	<u>FR</u>
1744/2005/IP	<u>EN</u>	<u>IT</u>
1919/2005/GG	<u>EN</u>	-
2053/2005/IP	<u>EN</u>	<u>IT</u>
2924/2005/OV	<u>EN</u>	<u>FR</u>
3509/2005/JF	<u>EN</u>	-
0163/2006/MHZ	<u>EN</u>	-
0786/2006/JF	<u>EN</u>	-
0817/2006/TN	<u>EN</u>	<u>SV</u>
0866/2006/(GK)SAB	<u>EN</u>	-
1085/2006/MHZ	<u>EN</u>	<u>FR</u>

C LIST OF CASES IN WHICH A FURTHER REMARK WAS MADE

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
1419/2003/JMA	<u>EN</u>	<u>ES</u>
0281/2004/JMA(CONF)	<u>EN</u>	<u>ES</u>
1217/2004/OV(CONF)	<u>EN</u>	-
2944/2004/ID	<u>EN</u>	-
3369/2004/JMA	<u>EN</u>	<u>ES</u>
3399/2004/OV(CONF)	<u>EN</u>	<u>NL</u>
3501/2004/PB	<u>EN</u>	-
3531/2004/TN	<u>EN</u>	-
3732/2004/GG	<u>EN</u>	<u>DE</u>
0032/2005/ELB(CONF)	<u>EN</u>	<u>FR</u>
0142/2005/BB	<u>EN</u>	-
0146/2005/GG	<u>EN</u>	<u>DE</u>
0880/2005/TN	<u>EN</u>	-
1315/2005/BB	<u>EN</u>	-
1440/2005/MHZ	<u>EN</u>	-
1555/2005/MHZ	<u>EN</u>	-
1587/2005/BB	<u>EN</u>	<u>FR</u>
1599/2005/MHZ	<u>EN</u>	-
1707/2005/GG	<u>EN</u>	<u>DE</u>
1726/2005/TN	<u>EN</u>	-

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
2044/2005/BM(CONF)	*	*
2075/2005/MHZ	<u>EN</u>	<u>FR</u>
2079/2005/MHZ	<u>EN</u>	-
2274/2005/MHZ	<u>EN</u>	-
2275/2005/MHZ	<u>EN</u>	-
2276/2005/MHZ	<u>EN</u>	-
2349/2005/MHZ	<u>EN</u>	<u>FR</u>
2354/2005/MHZ	<u>EN</u>	-
2471/2005/BU	<u>EN</u>	-
2616/2005/SAB	<u>EN</u>	-
2666/2005/MHZ	<u>EN</u>	-
2747/2005/IP	<u>EN</u>	<u>IT</u>
3172/2005/WP	<u>EN</u>	<u>DE</u>
3706/2005/MHZ	<u>EN</u>	-
0017/2006/MHZ(CONF)	<u>EN</u>	<u>PL</u>
0800/2006/WP(CONF)	<u>EN</u>	<u>DE</u>
3685/2005/MHZ	<u>EN</u>	-
OI/1/2006/TN	<u>EN</u>	-

* The decision in this case could not be satisfactorily anonymised and is, therefore, not published. As explained in the study, the EDA's follow-up of the further remark was exemplary.