



Decision

of the European Ombudsman closing his own-initiative inquiry OII/4/2012/CK concerning the European Centre for the Development of Vocational Training (Cedefop)

The background to the inquiry

1. The European Ombudsman launched a programme of visits to the EU agencies in May 2011 with the aim of promoting good administration and sharing best practice among these EU entities. These visits are formally carried out on the basis of the Ombudsman's competence to conduct own-initiative inquiries under Article 228 of the Treaty on the Functioning of the European Union. They provide an opportunity for the Ombudsman and the agencies to engage in a constructive dialogue with a view to nurturing and strengthening an administrative culture of service to citizens¹.

2. Cedefop was established by Regulation (EEC) No 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training², which was last amended by Council Regulation (EC) No 2051/2004³. Its mission is to support the development of European vocational education and training (VET) policies and to contribute to their implementation.

3. The Ombudsman visited Cedefop on 22 February 2012.

The subject matter of the inquiry

4. The meeting with Cedefop's management focused on the following issues:

- Complying with the Code of Good Administrative Behaviour and ethical standards
- Transparency, dialogue and accountability
- Selection and recruitment
- Tenders

¹ Information on previous visits to the EU agencies is available on the following page of the Ombudsman's website: www.ombudsman.europa.eu/activities/visits.faces

² OJ L 39, 13.2.1975, p. 1–4

³ OJ L 355, 1.12.2004, p. 1–3



- Conflicts of interest
- The absence of a staff committee

The Ombudsman's findings and suggestions following his visit to Cedefop

5. On 27 April 2012, the Ombudsman sent a Report to Cedefop containing his findings from the visit and the following suggestions⁴:

- a)** In addition to its commitments to create a dedicated page for access to documents requests and to produce an annual report on its handling of such requests, Cedefop could consider adopting formal procedures to deal with requests for access to documents. Such procedures should include both initial requests and confirmatory applications. In that way Cedefop would be able to comply with the deadlines set out in Regulation 1049/2001. The participation of the legal advisor in the handling of requests for access to documents would be most appropriate and advisable. The Ombudsman added that he would be happy to assist Cedefop in providing further training about access to documents and the application of Regulation 1049/2001.
- b)** The Ombudsman encouraged Cedefop to make at least the homepage of its website, as well as information on its functions and language policy, available in all 23 Treaty languages. By greeting citizens who visit the website in their own language and explaining its functions to them, Cedefop would demonstrate clearly that it recognises that all citizens of the European Union have a legitimate interest in its work.
- c)** With a view to further improving the information provided to candidates in selection procedures, the Ombudsman encouraged Cedefop to inform candidates of all the possibilities available to them to challenge a decision excluding them from a competition. The possibilities of external challenge are the right to complain to the Ombudsman and the right to bring an action for annulment before the EU courts.
- d)** The Ombudsman suggested that Cedefop reconsider its position regarding disclosure of the names of Selection Board members.
- e)** Cedefop could consider informing tenderers about the possibility to seek redress by submitting a complaint to the Ombudsman.
- f)** The Ombudsman encouraged Cedefop to take all necessary measures to ensure that a Staff Committee would be elected to represent the interests of the staff.

⁴ For a more detailed account on the visit and the Ombudsman's findings and suggestions, see the Report of the European Ombudsman's following his visit to the European Centre for the Development of Vocational Training (Cedefop), OII/4/2012/CK, <http://www.ombudsman.europa.eu/en/activities/visitreport.faces/en/11781/html.bookmark>



The follow-up given by Cedefop to the Ombudsman's suggestions

6. On 18 July 2012, Cedefop sent its follow-up action plan on the Ombudsman's suggestions. Cedefop informed the Ombudsman that it intended to create in its website a dedicated section for access to documents requests. The webpage, which will be available in English, German and French, will provide immediate access to Cedefop's 'most requested documents' and will include a request form to be used in cases where the document sought is not available online. Requests that require legal advice in order to be answered will be forwarded to the Legal advisor. The Agency also committed itself to publishing an annual report on its handling of access to documents requests. Cedefop informed the Ombudsman that, as from August 2012, it intended to make available in English, German and French its official website's static information, such as information on its mission and its main areas of activities, as well as the navigation menu. In the framework of a potential migration to a new technological solution for its Web portal, it also undertook to explore the possibility of having a multilingual website providing information in the 23 official languages. However, due to budgetary constraints, this project could not start before 2014. Cedefop added that as from July 2012, it started to inform both candidates in selection procedures as well as unsuccessful tenderers of their right to submit a complaint to the Ombudsman and a statement to this effect is now included in all relevant documents and communications. Cedefop maintained its position not to disclose the names of the Selection Board members. Finally, it informed the Ombudsman that, following elections, a new staff committee assumed its responsibilities on 12 June 2012.

The Ombudsman's analysis and conclusions

The Ombudsman's assessment leading to a draft recommendation

7. The Ombudsman welcomed Cedefop's constructive approach and willingness to implement the majority of his suggestions. In particular, he was pleased to note that Cedefop had already implemented his suggestions regarding the provision of information to tenderers and candidates in staff selection procedures. In this respect, he noted that the vacancy notices recently published in Cedefop's website included information on the possibility to complain to the Ombudsman, under the heading "appeal procedures". He expressed his belief that similar information is included in the letters sent to unsuccessful tenderers.

8. The Ombudsman also welcomed Cedefop's proactive approach regarding access to documents. As the Ombudsman has repeatedly emphasised, good administration requires that the right of public access to documents be understood to relate not only to the need for EU institutions, bodies, offices and agencies to deal correctly with requests for public access to documents, but also to the requirement that information and documents be readily made available to the public proactively⁵. Cedefop's commitment to providing direct

⁵ See, inter alia, the Ombudsman's speech "EU rules on access to documents: The European Ombudsman's perspective", Leon, April 2011
<http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10310/html.bookmark>



access to a number of documents identified as being of interest to the public was very welcome.

9. The Ombudsman was also pleased with Cedefop's commitments regarding its language policy. He was heartened by the Agency's efforts to make the homepage of its website available in all 23 official languages. It is the Ombudsman's position that, as far as the European institutions' external communication with the citizens is concerned, it would be ideal that the material intended for such purposes be published in all official languages. In order for that external communication to be effective, it is necessary that citizens understand the information provided to them by the institutions⁶.

10. Furthermore, since he considers highly important the role staff committees play as the main formal channel of communication between management and staff, the Ombudsman welcomed the news of the election of a staff committee.

11. As regards the disclosure of the names of Selection Board members, Cedefop argued during the Ombudsman's visit that non-disclosure aims to protect Selection Board members from outside pressure. It asked the Ombudsman to bear in mind the agency's small size and its location. It noted that its staff members would hesitate to participate in Selection Boards if their names were disclosed.

12. In his Report of 27 April 2012 following the visit, the Ombudsman carefully considered these arguments and responded to them as follows.

"31. Concerning Cedefop's policy of not disclosing the names of the members of its selection boards, the Ombudsman recalls that, according to established case-law, the secrecy relating to the deliberations and proceedings of selection boards was introduced with a view to guaranteeing the independence of these boards and the objectivity of their proceedings, by protecting them from all external interference and pressure⁷. Observance of this secrecy therefore precludes the disclosure of the views adopted by individual members of selection boards. The Ombudsman has consistently taken the view that the right to keep secret the individual views of selection board members is not, however, the same as keeping their identities secret⁸.

32. The Ombudsman notes that the institutions' views as to the correct balance between openness and the legitimate needs of confidentiality in the work of Selection boards have evolved in the direction of giving greater weight to openness⁹. He recalls that both EPSO and the Commission have an established practice, whereby they disclose the names of the selection board members. In the Ombudsman's view, such a practice guarantees transparency in selection procedures, helps to build and maintain public trust in the EU institutions, bodies, offices or agencies and

⁶ See the decision of the European Ombudsman on complaint 871/2006/(BB)MHZ, paragraph 2.9.

⁷ See, for example, case 89/79 *Bonu v Council* [1980] ECR I-553, paragraph 5.

⁸ Decision of the European Ombudsman closing his inquiry into complaint 2586/2010/(ML)TN against the European Personnel Selection Office (EPSO). See also, decision of the European Ombudsman closing his inquiry into complaint 3115/2009/RT against the European Commission; Special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)GG); Decision of the European Ombudsman on complaint 674/2004/(MF)PB against the European Commission and the European Personnel Selection Office.

⁹ Decision of the European Ombudsman on complaint 812/2004/MHZ against the European Personnel Selection Office.



reassures candidates that the selection procedure has not been vitiated by conflicts of interest.

13. Cedefop's reply to the Ombudsman's suggestions did not address the above points. The Agency merely reiterated that it prefers not to disclose the names of members of Selection Boards.

14. The Ombudsman regretted the position adopted by the Agency and took the view that, as regards the question of disclosing the names of Selection Board members, Cedefop's action, that is, both the failure to address the arguments formulated by the Ombudsman on this issue and the response itself, demonstrated an unwillingness to engage in a constructive dialogue with the Ombudsman in a manner conducive to nurturing and strengthening an administrative culture of service to citizens.

15. The Ombudsman, therefore, further examined the substantive question and maintained the analysis quoted in paragraph 12 above. In addition, the Ombudsman pointed out that any member of the public who deals with a civil servant is entitled to know the name of that civil servant. This constitutes a fundamental principle of good administration. An administration without a face and a name is alienating¹⁰. Furthermore, keeping secret the views of the members of Selection Boards is not the same as keeping their identities secret¹¹. The former protects members of Selection Boards from external pressure, whereas the latter contributes to a climate of secrecy and mistrust.

16. The Ombudsman also noted that disclosure of the names of the members of Selection Boards involves processing of personal data by the EU institution, body, office or agency concerned and therefore results in the applicability of Regulation 45/2001. The Ombudsman's understanding is that disclosure of the names would be compatible with the right to data protection provided that the institution concerned complies with a number of legal requirements. These include (i) the adoption of a decision specifying the legal basis as well as the purpose and the modalities of such disclosure and (ii) ensuring the protection of the data subject's rights, including the right to receive in advance clear and complete information on the disclosure and the right to object under Article 18 of the Regulation¹².

17. In light of the above, the Ombudsman made the following draft recommendation to Cedefop:

With a view to ensuring transparency in selection procedures, Cedefop should adopt a new policy enabling it to disclose the names of Selection Board members in a manner compliant with data protection rules.

¹⁰ Draft recommendation to the European Commission in the own-initiative inquiry 1004/97/PD.

¹¹ Decision of the European Ombudsman closing his inquiry into complaint 2586/2010/(ML)TN against the European Personnel Selection Office (EPSO). See also decision of the European Ombudsman closing his inquiry into complaint 3115/2009/RT against the European Commission; special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)GG); decision of the European Ombudsman on complaint 674/2004/(MF)PB against the European Commission and the European Personnel Selection Office.

¹² See for guidance the EDPS opinion on "Publication on the Internet of the official directory of the agents of European institutions of bodies", available at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Adminmeasures/2012/12-02-08_Official_directory_agents_EN.pdf



The arguments presented to the Ombudsman after his draft recommendation

18. Cedefop noted that its initial reply to the Ombudsman's suggestion regarding disclosure of the names of Selection Board members was based on a misunderstanding of the term "*public disclosure*" which it wished to correct. Cedefop argued that it had erroneously understood the concept of public disclosure to mean disclosure on its website, rather than disclosure to specific persons/candidates who may demonstrate the necessity of having access to such information. It stated that, while it disagrees with a policy of general public disclosure of the names at any time (whether *ex ante* or *ex post*), it examines specific, individual requests for disclosure in accordance with the relevant legislation and case-law. It added that its long-standing practice in selection procedures is that the members of Selection Boards always present themselves to the candidates selected during the interview phase.

19. Cedefop further explained the reasons that prevented it from accepting the Ombudsman's recommendation. First, it referred to Article 6 of Annex III to the Staff Regulations. Cedefop considered that public disclosure of the names of Selection Board members would expose them to external pressure in a similar manner as would the disclosure of the individual assessments adopted by them. Cedefop was of the opinion that this would be contrary to the purpose of Article 6 of Annex III.

20. Second, Cedefop argued that its refusal is justified by legislation and case-law regarding the protection of personal data. It considered that the term 'personal data' undoubtedly covers the names of Selection Board members and that, therefore, their disclosure should meet the conditions laid down by Regulations 1049/2001 and 45/2001. In its view, general disclosure of the names of Selection Board members is not supported by the joint reading of the legislation on public access to documents, on the protection of personal data and on the secrecy of the proceedings of Selection Boards. According to Cedefop, should a policy of unconditional disclosure of the names of Selection Boards members be adopted, it would render it impossible to weigh *ad hoc* the opposing principles and interests. Furthermore, Cedefop argued that EU legislation does not establish an absolute obligation of openness nor does it justify unlimited or unfettered disclosure of personal data. Where the principle of secrecy is invoked, transparency may be limited or excluded according to the principle that a special rule derogates from the general rule (*lex specialis derogat legi generali*).

21. Cedefop added that its selection procedures cannot be compared to the ones organised by EPSO or the Commission. In view of its small size and the fact that it organises selection procedures when specific posts have to be filled, the need for protection from pressure is more imperative than in the case of the Selection Boards appointed by EPSO. Last, Cedefop noted that it has established an internal control system to ensure that Selection Board members are not subject to conflicts of interest and that their assessments are based on objective criteria. For this purpose, all members of Selection Boards are informed by the Head of Human Resources of their responsibilities and their obligation to declare conflicts of interest.

The Ombudsman's assessment after his draft recommendation

22. The Ombudsman clarifies that both his suggestion following the visit and his draft recommendation to Cedefop concerned the issue of disclosure of the



names of selection board members to candidates¹³. It is not for the Ombudsman to indicate whether such disclosure should take place by means of a letter or an e-mail informing all candidates of the composition of the Selection Board or by publishing a list of the Selection Board members' names on Cedefop's website. While the Ombudsman supports any practice that ensures a high level of transparency, Cedefop should decide on a policy that best corresponds to its organisational needs. Having said that, the Ombudsman notes, nevertheless, that Cedefop's current practice of informing candidates about the identity of the members of the Selection Board during the interview phase is not a sufficient and adequate means of ensuring a high level of transparency. In the first place, such practice effectively excludes all candidates who were not invited for an interview from knowing the identity of the Selection Board members. In addition, its adoption seems to be driven mostly by considerations of courtesy rather than by the need to guarantee transparency in the selection process. It emerges from Cedefop's reply to the Ombudsman's draft recommendation that the agency's approach regarding disclosure remains negative. The Ombudsman cannot but express regret at Cedefop's insistence on keeping the names of the members of Selection Boards secret. For the reasons explained in the following paragraphs, he cannot accept the arguments put forward by the agency to justify its position.

23. Cedefop extensively referred to the principle of secrecy of the Selection Board's proceedings. The Ombudsman notes that Annex III of the Staff Regulations lays down rules governing the organisation and conduct of competitions. Article 3 contains detailed rules regarding the composition of Selection Boards¹⁴, whereas Article 6 guarantees the secrecy of the Selection Board's proceedings¹⁵. The Ombudsman underlines that none of the above provisions provides for anonymity or secrecy in relation to the composition of the Selection Board. The only rule that the legislator wished expressly to include in Annex III concerns the secrecy of the proceedings, which was introduced with a view to *"guaranteeing the independence of Selection Boards and the objectivity of their proceedings, by protecting them from all external interference and pressures whether these come from the Community administration itself or the candidates concerned or third parties"*¹⁶.

24. Article 6 does not, therefore, introduce a general principle of secrecy in selection procedures or a general derogation from the principle of transparency. In the Ombudsman's view, a distinction needs to be made between disclosure of

¹³ The question initially put to the agency was: "Are the names of selection board members known to candidates?".

¹⁴ "Article 3

The Selection Board shall consist of a chairman designated by the Appointing Authority and of members designated by the Appointing Authority and the Staff Committee, each designating the same number. For open competitions common to two or more institutions, the Selection Board shall consist of a chairman appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations and of members appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations on a proposal from the institutions, as well as of members appointed by agreement between the Staff Committees of the institutions, in such a way as to ensure equal representation.

The Selection Board may, for certain tests, be assisted by one or more examiners serving in an advisory capacity.

Members of the Selection Board shall be chosen from officials whose function group and grade is at least equal to that of the post to be filled.

If a selection board consists of more than four members, it shall comprise at least two members of each gender."

¹⁵ "Article 6

The proceedings of the Selection Board shall be secret."

¹⁶ Case 89/79 *Bonu v Council*, cited in footnote 7 above.



the **views** expressed by the individual members of a Selection Board and of any **other information** related to a selection procedure. While it is true that information that could result in divulging the views expressed by individual members of Selection Boards, and in revealing all the factors relating to the individual or comparative assessment of candidates is covered by Article 6 of Annex III, the same does not apply to every piece of information relating to a selection procedure, including the names of Selection Board members.

25. While it is also true that the Court of Justice has ruled on several occasions that this provision may limit or exclude public access to some documents, that case-law has a very specific scope of application¹⁷. In all the cases where the Court of Justice concluded that the principle of secrecy of the proceedings of Selection Boards prevailed over the principle of transparency, the applicants sought to obtain access to their corrected written tests and the evaluation forms filled in by the selection boards. Access to such documents is not, however, at issue in the present inquiry.

26. Cedefop argued that non-disclosure of the names serves the same purpose as keeping proceedings secret, namely, to protect Selection Boards from external pressure and interference. The Ombudsman is of the view that the notion of pressure cannot be invoked in general and abstract terms. It needs to be established that pressure on a selection board would be targeted, real and so intense and effective as to seriously undermine its independence. The Ombudsman notes that Cedefop did not demonstrate that there is such a real risk. The fact that there is a hypothetical risk that some members of a Selection Board might be approached in relation to an ongoing selection procedure is not sufficient to impose secrecy over the names of the members of Selection Boards, especially in cases where more appropriate safeguard mechanisms can be put in place. Effectively protecting the independence of Selection Boards implies that the agency should put in place the necessary procedures and safeguards in order to prevent and successfully deal with external interference and pressure. Such measures include establishing a comprehensive policy on conflicts of interest, informing all candidates that they are not allowed to contact members of the Selection Boards and imposing an obligation immediately to report any attempt made by candidates or third parties to contact members of Selection Boards. According to the information that Cedefop submitted to the Ombudsman, the agency has such mechanisms in place.

27. If, despite such measures, undue pressure were exerted on Selection Boards, the Ombudsman is of the view that Cedefop should then invite staff members coming from other institutions to participate in its Selection Boards, rather than simply try to deal with that problem by keeping their members' identity secret¹⁸.

28. In light of the above, the Ombudsman concludes that neither Article 6 of Annex III to the Staff Regulations nor the related case-law can justify Cedefop's refusal to adopt a new policy regarding the disclosure of the names of Selection Board members.

¹⁷ Case T-371/03 *Vincenzo Le Voci v Council of the European Union* [2005] ECR-SC I-A-209 and II-957; see also, F-96/09 *Eva Cuallado Martorell v Commission*, judgment of 18 September 2012, not yet published in the ECR.

¹⁸ In the Ombudsman's view, trying to keep the names of the members of the Selection Board secret is, in any case, simply illusory. All candidates who take part in interviews meet the members of the selection board at the interviews. They therefore know who they are. Other members of staff who assist the selection board will also know who the Selection Board members are. This is particularly the case in small agencies, such as Cedefop.



29. Cedefop also argued that disclosure of the names of Selection Board members is incompatible with the rules on the protection of personal data. In support of its view, Cedefop extensively referred to the interplay between Regulations 1049/2001 and 45/2001, as interpreted by the Court of Justice in the *Bavarian Lager* judgment¹⁹. Undoubtedly, disclosure of the names of the members of Selection Boards involves the processing of personal data by Cedefop and entails the applicability of Regulation 45/2001.

30. However, the Ombudsman draws Cedefop's attention to the fact that, as far as Regulation 45/2001 is concerned, a distinction should be drawn between proactively disclosing information containing personal data and reacting to requests for access to such information. In fact, when a request for access to documents containing personal data is made, Article 8 of Regulation 45/2001 applies and the recipient is required to establish the necessity of the transfer in light of the *Bavarian Lager* judgment. This is not however the case when an institution disseminates information containing personal data independently of a prior request. Situations where documents or information are proactively provided go beyond the scope of the *Bavarian Lager* case-law²⁰. This does not mean that data protection rules do not apply, but merely that Article 8 of the Regulation is not relevant.

31. The Ombudsman notes that transparency and personal data protection are not conflicting principles. As the European Data Protection Supervisor (EDPS) has consistently underlined, institutions can achieve a fair balance between the right to data protection and the public interests of transparency by adopting a proactive approach on the matter. "*Being proactive implies that the balance between the public interests which underlie openness and the interests protected by the data protection rules is already established before or at least at the moment that the data are collected and thus before a public access request is being made*"²¹. In some cases, the balance between the different interests at stake will favour non-disclosure of personal data, whereas in others, it will create a presumption of openness.

32. In his draft recommendation, the Ombudsman considered that disclosure of the names could be compatible with the right to data protection provided Cedefop complies with a number of legal requirements, including due consideration of the data subjects' rights. In relation to the latter, Cedefop could provide in advance clear and comprehensive information to the members of Selection Boards as to the purposes, scope and modalities of the disclosure of their identities and grant them the right to object on compelling and legitimate grounds. In this context, he referred to an opinion issued by the EDPS that could provide guidance and assist the agency in implementing his draft recommendation²². He regrets that Cedefop did not use this opportunity to adopt a new, proactive policy regarding disclosure of the names of Selection Board members.

33. It is clear from the above analysis that Cedefop did not accept the Ombudsman's draft recommendation. The Ombudsman notes, however, that the issue of the disclosure of the names of selection board members to

¹⁹ Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055.

²⁰ EDPS, Background Paper on Public access to documents and data protection http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf

²¹ *Idem*.

²² "*Publication on the Internet of the official directory of the agents of European institutions of bodies*", cited in footnote 12 above.



candidates has raised a number of questions in the context of his visits to different agencies. Some of the agencies have sought guidance from the Ombudsman as to the best approach to be adopted in this respect²³. The Ombudsman therefore considers that the best way forward is to close the present inquiry and to open an own-initiative inquiry concerning the issue of disclosure of the names of selection board members. In view of the subject-matter, the Ombudsman will include in his inquiry all EU agencies which he has not yet visited and those which appear to have an approach to this matter which differs from the one the Ombudsman recommends.

Conclusion

On the basis of his inquiry, the Ombudsman closes it with the following conclusion:

The Ombudsman welcomes Cedefop's constructive approach and willingness to implement the majority of the suggestions that he made after his visit to the Agency.

He regrets, however, that Cedefop could not agree to his suggestion to adopt a new, proactive policy regarding disclosure of the names of Selection Board members. In view of the Ombudsman's decision to open an own-initiative inquiry into how agencies deal with this issue, there are no grounds for further inquiries into the case.

Cedefop will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on **30 -04- 2013**

²³ See, for instance, the Follow-up given by the European Network and Information Security Agency following the European Ombudsman report - OII/11/2012/ANA
<http://www.ombudsman.europa.eu/en/activities/visitreport.faces/en/49236/html.bookmark>