



Report

of the European Ombudsman following his visit to
the European Chemicals Agency (ECHA) –
OI/12/2012/EIS

The background to the visit

1. In May 2011, the European Ombudsman launched a programme of visits to the EU agencies with the aim of identifying and spreading best practices in their relations with citizens¹.
2. By letter of 17 September 2012, the Ombudsman informed the European Chemicals Agency ('ECHA') that he intended to visit it on 5 October 2012.
3. ECHA was established on the basis of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (hereinafter the 'REACH Regulation')². The REACH Regulation was adopted to improve the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry. It also promotes alternative methods for the hazard assessment of substances in order to avoid unnecessary testing on vertebrate animals. ECHA acts as the central point in the REACH system: it (i) manages the databases necessary to operate the system; (ii) co-ordinates the in-depth evaluation of suspicious chemicals; and (iii) is building up a public database in which consumers and professionals can find hazard information. ECHA is based in Helsinki, Finland.
4. The Ombudsman sent ECHA a draft agenda with the specific issues he wished to discuss. In addition, the Ombudsman informed ECHA that, in response to a commitment he had undertaken following a request by the Assembly of Agency Staff Committees ('AASC'), he intended to meet ECHA's Staff Committee during his visit.

The visit

5. The meeting took place at ECHA's premises on 5 October 2012. The Ombudsman was accompanied by Ms Eija Salonen, Legal Officer. ECHA was represented by Mr Jukka Malm, Director of Regulatory Affairs, who was

¹ Information on 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 2006 L 396, p. 1.



accompanied by Mr Jef Maes, Director of Resources; Mr Alain Lefebvre, Head of the Executive Office; Ms Minna Heikkilä, Head of Legal Affairs Unit; Mr Shay O'Malley, Head of Human Resources Unit; Mr Frank Büchler, Legal Officer at the Executive Office; and Mr Mark Perera, Management Assistant at the Executive Office.

6. At the beginning of the meeting, the Ombudsman provided information on the purpose and context of his visit to ECHA. He clarified that he carries out his visits to agencies of the EU on the basis of his competence to conduct own-initiative inquiries. An own-initiative inquiry implies, among others, that the usual procedural guarantees concerning such inquiries apply. These include the Agency's right to request the Ombudsman to treat information and documents on a confidential basis, in accordance with Articles 5.1, 5.2 and 14.2 of the Ombudsman's Implementing Provisions³.

7. Following the Ombudsman's introductory remarks, ECHA first provided the Ombudsman with a general overview of its activities and then presented its position on the subjects identified by the Ombudsman in his letter of 17 September 2012. The Heads of Unit in charge and, when necessary, the Directors addressed the different agenda items with the help of PowerPoint slides. Each presentation was followed by a discussion and a question and answer session. At the end of the meeting, a copy of the presentation and supporting documents were provided to the Ombudsman.

8. The following issues were discussed between the Ombudsman and ECHA's management:

- A. The Public Service Principles;
- B. ECHA's initial contacts with the public;
- C. Transparency, dialogue and accountability;
- D. Recruitment;
- E. Tenders and contracts;
- F. Conflicts of interest; and
- G. Whistleblowing.

The Ombudsman's findings and suggestions

(A) The Public Service Principles

9. On 19 June 2012, the Ombudsman published the Public Service Principles for the EU Civil Service⁴. His main aim in publishing these principles was to help build greater trust between citizens and the EU institutions. The principles take

³ www.ombudsman.europa.eu/resources/provisions.faces

⁴ <http://www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces>



account of best practice in the Member States and were established following an extensive period of reflection and public consultation. As the public consultation confirmed, the public service principles are not new, but represent existing expectations of citizens and civil servants. They constitute the fundamental ethical standards that govern the conduct of EU civil servants. The principles are also meant to guide them towards the right decision in situations where they should exercise judgment. As such, they constitute a vital component of the administrative culture of service to which the EU institutions adhere.

10. On 10 July 2012, the Ombudsman informed ECHA of the publication of the Public Service Principles. He was therefore interested in learning whether ECHA has taken or plans to take steps (a) to ensure that all members of its staff are informed of the principles, and (ii) to make the principles available on its website, so that the public is informed that the Agency subscribes to them.

11. In its presentation, ECHA explained that it fully endorses the EU Public Service Principles and actively contributed to the Ombudsman's public consultation on them, through a letter sent by ECHA's Executive Director on behalf of all EU Agencies on 16 May 2011. The Principles were brought to the attention of ECHA's staff on 1 August 2012 by means of a news alert, which is still available on ECHA's intranet. ECHA also explained that the principles would shortly be available on ECHA's external website.

The Ombudsman's findings concerning (A)

12. The Ombudsman welcomes ECHA's active involvement in the public consultation on the Public Service Principles and the proactive measures it has taken to make its staff aware of them. The Ombudsman also notes that, after his visit, ECHA published the Public Service Principles on its external website⁵. The Ombudsman applauds this initiative to inform citizens that ECHA subscribes to the Principles.

(B) ECHA's initial contacts with the public

13. One of the Ombudsman's fundamental tasks is to ensure that the EU administration is open, service-minded and efficient in handling contacts with citizens. The relevant basic principles are laid down in the European Code of Good Administrative Behaviour ('the ECGAB'). The European Ombudsman often receives complaints alleging lack of service-mindedness and efficiency. This suggests that the EU administration is still faced with challenges in this area. When appropriate, the European Ombudsman tries to find a rapid solution to complaints that concern grievances arising from citizens' initial contacts with the administration. In such circumstances, the Ombudsman's services usually contact the relevant person by telephone.

14. In his letter of 17 September 2012, the Ombudsman informed ECHA that all the EU agencies had agreed to adopt the Code at a meeting of the Heads of the agencies held in Lisbon in October 2008. However, ECHA's website contained no link to the Code but rather a link to its own Code of Good Administrative

⁵ http://www.echa.europa.eu/documents/10162/13559/public_service_principles_en.pdf



Behaviour⁶ ('the ECHA Code'). At first sight, it appeared that the ECHA Code reflected the principles contained in the ECGAB. However, closer examination revealed certain differences. For example, it appeared that a reference to the Ombudsman was missing in the ECHA Code as regards the provision corresponding to Article 19 of the ECGAB (indication of the possibilities of appeal). In this respect, the Ombudsman was interested in knowing whether ECHA could clarify how it sees the relationship between the two codes and whether it intends to also publish the ECGAB on its website. Moreover, the Ombudsman asked how ECHA ensures that its staff members comply with the principles laid down in the ECGAB.

15. In its presentation, ECHA underlined the importance it attaches to the principles of good administrative behaviour and outlined its efforts to ensure that its staff members are aware of them. To this end, by decision of 14 February 2008, that is to say, before the October 2008 meeting of the Heads of the agencies in Lisbon, ECHA's Management Board adopted the ECHA Code. The ECHA Code is presented to ECHA staff during the induction training, and is available both on the Agency's internal and external websites. In ECHA's view, publishing two Codes on its website would confuse both its staff and external audience.

16. In the ECHA Code, there is a specific provision concerning the possibilities of appeal (Article 19 of the ECHA Code), which, as ECHA explained, reflects the binding nature of its operational decisions and decision-making powers. Even if Article 19 of the ECHA Code does not contain an explicit reference to the Ombudsman, the possibility of complaining to the Ombudsman is mentioned in most of ECHA's administrative decisions. In operational decisions, there is either a reference to the possibility of initiating court proceedings or an indication of the possibility of turning to the Board of Appeal of the Agency.

17. Next, focusing on recent initiatives, ECHA explained its practices aimed at improving initial contacts with citizens. First, ECHA presented its adoption of the Integrated Quality Management System based on ISO 9001. This system aims at: (a) ensuring that acknowledgments of receipt are sent in response to correspondence received; (b) keeping adequate records; and (c) providing details on the time-limits in procedures as described in the REACH Regulation. The Ombudsman asked whether ECHA has considered the model created by the European Foundation for Quality Management (EFQM) as an alternative to the system it has in place. ECHA replied that the matter had not been discussed so far. Second, ECHA informed the Ombudsman that it attaches particular importance to customer orientation in its outreach efforts. In cases where a response can be sent swiftly, the member of the public gets it straight away. In special areas, such as in Help Desk and access to documents requests, an acknowledgement of receipt is always sent, while for normal letters, a holding reply is sent within 15 working days, unless a substantive reply can be sent within the same time frame. Templates go through a thorough legal check in order to ensure not only legality but also objectivity and impartiality; internal audits are carried out; and training sessions are organised on a regular basis. ECHA has also had a new website since 2011. With a view to enhancing user-friendliness, documents are electronically tagged and grouped for easy

⁶ http://www.echa.europa.eu/documents/10162/13559/code_of_good_administrative_behaviour_en.pdf



electronic reference. Preliminary conclusions of the Management Board are available within two working days on ECHA's public website.

18. As to the provision included in Article 14(3) of the ECGAB⁷ and of the ECHA Code, ECHA asked the Ombudsman for guidance on situations where the same person sends repeated complaints or other correspondence. In reply, the Ombudsman explained that a decision to invoke the 'stopping clause' should be taken at the management level and people handling the cases should be duly informed. Second, the Ombudsman emphasised that, when invoking the 'repetitive' character of complaints or correspondence, a cautious approach is appropriate.

The Ombudsman's findings and suggestions concerning (B)

19. The Ombudsman welcomes ECHA's commitment to providing its staff with a wide range of information relating to good administrative behaviour and applauds it for paying specific attention to the principles of good administrative behaviour and its efforts in enhancing citizen-friendliness. He also understands the reasons underpinning ECHA's decision to publish only one code on its website. The ECHA Code follows the structure and presentation of the ECGAB, even if there are some differences in detail⁸. The Ombudsman therefore considers that, overall, the ECHA Code can be considered to be satisfactory. However, he takes the view that Article 19 of the ECHA Code could include an explicit reference to the Ombudsman. Furthermore, the Ombudsman expresses his satisfaction with ECHA's outreach activities and the initiatives undertaken to enhance the Agency's quality management and to facilitate its initial contacts with the public.

(C) Transparency, dialogue and accountability

20. The Ombudsman attaches great importance to promoting transparency and increasing accountability in the EU administration. The need for transparency is reflected in, among others, the EU legislation on public access to documents, which expressly mentions the Ombudsman as a review body. The need for accountability is reflected in the Ombudsman's extensive powers of investigation, which enable him thoroughly to clarify the facts and issues which arise during his inquiries.

21. In view of the above considerations, the Ombudsman asked ECHA to provide additional information and to answer the following questions:

"a) I note that ECHA's website contains a section on access to documents held by the agency. However, I would be grateful to know how ECHA deals in practice with requests for public access to documents. What are its rules, guidelines and/or practical arrangements for handling such requests? Please provide examples, such as the main correspondence in the Agency's handling of the last three requests for public access to documents dealt with under the relevant ECHA rules and/or Regulation 1049/2001.

⁷ "No acknowledgement of receipt and no reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character."

⁸ For instance, compared to the relevant provision of the ECGAB, there is no reference to "advice" (Article 10(3) of the ECHA Code).



(The substance of ECHA's decisions in these examples will not be examined, as this is not the purpose of this visit.)

b) Does ECHA produce an annual report (internal or external) on its handling of public access to documents?

c) Does ECHA operate, or intend to operate, a public register in the sense of Article 11 of Regulation 1049/2001?

d) ECHA handles a vast amount of information and data. Its website is user-friendly and contains a large volume of data, publications and information relating to ECHA's main activities. Regulation 1049/2001 strictly speaking only applies to 'documents'. How does ECHA deal with requests for information? Please provide us with information concerning the feedback ECHA's services receive from users and stakeholders regarding access to information."

22. In its presentation, ECHA noted that transparency is an important characteristic of the manner in which it carries out its work. On its internal website, there is a specific section dedicated to access to documents to help staff deal with requests for access to documents. Training on access to documents is organised twice a year, and there is also a specific network within ECHA dealing with access to documents matters. The network consists of contact persons from each Directorate for the handling of requests for access to documents, and holds meetings twice a year.

23. In reply to the questions relating to access to documents, ECHA explained that it deals with all the requests it receives in accordance with Regulation 1049/2001 and Decision MB/12/2008⁹ implementing that Regulation. ECHA has two lawyers whose task is to ensure the central coordination of the handling of initial applications. The coordinators receive initial requests through ECHA's special webform or through a functional mailbox and assign them to the Directorate in charge. They also handle negotiations with the applicant, provide advice in order to ensure consistency and monitor the deadline. Concrete processing of initial applications is decentralised, so that each Directorate handles applications within its area of responsibility. Confirmatory applications are dealt with in a more centralised manner by the Executive Office and the Legal Affairs Unit.

24. Next, ECHA presented statistics on its handling of requests for access to documents. In 2011, ECHA received 93 requests for public access to documents. While most of the requests led to full or partial access, in 8 cases, access was denied. A high number of the requests received concerned documents containing third-party data, which, in accordance with the applicable rules, required consultation with the third party before granting access¹⁰: for instance, during the last quarter of 2011, approximately 130 third-party consultations took place. In three cases, the deadline for ECHA's reply was extended, but deadlines were respected in all cases but one, in which a one-day delay was incurred. Around 65 per cent of the requests came from industry or law firms,

⁹ http://echa.europa.eu/documents/10162/13604/mb_12_2008_final_implementing_rules_access_to_documents_en.pdf

¹⁰ Pursuant to Article 5(1) of Decision MB/12/2008, "[w]here the Agency receives an application for access to a document which it holds but which originates from a third party, the Agency shall check whether one of the exceptions provided for under Article 4 of Regulation (EC) No 1049/2001 applies."



while the rest came from NGOs, academics and journalists. ECHA also presented the corresponding figures regarding the first two quarters of 2012, which largely resembled the 2011 statistics, and provided the Ombudsman with copies of the last three requests for public access to documents and of its replies.

25. As to recent trends, ECHA pointed out that there was a clear drop in the number of requests after ECHA started to disseminate information related to the registration files on its website. However, the number of documents covered by individual requests and the number of pages disclosed per request have increased.

26. In reply to the Ombudsman's question concerning ECHA's reporting on its handling of requests for public access to documents, ECHA explained that, beginning in 2011, internal reports to management are produced on an annual and a quarterly basis. Moreover, an excel database was created at the end of 2011, in order to allow for automated reporting. There is no external reporting yet, but an update of the access to documents section on ECHA's website is envisaged. On ECHA's website, there is a public register of documents ('Document Library'), and the documents contained therein have been (i) electronically tagged for better searchability, and (ii) grouped for their easy electronic reference, as stated in point 17 above. ECHA constantly enhances the publicly available materials.

27. As to requests for information, ECHA explained that it operates two support desks: (i) the ECHA Info Desk and (ii) the ECHA Helpdesk. The ECHA Info Desk is responsible for general enquiries addressed to the Agency, whereas the ECHA Helpdesk provides advice to those who have obligations under the REACH, CLP¹¹ and Biocides¹² Regulations. The latter also provides support to the users of ECHA's information technology tools and assistance related to the processing of individual submissions.

28. As to the ECHA Helpdesk, it operates on a three-level system: the first level (L1) is for questions which fall within the competence of the Helpdesk team and to which it can provide an answer on its own; the second level (L2) is for cases requiring expertise outside the Helpdesk Unit at ECHA; and the third level (L3) is for cases that require external consultation. The ECHA Helpdesk answered 5 362 questions in 2011, 90 per cent of which within 15 working days. In the L1 and L2 categories, the cumulative average resolution time for cases and questions was 6.9 working days and, in the L3 category, 54.8 working days.

29. The ECHA Info Desk became operational in January 2012. During the first two quarters of 2012, it received 850 e-mails, 900 telephone calls and one visitor. Most of the queries were replied to either on the same day, or within five working days. The topics covered by the queries concerned mostly invitations,

¹¹ The CLP Regulation (that is to say, Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ 2008 L 353, p. 1) ensures that the hazards presented by chemicals are clearly communicated to workers and consumers in the European Union through classification and labelling of chemicals.

¹² The Biocidal Product Regulation (Regulation (EU) No 528/2012, OJ 2012 L 167, p. 1) concerns the placing on the market and use of biocidal products, which are used to protect humans, animals, materials or articles against harmful organisms, like pests or bacteria, by the action of the active substances contained in the biocidal products.



Helpdesk enquiries, registered substances, e-news subscriptions, ECHA's website and offers on products or services. Almost three quarters of the queries came from companies.

30. The discussion then turned to ECHA's initiatives to promote transparency, dialogue and accountability. In this regard, ECHA explained that its website contains a large volume of data, publications and information relating to its core activities. ECHA also presented its stakeholder policy for cooperation with its accredited stakeholders. The policy is implemented mainly through committee work. With a view to enhancing stakeholder cooperation, ECHA also organises a Stakeholders' Day and other workshops every year and participates actively in conferences organised by stakeholders. There are also online information sessions ('webinars') organised by ECHA on a regular basis. Feedback on the events has been obtained by means of satisfaction surveys targeting stakeholders, ECHA Committees and Helpdesk customers. Most of the feedback has been very positive towards ECHA's services.

31. The Ombudsman then asked ECHA how it sees the role of plain language in its communications with the public. ECHA explained that it is very conscious of the issue, especially because ECHA's core activities are of a highly technical nature. As an example of the use of plain language in its communications, ECHA mentioned its publications providing guidance in a nutshell. The Communication Department takes care of the templates of letters that are sent out to the public. There is a specific section on the website for interested citizens.

The Ombudsman's findings and suggestions concerning (C)

32. The Ombudsman congratulates ECHA on its website, which is user-friendly, easy to navigate and informative. The homepage, search functions and also other substantive information on the website are available in all 23 official languages. This practice demonstrates ECHA's commitment to greeting citizens in their own language and to recognising that all citizens of the European Union have a legitimate interest in its work.

33. On its website, ECHA provides the public with a vast amount of information mainly relating to its core activities, as well as sufficient information regarding financial and organisational matters. It has adopted a proactive approach to the dissemination of information, principally through its help desks and online publications, and should be applauded in that respect. The Ombudsman also applauds the mechanisms ECHA has put in place to ensure the searchability and easy electronic reference of documents on its website, as well as the efficient handling of contacts from the public.

34. As regards access to documents, the Ombudsman congratulates ECHA on the detailed and specific procedures it has in place for the handling of requests for access to documents. The statistics seem to confirm that the procedures generally work well. The Ombudsman also notes with satisfaction that ECHA has started to produce reports on its handling of requests for public access to documents. He suggests that ECHA could consider making the annual report on its handling of requests for public access to documents available to the public.



(D) Recruitment

35. With regard to the substance of selection and recruitment decisions, the Ombudsman takes an approach similar to that of the Court of Justice of the European Union. This means, among others, that he recognises the administration's wide discretionary powers in selecting its staff. With regard to the procedural aspects of selection and recruitment, the Ombudsman has very actively worked to increase transparency in EU recruitment. His efforts have, for instance, led to enhanced transparency regarding the names of members of selection boards, and more detailed evaluation sheets providing candidates with better insight into how they were assessed.

36. In his letter of 17 September 2012, the Ombudsman asked ECHA to provide clarifications on the following issues:

"a) How does ECHA ensure an effective communication with candidates to selection procedures concerning the status of their applications and/or the outcome of the selection procedure?

b) Are the names of selection board members known to candidates? To what extent does ECHA provide candidates with access to the assessments of their applications?

c) To what extent does ECHA seek quicker and less formal means to resolve disputes about selection and recruitment decisions than the ones foreseen in Article 90 of the Staff Regulations?

d) Does ECHA systematically inform candidates in its correspondence that they may complain to the Ombudsman, as provided for in Article 19 of the above-mentioned European Code of Good Administrative Behaviour and ECHA's Code of Good Administrative Behaviour?"

37. In its presentation, ECHA provided information regarding its selection procedures. With a view to ensuring an effective communication with candidates, ECHA has adopted a Guide for Applicants¹³, which contains a specific section on communication with applicants. The Human Resources Unit has nominated a coordinator for selection procedures, who acts as a contact person for each selection procedure to ensure that all candidates are kept fully informed at all stages of the procedure. The coordinator replies to queries and provides clarifications to candidates, issues invitations to interviews, prepares outcome letters and answers requests for review after members of the selection board have validated the replies.

38. As to the practical arrangements for selection procedures, it is the chairperson of the selection board who signs correspondence with applicants. Upon request, candidates may receive: (i) written feedback on the assessment of their applications; (ii) the total score of the evaluation and general feedback on the assessment of their applications; (iii) an extract of the evaluation grid, including that of an external consultant; and (iv) information on the composition of the selection board.

¹³ http://echa.europa.eu/documents/10162/13602/general_guide_for_applicants_en.pdf



39. ECHA further stated that it would be grateful to hear the Ombudsman's opinion on its current practice of protecting selection board members from outside pressure by disclosing their names only upon request. It also pointed to the possibility that staff members or external members could hesitate to participate in selection boards if their names were disclosed. The Ombudsman explained that the issue is a balancing exercise, but disclosing the names of selection board members is in line with the Court's case-law on the matter. The secrecy of 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. It protects them from all external interference and pressure¹⁴. Observance of this secrecy therefore precludes the disclosure of the views adopted by individual members of selection boards. However, the Ombudsman has consistently taken the view that the right to keep secret the individual views of selection board members is not the same as keeping their identities secret¹⁵. In this respect, two points were discussed at the meeting: (i) at which stage of the selection procedure the names should be provided, and (ii) whether the hierarchical position of the person concerned (e.g., manager/assistant) could play a role in that exercise.

40. ECHA informs candidates of the possibility of bringing a formal complaint in accordance with Article 90(2) of the Staff Regulations. Since 2007, ECHA has had two disputes related to selection and recruitment decisions, and there have been four complaints to the Ombudsman in this respect. In terms of informal means of resolving disputes, Section F of ECHA's Guide for Applicants provides for the possibility of submitting a request for review to the Chairperson of the Selection Board. In the same guide, there is also a reference to the right to either lodge a complaint with the Ombudsman or bring a case before the Civil Service Tribunal.

The Ombudsman's findings and suggestions concerning (D)

41. The Ombudsman notes that the institutions' views on 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 openness¹⁶. He points out that the established practice within both the European Personnel Selection Office ('EPSO') and the Commission is to disclose the names of 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 and agencies; and reassures candidates that the selection procedure has not been vitiated by conflicts of interest. In light of the above considerations, ECHA could reconsider its position regarding disclosure of the names of selection board members and disclose them to all candidates and not only to those who explicitly request such information.

¹⁴ See, for example, Case 89/79 *Bonu v Council* [1980] ECR I-553, paragraph 5.

¹⁵ 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); and Decision of the European Ombudsman on complaint 674/2004/(MF)PB against the European Commission and the European Personnel Selection Office.

¹⁶ Decision of the European Ombudsman on complaint 812/2004/MHZ against the European Personnel Selection Office.



(E) Tenders and contracts

42. At the review level, disputes in relation to tender decisions and contractual relationships are most commonly dealt with by the courts. However, over the years, a significant proportion of the Ombudsman's cases has concerned these areas as well. In relation to tenders, the Ombudsman draws inspiration from the Court of Justice's approach, which is to recognise the administration's broad discretionary powers in assessing the substantive aspects of tender proposals, while carefully checking whether it gave valid and adequate reasons for its decisions and whether it adequately respected applicable procedures and information rights. In relation to contractual disputes, the Ombudsman does not, as such, assess whether there is a breach of contract. He does, however, thoroughly examine whether the administration provided good reasons for its position, and also looks into the fairness of administrative actions or omissions.

43. In view of the above, the Ombudsman wished to be informed of how ECHA handles disputes in relation to these areas.

44. ECHA presented the main elements of the procedure it follows in tender cases. It informed the Ombudsman that it sends notification letters to tenderers, stating reasons for the award or non-award of a tender. The notification letters contain information on the winning tender and information on available judicial remedies. A second letter is sent upon request, and it contains information on the characteristics and comparative advantages of the winning tender. If requested, or in response to a request for administrative review of the decision, a third letter with further clarifications on the assessment of the unsuccessful tender is sent. Tenderers are also informed about the possibility of judicial review by the General Court.

45. In the area of contracts, ECHA explained that it seeks to settle disputes primarily by means of negotiation in the context of project and contract management. If the dispute is not resolved by negotiation, the parties may agree to submit it to mediation. Such an optional clause is included, for example, in IT contracts. However, so far, there has been no resort to mediation. In case the dispute cannot be settled amicably, judicial review is also possible before the Helsinki District Court.

46. On the question of whether tenderers and contractors are informed that they can complain to the Ombudsman, ECHA stated that it informs tenderers and contractors of their right to submit a complaint to the Ombudsman in the contract notice and the contract award notice published in the Official Journal of the EU. Notification letters in procurement procedures follow the templates of the European Commission and do not contain a reference to the Ombudsman. In the standard contracts, there is no direct reference to the Ombudsman.

47. In the course of the discussion, the Ombudsman explained the difference between legality and good administration, and raised the issue of subcontractors, providing an example of a case in which he intervened in order to ensure that the subcontractor received the correct payment under the contract. He pointed out that, even if the contracting authority is under no legal obligation to sensitise its contractors to the need to respect the interests of subcontractors, it would be in line with the principles of good administration if it did so. ECHA welcomed this guidance.



The Ombudsman's findings and suggestions concerning (E)

48. The Ombudsman welcomes the fact that ECHA informs tenderers and contractors of their right to submit a complaint to the Ombudsman in the contract notice and the contract award notice. Furthermore, he considers that the procedures which ECHA has in place in the area of tenders and contracts are satisfactory as a whole. However, he encourages ECHA to provide information about the possibility of submitting a complaint to the Ombudsman also in its notification letters concerning procurement procedures. ECHA could also consider including a reference to the Ombudsman in its contracts.

(F) Conflicts of interest

49. Conflicts of interest arise when persons who work for the public administration may be perceived as having an inappropriate personal interest in a matter with which they are dealing. Such conflicts need to be handled appropriately in order to ensure objective decision-making, and to enhance the public's trust in the administration. Recent events and cases show that the EU administration does not enjoy the public's full confidence in relation to this issue.

50. In his letter of 17 September 2012, the Ombudsman asked ECHA to provide information on the concrete measures it takes in order to avoid conflicts of interest in relation to:

- (a) the recruitment of staff, including senior staff; and
- (b) the conduct of current and former staff members, notably regarding external activities during and after their service at ECHA (see, for instance, Articles 11, 11a, 12b, and 16 of the Staff Regulations).

51. In its presentation, ECHA explained that the type of conflicts of interest that may arise with respect to ECHA's staff members must be viewed in relation to (i) the Agency's mandate and (ii) the fact that its staff consists of temporary agents and contract agents with highly specialised profiles.

52. As the Ombudsman noted in his letter to ECHA, the Agency has published on its public website, under the section "Procedures and Policies", both its Policy for Managing potential Conflicts of Interest¹⁷, as well as annual declarations of interest by ECHA's Directors, Managers and other senior-level staff members. Furthermore, every staff member of ECHA is required to sign a declaration of interest which complies with the template in Annex 1 of the aforesaid Policy.

53. A specific section on ECHA's internal website is dedicated to issues of "Ethics and code of conduct". That section contains, among other things, a Decision of the Executive Director on guidance on invitations and gifts, as well as declarations of commitment and confidentiality. The decision contains detailed instructions on the acceptance of gifts and favours, invitations to events, fees and honorariums, and honours and decorations.

¹⁷ http://www.echa.europa.eu/documents/10162/13608/mb_45_2011_d_policy_conflict_interest_en.pdf



54. The discussion then moved on to selection procedures. ECHA has developed templates to be used for statements and declarations on conflicts of interest in selection procedures. Every member of a selection board is asked to sign such documents. The Executive Director subsequently assesses the statement and takes the necessary measures where necessary. Training on the issue of conflicts of interest in recruitment is organised on an ongoing basis.

55. ECHA subsequently asked the Ombudsman for guidance concerning situations where a member of a jury knows a candidate. The Ombudsman replied that such an incident should be declared and then, depending on the specific circumstances of the case, the person concerned should either not participate in the selection procedure at all or be present as an observer only, without taking part in the deliberations.

56. The discussion then turned to the two-year period provided for in Article 16 of the Staff Regulations, during which approval to engage in certain occupations after leaving the service is needed. ECHA asked the Ombudsman whether the question should be treated differently if a member of staff is a temporary agent whose contract may not be renewed for one reason or another. The Ombudsman replied that the situation is indeed delicate and has to be reflected upon. However, in principle, the rules are the same for all staff members. An important factor could also be what tasks have been entrusted to the staff member concerned before leaving. In so doing, the grade of the agent should be taken into account.

The Ombudsman's findings and suggestions concerning (F)

57. The Ombudsman has stated on several occasions that EU institutions, bodies, offices and agencies should do their utmost to avoid not only actual but also apparent conflicts of interest, in order to maintain public trust and confidence in their activities and to protect their staff from unjustified suspicion. In this regard, he welcomes the fact that ECHA has developed templates for Declarations of Interest and made those filled out by its Directors, Managers and other senior-level staff members available on its public website. The Ombudsman also notes that ECHA has detailed internal rules in place, which aim at avoiding conflicts of interest.

58. However, it should also be noted that, in its recent Special Report No 15/2012¹⁸, the European Court of Auditors recommended that certain agencies, including ECHA, improve their conflict of interest policies and procedures. In this regard, the Court of Auditors pointed out that ECHA's practical implementation of policies and procedures in conflicts of interest has significant shortcomings. In particular, it pointed to the facts that (i) interests are not reviewed before tasks are assigned to staff, and (ii) policies and procedures to assess and manage conflict of interest situations at ECHA's Board of Appeal are not adequate. The Ombudsman welcomes the fact that ECHA has already taken follow-up action in relation to many of the findings of the European Court of Auditors¹⁹. It would however be clearly appropriate if ECHA could report on the concrete measures it has adopted in order to comply with its legal

¹⁸ <http://eca.europa.eu/portal/pls/portal/docs/1/18686746.PDF>

¹⁹ See, in this respect,

http://www.europarl.europa.eu/document/activities/cont/201301/20130117ATT59286/20130117ATT59286_EN.pdf.



obligations, in particular, as suggested in the report of the Court of Auditors, with respect to the conflict of interest issues set out under points (i) and (ii) above.

(G) Whistleblowing

59. The Ombudsman asked ECHA to provide information about any arrangements it has in place for internal whistleblowing and about any whistleblowing cases.

60. In its presentation, ECHA noted that, to date, it has had no whistleblowing cases. The relevant principles included in the Staff Regulations have been internally implemented by Decision MB/30/2009 of ECHA's Management Board. The rules are explained to new staff members during induction training. A specific section on ECHA's internal website is dedicated to issues concerning whistleblowing.

61. The Ombudsman pointed out that Article 22a of the Staff Regulations does not provide a complete answer to the challenges of whistleblowing. For this reason, it is important that management takes appropriate decisions before possible problems get out of hand. Furthermore, the Ombudsman pointed out that whistleblowing is an additional dimension where citizens can exercise their rights and thus encouraged ECHA to inform its staff about the option provided by the Staff Regulations to report the possible existence of illegal activity internally first.

The Ombudsman's findings concerning (G)

62. The Ombudsman welcomes the fact that ECHA has taken a proactive approach to whistleblowing by adopting internal rules (Decision MB/30/2009) in that respect. That Decision contains rules with respect to fighting fraud, corruption and irregularities, as well as provisions intended to facilitate the administrative investigations of the European Anti-Fraud Office (OLAF) within the Agency. The Ombudsman takes the view that the Decision contains important internal rules addressing the challenges of whistleblowing.

Summary of the Ombudsman's suggestions

63. On the basis of his visit and the information provided to him by ECHA, the Ombudsman makes the following suggestions:

- a)** ECHA could consider adding an explicit reference to the Ombudsman in Article 19 of its Code of Good Administrative Behaviour.
- b)** ECHA could consider making its annual report on its handling of requests for public access to documents available to the public.
- c)** ECHA could reconsider its position regarding disclosure of the names of selection board members, so that such information would be provided to all candidates and not only to those who explicitly request it.
- d)** In the area of tenders and contracts, ECHA could consider including a reference to the Ombudsman in its notification letters and contracts.



e) ECHA could report on the concrete measures it has adopted, in order to comply with its legal obligations, on the conflict of interest issues identified by the Court of Auditors. In this regard, ECHA could in particular report on its follow-up actions with respect to the findings that (i) interests are not reviewed before tasks are assigned to staff, and (ii) policies and procedures to assess and manage conflict of interest situations at ECHA's Board of Appeal are not adequate.

I would appreciate if ECHA could report back to me by 30 June 2013 on its follow-up to the suggestions listed above.

P. Nikiforos Diamandouros

Done in Strasbourg on 03-04-2013