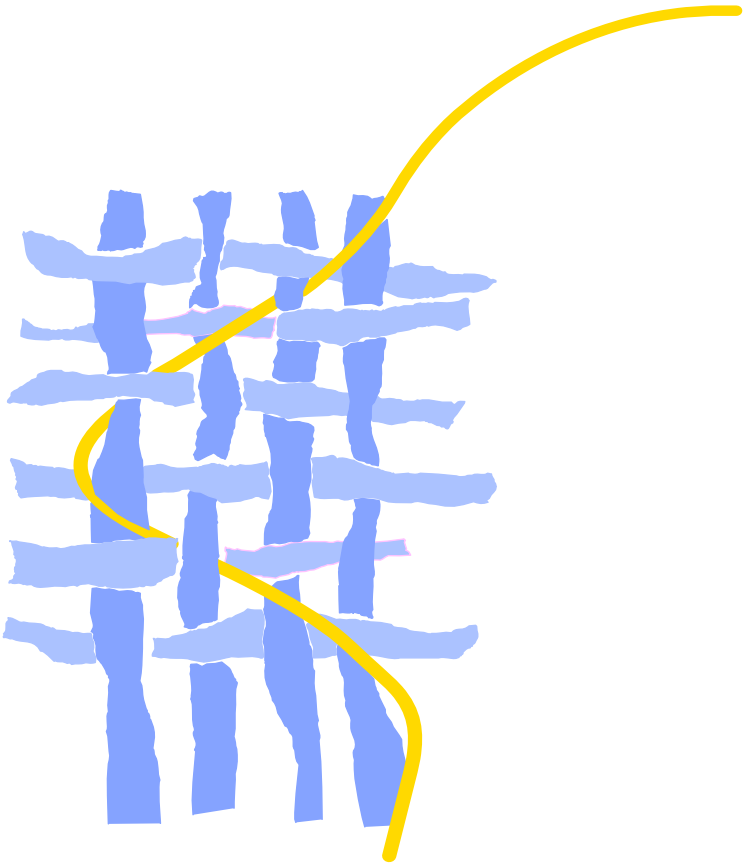
THE EUROPEAN OMBUDSMAN

FOLLOW-UP TO CRITICAL AND FURTHER REMARKS

HOW THE EU INSTITUTIONS RESPONDED TO THE OMBUDSMAN'S RECOMMENDATIONS IN 2008



Strasbourg 2009

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FOREWORD

In May 2008, I published the first systematic examination of the follow-up to all the critical and further remarks made by the Ombudsman during a particular year (2006). I announced my intention to repeat the study for subsequent years. A study of the follow-up to remarks made in 2007 was published in November 2008. The present study deals with the remarks made in 2008. It also includes the remarks made in five cases closed in 2007, concerning which information from the Commission on its follow-up was not received in time to be included in the 2007 study.

As well as reporting in detail on certain results of the Ombudsman's work, the present study should serve to familiarise the institutions and their services with the intellectual rationale underpinning the Ombudsman's practices. That is, the report should also be read as a *further guide* to our "institutional mind and cognitive maps" in matters relating to good administration and the Ombudsman's mandate.

Critical remarks and further remarks contain constructive criticism and suggestions from the Ombudsman, resulting from inquiries conducted on his own initiative or following complaints. A critical remark is premised on a finding of maladministration, whereas a further remark is made without such a finding. The Ombudsman's remarks are meant to offer the EU institutions[1] guidance on how to provide a better service to Europe's citizens.

The study looks at follow-up in terms of *systemic* improvements that raise the quality of administration, thus making maladministration less likely to occur in the future. In dealing with critical remarks, the study does not focus on the specific instance of maladministration that led to the remark, but on the lessons that the institution concerned has learnt for the future.

In this context, it is important to recognise that a critical remark does not constitute redress for the complainant. Not all complainants claim redress and not all claims for redress are justified. When redress should have been provided, however, closing the case with a critical remark signals a triple *failure*. The complainant has failed to obtain satisfaction; the institution concerned has failed to put the maladministration right; and the Ombudsman has failed to persuade the institution concerned to alter its position. My annual reports include many examples of cases in which the institutions have provided redress to complainants. They provide, therefore, a more complete picture of the Ombudsman's activities to combat maladministration, promote good administration and improve relations between the European Union and its citizens.

The way in which an institution reacts to complaints and to criticism and suggestions is a key indication of how citizen-centred it is. As Ombudsman, I have made efforts to persuade the institutions and their officials not to adopt a defensive approach.

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

In particular, I have 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. An important part of "moving on" in this context is to reflect on whether the experience of handling the complaint has provided any information that can be used to raise the quality of administration in the future. The Ombudsman's remarks should help stimulate such reflection.

Overall, the institutions gave a satisfactory follow-up to nearly four out of five of the critical and further remarks made in 2008. However, the rate of satisfactory follow-up to critical remarks (62%) was considerably lower than for further remarks (100%). This demonstrates that there is still important work to be done, by the Ombudsman and by the institutions themselves, in persuading officials that a defensive approach to the Ombudsman represents a missed opportunity for their institution and risks damaging the image of the European Union.

I am glad to report that there are also five cases in which the follow-up to a critical or further remark was exemplary. I have designated these as "star cases", by analogy with the "star cases" mentioned in my Annual Reports, in which the institution concerned handled a complaint in an exemplary way.

P. Nikiforos Diamandouros, 23 November 2009

STUDY

1 INTRODUCTION

The present study explains the purpose of critical remarks and further remarks and the different kinds of circumstance which give rise to them. It then analyses the follow-up which the institutions, bodies, offices and agencies concerned have given to critical remarks and further remarks made in 2008 and identifies five star cases. Finally, conclusions are drawn as regards the main lessons of the study for the future.

The European Ombudsman serves the general public interest by helping to improve the quality of administration and of service rendered to citizens by the EU institutions[2]. At the same time, the Ombudsman provides the Union's citizens and residents with an alternative remedy to protect their interests. That remedy is complementary to protection by the EU Courts and does not necessarily have the same objective as judicial proceedings.

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

2 THE PURPOSE OF CRITICAL REMARKS AND FURTHER REMARKS

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

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

[2] 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 amends 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". See also the note of page 4 above for the use of the term "institutions" in the present study.

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

A critical remark does not, however, constitute redress for the complainant. Where redress should be provided, it is best if the institution concerned takes the initiative, when it receives the complaint, to acknowledge the maladministration and offer suitable redress. In some cases, this could consist of a simple apology.

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

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

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

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

Where the Ombudsman disagrees with the institution and finds maladministration for which the complainant should receive redress, the normal procedure is to propose a friendly solution. If the institution rejects such a proposal without good reason, the next step is usually a draft recommendation.

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

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

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

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

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

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

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

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

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

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

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

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

relation to important matters, where Parliament is able to take action in order to assist the Ombudsman.

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

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

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

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

5 FOLLOW-UP GIVEN TO CRITICAL REMARKS AND FURTHER REMARKS MADE IN 2008

In 2008, a total of 53 critical remarks were made in 43 decisions and a total of 47 further remarks were made in 42 decisions. A single decision may contain more than one remark, and both kinds of remark may be included in the same decision. Table 1 shows the distribution of remarks by institution.

TABLE 1 - Distribution of remarks by institution.

Institution	Number of critical remarks in 2008	Number of further remarks in 2008
European Parliament	7	6
European Commission	36	27
European Economic and Social Committee (EESC)	4	2
Committee of the Regions of the European Union	1	-
European Data Protection Supervisor (EDPS)	-	1

Office for official publications of the European Communities (OPOCE)	2	-
Centre for the development of vocational training (Cedefop)	1	-
European Police Office (Europol)	1	1
Translation Centre for the bodies of the European Union	1	1
European Personnel Selection Office (EPSO)	-	9
TOTAL	**53**	**47**

The institutions concerned were invited to respond to the remarks within a period of six months. Responses were received to all the remarks made in 2008, although with a delay in some cases. The last to arrive were those of the Commission to the remarks in cases 3579/2006/TS and 3208/2006/GG, which were sent on 22 and 30 September 2009 respectively. This represents a significant improvement from the previous year, when some responses were so delayed that they could not be taken into account in the 2007 study.

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

The study also deals with the responses to the remarks made in five cases closed in 2007, in which information from the Commission on its follow-up was not received in time to be included in the 2007 study. The cases, which all concern public access to documents under Regulation 1049/2001[3], are dealt with in a special sub-section under the general heading of the Commission.

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

Taking critical and further remarks together, the rate of satisfactory follow-up was 79%. The follow-up to further remarks was satisfactory in all cases, whilst the rate of satisfactory follow-up of critical remarks was significantly lower at 62%. Examples of unsatisfactory responses to critical remarks include those of the European Parliament and the Commission in cases **2819/2005/BU** and **327/2007/GG** respectively.

Table 2 shows the number and percentage of satisfactory replies by institution. (The figures include the eight critical remarks and two further remarks made in the five public access cases from 2007, which were mentioned above).

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

TABLE 2 - Number and percentage of satisfactory replies by institution.

Institution	Number of critical and further remarks	Number of satisfactory replies	% of satisfactory replies
European Parliament	13	11	85%
European Commission	73	56	77%
European Economic and Social Committee (EESC)	6	6	100%
Committee of the Regions of the European Union	1	1	100%
European Data Protection Supervisor (EDPS)	1	1	100%
Office for official publications of the European Communities (OPOCE)	2	-	0%
Centre for the development of vocational training (Cedefop)	1	-	0%
European Police Office (Europol)	2	2	100%
Translation Centre for the bodies of the European Union	2	1	50%
EPSO	9	9	100%
TOTAL	**110**	**87**	**79%**

6 CASES THAT ARE PARTICULARLY SIGNIFICANT FOR THE OMBUDSMAN'S KEY OBJECTIVES

The European Ombudsman was established in order to help bring the European institutions closer to Europe's citizens. The Ombudsman aims to promote an administrative culture of service to citizens. An important part of such a culture is for the institutions to make a continuous effort to look at themselves and their activities from the citizen's perspective and to avoid acting in ways that could lead citizens to feel that European integration is a process that excludes and disempowers them. The Ombudsman also aims to promote transparency of the institutions towards citizens. Some of the critical and further remarks made in 2008 are particularly relevant to the key objectives of a culture of service and of transparency:

- Case **3617/2006/JF** concerned the Commission's Communication entitled "*Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*"[4]. The promises made in this Communication to citizens and to

[4] Communication from the Commission towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission COM(2002) 704 final.

organised civil society are of great value and importance. The Ombudsman welcomes the Commission's commitment to respect those promises.

- For citizens who want to participate in, or to scrutinise, the application of EU law, the infringement procedure (through which the Commission fulfils its duties as guardian of the Treaty) is a natural focus of interest. In case **3737/2006/JMA**, the Commission explained that delays in the infringement procedure often result from slow replies by Member States to letters of formal notice, making it impossible to predict with accuracy how long the procedure will take. The Ombudsman takes the view that, if delay in handling an infringement complaint is the fault of a Member State, it would be in the interests of transparency and the empowerment of citizens in the national democratic framework for the Commission to inform the complainant accordingly. The complainant could use such information as the basis for a complaint to the national ombudsman against the delay in replying to the Commission, or to bring political and media pressure to bear on the government of the Member State.

- Case **3208/2006/GG** concerned the obligation, contained in the Regulation on public access to documents, to establish registers of documents. During the Ombudsman's inquiry, the Commission consistently argued that it was going to expand the scope of its registers and led the Ombudsman to believe that the problem was mainly a technical one. The Ombudsman regrets that the Commission's response to the critical remark in this case suggests that it has no intention of trying to complete its register.

- The Commission's response in case **1693/2005/PB** takes account of the Union's 2007 and 2008 legislative reform, which requires publication of the beneficiaries of the European agricultural funds and the amounts received by each beneficiary. Detailed information on this reform is available on the website of the Commission's Directorate for Agriculture[5].

- The Commission's responses in case **1434/2004/PB, 144/2005/PB** and **3002/2005/PB** indicate that the Commission takes an expansive view of the scope of the exception in Regulation 1049/2001 for the protection of its decision-making process (Article 4(3)). The Ombudsman made a draft recommendation to the Commission in June 2009, which contains an in-depth analysis of the exception, taking into account the most recent case-law of the Court of First Instance[6].

- Case **2681/2007/PB** concerned a request for access to a document concerning the European Regulators Group (ERG). The Commission set up the ERG as a mechanism to encourage cooperation and coordination between national regulatory authorities and itself, with an eye to promoting the development of the

5 http://ec.europa.eu/agriculture/funding/index_en.htm

6 The draft recommendation is in case 355/2007/TN. The recent case law is Case T-121/05, *Borax Europe Ltd v Commission*, judgment of 11 March 2009 (not yet reported).

internal market for electronic communications networks and services, and the consistent application of the relevant Directives[7]. The Commission originally stated that the requested document did not exist. Subsequently, it found the document on a website used for exchanges among the delegates of national regulatory authorities[8]. This case illustrates the need for the Commission to take concrete and proactive measures to ensure clear responsibility for guaranteeing public access to information and documents about administrative and regulatory cooperation between the EU institutions and national authorities.

7 CONCLUSIONS

The follow-ups given to critical and further remarks in 2008 show that the Ombudsman's efforts to reach out to the institutions and to promote a culture of service to citizens are continuing to bear fruit. In certain cases, the follow-up has been exemplary, clearly showing that those responsible are keen to use this opportunity to demonstrate that they are fully committed to a service culture.

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

The Ombudsman intends to publish in November 2010 the study of the follow-up of critical and further remarks made in 2009.

7 See the website www.erg.eu.int

8 www.circa.europa.eu

ANNEXES

I DETAILED ANALYSIS OF CASES

A STAR CASES

Case **101/2004/GG** was closed with the following critical remark:

On 16 September 2002, the complainant asked the European Commission to examine nine instances of maladministration that she considered to have occurred at the Institute for Transuranium Elements ("ITU") in Karlsruhe in the field of protection against radiation and as regards transports of radioactive materials. The ITU is part of the Joint Research Centre, a Directorate-General of the Commission. After a thorough inquiry, the Ombudsman concludes that the Commission has failed to show that it has properly dealt with the complainant's third, sixth and seventh allegations set forth in the complainant's letter of 16 September 2002. This constitutes maladministration.

In response, the Commission informed the Ombudsman as follows:

As regards the third allegation (alleged illegal dispatch of a sample of radioactive material as a normal shipment), the ITU had introduced improvements to its inventory system. The new system includes a more detailed database and allows for better identification of stored items. The implementation of stricter procedures concerning the transport of radioactive material started at the end of 1997. Since then, more written instructions have been developed and existing instructions were amended and adapted to new regulations. The relevant members of staff have received detailed training regarding the new procedures, and checks are being carried out on a regular basis. Three members of staff have been trained and formally qualified as dangerous goods managers, with appropriate deputising.

As regards the complainant's sixth allegation (allegedly incorrect handling of passes of outside staff on which the exposure to radiation was noted and failure to notify an incident to the supervisory authorities), the ITU had received new regulations and guidelines from the German authorities. The ITU had revised its internal working instructions accordingly, and these were approved by the supervisory authorities in March 2009. Among other things, monthly information about the doses to which outside workers have been exposed is now provided to the firm concerned and the supervisory authorities are immediately informed when the limits of exposure laid down in the relevant regulations are exceeded.

As regards the complainant's seventh allegation (alleged use of staff that was completely unsuitable for the posts occupied and failure to remove the persons concerned in case of serious misconduct), the appointment of such officers has now changed. There is now one nuclear expert with two deputies responsible to ensure compliance with all relevant rules. In addition, the heads of the scientific units are appointed as nuclear experts responsible to ensure compliance with the relevant rules that concern their staff and equipment.

The Commission also stated that, during the period from 2004 to 2006, several audits had been carried out in the ITU by its own services and the supervisory authority. No irregularities were found on the occasion of these audits. It added that it would continue to monitor, adapt and improve its internal processes at the ITU in agreement with the supervisory authorities.

The Ombudsman welcomes the constructive and detailed follow-up that the Commission has given to the critical remarks.

Complaint **3464/2004/(TN)TS** concerned the European Parliament's decision to recover part of the allowance that the complainant had received as an official assigned to non-active status. The Ombudsman criticised Parliament's failure to inform the complainant properly and in due time of its recovery decision. This was contrary to the Staff Regulations and to the European Code of Good Administrative Behaviour.

In response, Parliament acknowledged that it should have informed the complainant of the recovery decision before the decision was executed. It informed the Ombudsman that it had adopted measures which will, in future, ensure communication of the decision at the earliest possible stage of the procedure before its execution.

The Ombudsman welcomes Parliament’s positive and constructive response to the critical remark.

The complainant in case **1473/2006/TS** worked for the European Economic and Social Committee (“the EESC”). The Ombudsman found that the EESC did not handle correctly the complainant’s requests for information and for access to a document and that a letter from the complainant was not promptly transmitted to the competent service. He made critical remarks accordingly. The Ombudsman also noted that the underlying issue in the case (although not the object of the Ombudsman's inquiry) concerned the institution’s reaction in cases of discrimination, including cases of anti-Semitism. In a further remark, he encouraged the EESC to take the necessary measures to guarantee that its officials and agents fully comply with the principles of equality and non-discrimination enshrined in the Charter of Fundamental Rights, which are also reflected in the duties and obligations laid down in the Staff Regulations for officials of the European Communities.

In response, the EESC introduced mandatory training courses on prevention of harassment for all managerial staff. The EESC also informed the Ombudsman that its administration is in the process of adopting a new decision on procedures to follow in cases of alleged psychological or sexual harassment.

The Ombudsman welcomes the EESC’s positive and constructive follow-up to his remarks.

In case **OI/8/2006/BU**, EPSO only paid its contribution to the travel expenses of a Romanian citizen after the latter had complained to the Ombudsman. The Ombudsman suggested that, in the future, EPSO should pay more attention to respecting the applicable time limits. The Ombudsman also pointed out that, if delays in payments occur, principles of good administration require offering apologies to the candidates concerned.

In response, EPSO apologised to the complainant and informed the Ombudsman that it is doing its utmost to ensure that payments relating to travel expenses are made as rapidly as possible. In April 2008, EPSO created a single contact point for candidates which will help avoid similar delays in future.

The Ombudsman welcomes EPSO's positive and constructive response.

Case **3148/2007/BEH** concerned a call for grant proposals launched by EuropeAid. In a further remark, the Ombudsman pointed out that it is in the interests of good administration that any modifications or clarifications to a call for proposals be made in a manner which takes into account the legitimate interests of citizens. He suggested that, in future calls for proposals, the Commission could consider informing potential applicants about the need to keep themselves updated with regard to clarifications and modifications published in line with the applicable rules. He also pointed out that the Guidelines for Grant Applicants should be as clear and precise as possible, so as to require only a minimum of clarification.

In response, the Commission expressed its full agreement as regards the need to take into account the legitimate interests of citizens. It went on to state that current practice already took account of citizens' interest in the following ways:

1. The Commission publishes clarifications and questions which are of general interest on its website 11 days before the deadline for submission of proposals;
2. This deadline may be extended if the call for proposals needs to be modified;
3. The Guidelines for Grant Applicants as well as the Practical Guide to contract procedures for EC external actions clearly inform potential applicants that clarifications may be published up to 10 days before the deadline.

The Commission also stated that it has taken a number of steps to further improve applicants' awareness:

1. The 2009 Guidelines have been modified by adding, in sections 2.2.4 and 2.2.8, that “it is therefore highly recommended to regularly consult the above-mentioned website in order to be informed of the questions and answers published”;

2. The new template for the Guidelines for Grant Applicants states that "[Partners] *must therefore satisfy the eligibility criteria as applicable on the grant beneficiary himself*" (point 2.1.2). It further states that "Partners <may/may not> take part in more than one application" (point 2.1.3).

3. EuropeAid is implementing an on-line service tool called PADOR ("Potential Applicant Data On-line Registration") which will enable it to improve its knowledge management and the services offered by it. It is further envisaged that the system will allow potential applicants to get direct information on the status of the calls for proposals to which they have applied as well as notifications.

The Ombudsman notes, in particular, that sections 2.2.4 and 2.2.8 of the Guidelines for Grant Applicants, which recommend that applicants regularly consult the relevant website in order to be informed of the questions and answers published, clearly implement the Ombudsman's suggestion and that the new template used for the Guidelines unambiguously excludes or allows (as the case may be) participation of a partner in more than one project. Furthermore, the new version of the template makes clear that partners and beneficiaries have to satisfy the same eligibility criteria.

The Ombudsman welcomes the Commission's positive and detailed response.

B OTHER CASES BY INSTITUTION

1 The European Parliament

Case **186/2005/ELB** concerned the European Parliament's recruitment of Auxiliary Conference Interpreters ("ACIs") who are over 65 years of age. Parliament accepted the Ombudsman's draft recommendation that it should adopt identical procedures to recruit ACIs over and under 65 years of age. In closing the case, the Ombudsman made a further remark encouraging Parliament to establish clear criteria for comparative assessment of ACIs before the procedure begins and to document the procedure accordingly.

In response, Parliament informed the Ombudsman that a more structured procedure for monitoring the performance of interpreters had been introduced. The aim is to ensure that all interpreters are assessed on the basis of the same criteria and that all assessment reports are comparable. In Parliament's view, the fact that all quality control procedures are now based on a single form, applicable to all interpreters and all language units, guarantees the comparability of all assessment reports on the basis of uniform criteria. At the end of the procedure, the interpreter concerned has the right to lodge an appeal with the Director.

The Ombudsman was delighted that Parliament accepted the draft recommendation in this case. He also warmly welcomes Parliament's positive response to the further remark.

In case **2675/2005/MF**, the Ombudsman criticised Parliament for failing to convene the Invalidity Committee as soon as possible in the circumstances of the complainant's case. In response, Parliament took the view that it had fulfilled its statutory obligations towards the official concerned, but undertook to adopt a less strict approach should it be confronted with a similar case in the future.

The Ombudsman welcomes Parliament's recognition that good administration requires more than just fulfilling its legal obligations.

In complaint **2989/2006/OV**, the Ombudsman criticised Parliament's failure to inform an unsuccessful tenderer of the possibilities of appeal against the rejection of the tender. In response, Parliament informed the Ombudsman that its standard model documents have been changed and now inform tenderers of the ways in which they may lodge an appeal.

The Ombudsman welcomes Parliament's positive and constructive response.

In case **747/2007/MF**, the Ombudsman criticised Parliament's failure to reply to the complainant's request for information. The Ombudsman also suggested (i) that it would have been courteous to have informed the complainant, as soon as reasonably possible, that her contract would not be extended and (ii) that future letters inviting candidates in a selection procedure to a medical examination should clearly state that the invitation does not constitute an offer of employment.

In response to the criticism, Parliament stated that the competent service had adopted measures to ensure that e-mails concerning the administrative situation of contract staff receive a reply within a reasonable deadline. Parliament also accepted the Ombudsman's suggestions and announced that in future contracts staff will be informed at least one month before the expiry of their contract whether Parliament intends to renew it or not and that candidates will be informed that an invitation to a medical examination does not under any circumstances constitute an offer of employment.

The Ombudsman welcomes Parliament's positive and constructive response.

In case **720/2006/DK**, the Ombudsman suggested that the European Parliament should review the general question of which kinds of document should be included in the personal file of officials. Parliament responded that, rather than broadening the categories of documents that should be placed into personal files, its services should ensure the effectiveness of data protection mechanisms; in particular the right of access to one's own data for which Article 13 of the data protection Regulation (Regulation 45/2001[9]) provides.

The Ombudsman welcomes Parliament's positive and constructive approach to the matter.

In case **2819/2005/BU**, the Ombudsman criticised the treatment given to the complainant, a former assistant of an MEP, after the latter decided to terminate the complainant's contract. In March 2005, a member of Parliament's Security Unit interrupted the complainant during her lunch in Parliament's canteen in Brussels, and, in the presence of other diners and without allowing her to finish her meal, asked her immediately to follow him to the Security Unit, where she had to return her accreditation card and then leave Parliament's premises. The Ombudsman considered that Parliament's treatment of the complainant involved instances of maladministration consisting of a violation of her fundamental right to be heard and a violation of the principle of proportionality. Parliament refused the Ombudsman's suggestion that it could offer the complainant apologies and compensation.

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[9] Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8 p. 1

In response to the critical remark, Parliament insisted that its actions were not in any way untoward and that there was no reason for it to offer the complainant an apology or compensation.

The Ombudsman notes that Parliament rejected both a proposal for a friendly solution and a draft recommendation. The Ombudsman profoundly regrets Parliament's failure to acknowledge the maladministration in this case and to offer the complainant suitable redress.

Case **3051/2005/WP** concerned the European Parliament's staff assessment exercise for the year 2003. The Ombudsman criticised Parliament's failure (1) to conduct a proper comparative assessment of the complainant's merits in 2003 with those of his colleagues, (2) to fulfil his legitimate expectations as regards a letter sent to him by Parliament's Secretary-General on 24 June 2004 and (3) to send the complainant a correctly made proposal for the award of merit points.

In response, Parliament accepted that, when awarding merit points, the appointing authority is obliged to compare the professional merits of the staff concerned. According to Parliament it could not be excluded, however, that in particular circumstances such comparative assessment is difficult to carry out. Parliament insisted that, in the present case, a comparative assessment of the complainant's merits had been carried out and that it had complied with the applicable internal rules on the award of merit points. As regards the second and third aspects of the critical remark, Parliament accepted that it would have been appropriate to address the proposal on points to the complainant. Parliament maintained, however, that what it called a "*minor procedural error*" had not prevented the complainant from exercising his rights of defence.

The Ombudsman notes that Parliament appears to insist on the legality of its approach, according to which the complainant would have to prove that his merits were *superior* to those of his colleagues who received a third point, instead of proving only *comparable* merits. The Ombudsman points out that, on 11 February 2009, the Civil Service Tribunal annulled Parliament's decisions on the award of merit points for 2003 to the complainant and held that, by arguing that the complainant could only obtain a third merit point if his merits were superior to those of his colleagues who had received a third merit point, Parliament had failed to respect the principle of equal treatment[10]. The Ombudsman recalls that his inquiry into case 344/2007/BEH, which relates to the award of merit points to the complainant for the year 2004, is on-going. In the framework of that inquiry, Parliament informed the Ombudsman that, notwithstanding the judgment in Case F-7/08, it remains convinced of the legality of its approach.

The Ombudsman regrets the European Parliament's unwillingness to apply the logic of the above-mentioned judgment of the Civil Service Tribunal.

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[10] Case F-7/08, *Schönberger v European Parliament*, judgment of 11 February 2009.

Case **3643/2005/WP** concerned the European Parliament's refusal to grant the complainant's request for access to data detailing the allowances granted to certain Members of the European Parliament. Parliament dealt with the request under Regulation 1049/2001. The Ombudsman closed the case with the following critical remark:

The Ombudsman regrets that the European Parliament has sought to justify its refusal fully to accept the draft recommendation to remedy the maladministration in this case by relying on a legal interpretation that weakens the principle of transparency and which has been rejected by the Court of First Instance in the Bavarian Lager *case.*

In response, Parliament informed the Ombudsman that it has adopted a series of major reforms concerning its system of allowances for Members. In Parliament's view, these amount to a substantial increase in transparency and largely address the spirit of the Ombudsman's remarks. The changes include:

a) A new Statute for Members, applicable from the 2009 elections, with a common salary, coupled with a new system for travel expenses, based directly on reimbursement of ticket prices;

b) A major change to the system for employment of assistants after the elections, with those working in Parliament's main places of work (Strasbourg, Brussels and Luxembourg) employed under the EU Staff Regulations and qualified paying agents handling the pay and social security arrangements for most of the assistance requirements of Members of the European Parliament in their Member States;

c) A phasing out of the additional (voluntary) pension scheme from 2009;

d) Publication on the EP website of up to date information on the expenses and allowances for Members, including the sums available under each category.

The Ombudsman welcomes the positive measures taken by the European Parliament to address the issue of transparency underlying the complaint. The Ombudsman notes that two cases against the European Parliament concerning access to documents are currently pending before the Court of First Instance and that the Commission's appeal against the judgment of that Court in the *Bavarian Lager* case is pending before the Court of Justice[11]. The Ombudsman trusts that the European Parliament will apply the case-law of the Community Courts.

Case **655/2006/ID** concerned the European Parliament's refusal to grant the complainant's request for access to the list of the names of the members of the Additional Pension Scheme for MEPs. Parliament dealt with the request under Regulation 1049/2001. The Ombudsman's closing decision contained the following further remark:

[11] Pending cases T-82/09, *Dennekamp v Parliament* (2009 OJ C 102/44); T-471/08, *Toland v Parliament* (2008 OJ C 32/72); C-28/08 P, *Commission v Bavarian Lager (*2008 OJ C 79/36). The opinion of the Advocate General in the *Bavarian Lager* case was delivered on 15 October 2009.

In its reply to the Ombudsman's Draft Recommendation in case 3643/2005/(GK)WP (concerning the related issue of access to data detailing the allowances granted to MEPs), Parliament stated that the situation should be analysed again in the light of the experience of the entry into force, in 2009, of the Statute for Members (Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament, 2005/684/EC, Euratom) and that new implementing rules would come into force in this field. Taking into account this statement, and that, under Article 27 of the Statute for Members, the voluntary pension scheme in question will continue to exist, the Ombudsman encourages Parliament to make a commitment to reconsider the matter, in the above context.

In response, Parliament informed the Ombudsman that the question at issue is currently before the Court of First Instance[12] and that Parliament will reconsider the matter in the light of the final judgment of the Court of Justice.

The Ombudsman trusts that the European Parliament will apply the case-law of the Community Courts.

The complainant in case **1235/2008/ELB** participated unsuccessfully in a tender organised by the European Parliament. The Ombudsman found no maladministration in relation to the complainant's allegations. However, he drew Parliament's attention to the fact that its letter to the complainant explaining why she had not been awarded the tender had put forward reasons additional to those which the Evaluation Committee had taken into account.

In response, Parliament explained that the additional reasons were intended to demonstrate the complete transparency of the institution and that, in future, its authorising officers would clearly draw the attention of evaluation committees to the appropriate method for assessing the criteria for exclusion, selection and award of tenders.

The Ombudsman welcomes Parliament's commitments to transparency and to correct application of the award criteria. The Ombudsman recalls that his comment was based on the fact that Parliament's explanation for the rejection of the complainant's tender had included reference to selection criteria which the Evaluation Committee had expressly decided to disregard.

[12] The Ombudsman notes that the case to which Parliament refers is pending Case T-82/09, *Dennekamp v Parliament* (2009 OJ C 102/44).

2 The European Commission

Case **1744/2004/BB** concerned similar facts to three cases closed in 2007 and included in the study of critical and further remarks made in that year: 240/2004/PB, 242/2004/PB and 756/2004/PB. In all four cases, the Ombudsman criticised the Commission's failure to ensure that the daily allowances paid to national experts in an accession country reflected actual changes in living costs. The Commission's response is examined in the 2007 study and need not be dealt with again here.

In the present case, the Ombudsman also criticised the Commission's administrative follow-up of the complainant's letters.

In its response, the Commission apologised to the complainant for not having replied directly to his letters. The Commission also recognised that it ought to check whether information provided through the network of national contact points is passed to the experts concerned. In this regard, it announced its intention to raise the issue of dissemination of information during the next annual meeting of national contact points.

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

In case **2283/2004/GG,** the Ombudsman criticised the Commission's handling of two applications for co-financing submitted by the complainant in 1992.

In response, the Commission disagreed with the critical remark. It stated that it had presented apologies to the complainant for the aspects of the case that it considered justified. In the Commission's view, apologies as regards other aspects, when the Commission maintained its position on the merits, would not have been understood, let alone accepted by the complainant. As regards action to prevent such instances of maladministration in the future, the Commission emphasised how much the present context differed from that existing at the time of the facts and that the Commission has revised the rules in the Practical Guide to contract procedures for EC external actions in order to follow the Ombudsman's remarks.

The Ombudsman agrees with the Commission that insincere apologies are not useful. The Ombudsman recalls, however, that the Commission (i) failed to handle the complainant's applications fairly and objectively; (ii) rejected these applications without valid reasons; (iii) failed to hear the complainant before adopting its decision on the basis of information it had obtained from third parties; and (iv) only informed the complainant of the reasons for its decision nearly three years after the latter had been taken.

These were serious instances of maladministration and the Commission's failure to recognise and apologise for them is therefore all the more deplorable.

In case **3203/2004/DK,** the Ombudsman criticised the exclusion of officials seconded at their own request from participating in internal competitions as being without any legal basis and discriminatory.

In response, the Commission maintained its previous position. Nevertheless, it stated that it was willing to modify the relevant rules, while maintaining the differentiation of the two administrative statuses foreseen by the Staff Regulations.

The Ombudsman regrets that the Commission is not willing to act quickly to end its discriminatory practice.

In case **184/2005/GG**, the Ombudsman made a further remark encouraging the Commission to ensure that, if it resorts to the assistance of outside consultants in the context of procedures for filling high-ranking positions, these consultants are guided and supervised in such a way as to ensure that the procedure and its outcome do not give rise to objections that could have been avoided.

In response, the Commission stated that it will take into account the Ombudsman's opinion for the future.

The Ombudsman welcomes the Commission's commitment as regards its future actions.

Case **259/2005/GG** concerned a call for proposals published by the Commission in 2004 within the framework of the programme "European Initiative for Democracy and Human Rights". Applicants had to apply in English, French, or Spanish. The Ombudsman criticised the restriction of the languages that could be used. He pointed out that Article 2 of Regulation 1/58 gives non-governmental organisations the right to use any of the Community languages when sending documents to the institutions of the Community. He considered that the Commission has not established that there were exceptional circumstances that would have made it impossible to deal with applications in other Community languages, for instance in view of the urgency of the matter. Nor had the Commission shown that the Community legislator had authorised it to depart from the above-mentioned rule. In these circumstances, the Ombudsman concluded that the Commission had failed to comply with Article 2 of Regulation 1/58 in this case.

In response, the Commission stated that it did not share all of the legal premises of the critical remark, but that it had implemented a number of changes in its practice:

(1) Documents supporting applications were now accepted in all EU languages.

(2) For certain actions taking place exclusively in the EU and for which the principal target groups are EU citizens, applications in the language(s) of the Member State(s) concerned are accepted.

(3) The Commission was ready to state in the grant guidelines the reasons for limiting the number of EU languages in which proposals can be submitted.

The Ombudsman notes that points 1 and 3 of the Commission's response are not new, since they were already known and considered insufficient during his inquiry. The Ombudsman welcomes the change in point 2, but considers it to be of limited value as a follow-up to the finding of maladministration, given that it must be assumed that projects falling under this heading will be extremely rare in the field of external aid.

In case **1105/2005/MF**, the Ombudsman made a further remark pointing out that it is in the interests of good administration that all reasonable efforts should be made to effect any necessary modifications or clarifications to a call for proposals in good time, so as to allow interested parties sufficient time to take account of such modifications or clarifications.

In response, the Commission stated that even a slight rewording of the Work Programme is publicised before the deadline for applications by highlighting the new version in red on the CORDIS (Community Research and Development Information System) website. For the PEOPLE Programme (implementing the Marie Curie Actions in the 7th framework programme), the first page of the annual Work Programme explained the changes as compared to the former version. Other relevant documents such as the Guide for Applicants, also explain the changes, in compliance with the Ombudsman's suggestion.

The Ombudsman welcomes the Commission's positive and detailed response.

Case **576/2005/GG** concerned Community financial support for a research project. The university that was originally co-ordinating the project withdrew after one year and a second university took over. Following financial and scientific audits, the Community contribution foreseen for the first university was reduced. However, the second university considered that the Commission should have claimed back all the advance payments made to the first university. Among other things, it alleged that the latter university had declared costs for postgraduate staff whereas the reports it had handed in consisted exclusively of translated papers of students. According to the contract, only work carried out by postgraduate staff was eligible for Community funding.

In his decision closing the case, the Ombudsman considered that the complainant had submitted strong arguments to call into doubt the staff costs that had been accepted by the Commission. He criticised the Commission's failure to examine this issue in a sufficiently thorough and proper manner.

In response, the Commission maintained that it had acted in an appropriate manner. Carrying out a further scientific audit concerning the staff costs would have been impossible due to the fact that under the relevant rules such a scientific audit could only

be conducted up to 2 years after the end of the project. Furthermore, all the staff that had worked on the project had most probably left the first university. The relevant contract had been carried out under the 4th Framework Programme for Research that ran from 1994-1998. Under the 6th (2003-2006) and 7th (2007-2013) Framework Programmes, the review of projects had been reinforced significantly. The Commission now performs, on its own initiative, around 400 financial audits per year. Audits are now possible up to five years after the end of a project.

The Ombudsman notes that his criticism was based on the way in which the Commission had dealt with (or, rather, ignored) the complainant's argument that the reports submitted by the first university consisted of copies of papers drawn up by students. Dealing with this argument would thus not have necessitated a (second) scientific audit, but a comparison of the reports submitted by the first university and the papers drawn up by students.

Case **789/2005/ID** concerned the Commission's handling of an infringement complaint submitted to it against Greece, concerning the construction of a tramway in Athens. The Ombudsman criticised the Commission's failure to deal properly with the complainant's arguments that the publicity given to the Environmental Impact Assessment ("the EIA") had been inadequate to fulfil the requirements of Directive 85/337. The Ombudsman also criticised the length of time the Commission had taken to deal with the infringement complaint.

In response, the Commission emphasised its view that the available evidence did not show that the public had been prevented from expressing a view on the EIA, or that it had been unduly difficult for it to do so. Furthermore, the Commission repeated that the Greek Council of State had found that the procedure for publicising the decision had been respected. As regards the length of the procedure, the Commission regretted the delay that occurred and explained, in summary, that the complexity of the case and the need to assess the evidence had justified taking longer than the one year normally foreseen for infringement investigations. The Commission also mentioned that its Communication of 5 September 2007[13] announces measures that should lead to an improvement in the handling of complaints and infringements.

The Ombudsman is closely following developments in the Commission's handling of complaints about infringements.

In case **1785/2005/OV,** the Ombudsman criticised delay by the Commission in making certain payments to a contractor.

In response, the Commission recalled that an in-depth inquiry had been considered necessary, following allegations of fraud raised by a partner of the project. Although an *ex post* analysis of each step suggested that the payment decision could have been made

[13] *A Europe of Results – Applying Community Law*, COM(2007) 502.

earlier, the delay had allowed the Commission services to carry out a complete review of the case and to make a decision which was fair. The Commission has taken the following steps to accelerate the resolution of similar issues in the future:

1 Setting up two horizontal units to reinforce and speed up provision of the support which operational units need in managing project contracts;

2 Putting in place an automatic tool with systematic reminders to monitor payment deadlines. Payments flagged as not executed on time are checked by the "Administration and Finance" unit of each Directorate. The cases thus identified are examined in cooperation with the operational unit in charge, with a view to accelerating the decision making process.

The Ombudsman welcomes the two measures adopted by the Commission, which are likely to help to avoid payment delays in the future.

Case **1962/2005/IP** concerned an infringement complaint submitted by an Italian environmental association. The Commission closed its investigation of the complaint. The Ombudsman criticised the Commission's reasoning for this decision, finding that it was not sufficient and coherent.

In response, the Commission recognised that the explanation given to the complainant had failed to set out clearly the grounds on which it decided to close the case. It emphasised that this was an isolated case and that the Commission takes very seriously the commitments in its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law[14]. The Commission also stated that it will continue to work to ensure that these commitments are fully respected.

The Ombudsman welcomes the Commission's acknowledgement that the explanation given in the present case was not adequate and its commitment to avoid similar cases in the future.

Case **2477/2005/GG** concerned the replacement, at the Commission's request, of a member of a contractor's staff. The case was closed with the following critical remark:

Article 17.2 of the General Conditions stipulates that a request for the replacement of a member of a contractor's staff has to be made "on the basis of a written and justified request". This means that the request needs to set out the reasons on which it is based. However, the Commission's letter of 17 July 2003, in which the replacement of the complainant as team leader was requested, simply states that the Commission wished "to reconfirm [its] serious concerns" about the complainant's performance. These concerns

[14] 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.

are nowhere specified in this letter. In these circumstances, the Ombudsman concludes that the Commission failed to provide the Contractor with a written request properly setting out the reasons on which this request was based. This constitutes an instance of maladministration.

In response, the Commission promised that, in similar cases in the future, it would avoid creating any ambiguities and provide the contractor with a written request to replace an evaluator or team leader, setting out the reasons for the request.

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

Case **3303/2005/GG** concerned repeated medical checks to which the complainant, an EU official, was subjected. The case was closed with the following critical remarks:

It is good administrative practice for an institution to have regard to the interests of its staff when taking decisions or measures affecting the latter. In the present case, the Commission subjected the complainant, who suffers from depression, to a medical examination on 13 January 2004 without being able to put forward a clear and valid reason for this decision and even though, at the previous control of 9 December 2003, the Commission's Medical Service had concluded that the complainant was not fit to work until the end of February 2004. In proceeding to the examination of 13 January 2004 the Commission thus failed to have due regard to the interests of the complainant. This constitutes an instance of maladministration.

Public access to documents in the possession of an institution needs to be granted unless one of the exceptions set out in Regulation 1049/201 applies. In the present case, the Commission refused to grant access to nine documents on the basis of the exception set out in Article 4(3), second subparagraph of Regulation 1049/2001 without being able to show that this exception is applicable. The Commission thus failed adequately and correctly to deal with the complainant's requests for access to documents. This constitutes a further instance of maladministration.

As regards the first critical remark, the Commission informed the Ombudsman that adequate measures had now been put in place.

As regards the second critical remark, the Commission recalled that it had proposed to give the complainant, outside the scope of Regulation 1049/2001, the possibility to consult the disputed documents in person at its premises. It reiterated its view that public disclosure of the documents concerned would harm the interests protected by the said exception.

The Ombudsman recalls that he made a draft recommendation that the Commission should reconsider the complainant's request for access. Only nine documents were still at issue at this stage. The Ombudsman had indicated, document by document, why he doubted that the exception invoked by the Commission

(Article 4(3), second sub-paragraph) applied. Furthermore, the Ombudsman still fails to see why the Commission did not at the very least consider the possibility of giving partial access to the documents. Given the small number of the documents concerned and the limited number of pages they comprise, it would easily have been possible for the Commission to implement the Ombudsman's draft recommendation. The Ombudsman regrets the Commission's failure to do so.

In case **3346/2005/MHZ**, the Ombudsman criticised the Commission's failure to assess the complainant's bid correctly and to handle the tender procedure properly. In response, the Commission informed the Ombudsman that it maintained its initial position that its decision to reject the complainant's bid was correct.

The Ombudsman regrets the Commission's apparent unwillingness to learn lessons for the future from this case.

In case **262/2006/OV**, the Ombudsman criticised the Commission's failure to address one of the points raised by the complainant in correspondence with the Commission. The point in question was the complainant's argument that, after four years of service, contracts of teachers seconded to the European Schools should become permanent.

In response, the Commission explained that the objectives of Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP are (i) the improvement in the quality of fixed-term work by ensuring the application of the principle of non-discrimination and (ii) the establishment of a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The Directive does not specify that fixed-term contracts must be converted into contracts of indefinite duration. The Netherlands gives effect to the requirement in the Directive to have measures in place to avoid abuse of successive fixed-term contracts by means of Article 7:668(a) of the Civil Code. Since the complainant's employment was with the Dutch authorities, the contract would be covered by the Dutch provisions on measures to prevent abuse. If the arrangements for the employment of teachers for secondment to the European Schools are in breach of Dutch legislation, then the complainant would need to seek a remedy through the Dutch courts.

The Ombudsman welcomes the additional clarifications from the Commission.

Case **284/2006/PB** concerned the EU's introduction of mandatory digital tachographs in goods and transport vehicles. Tachographs register driving times and rest periods of professional drivers, and are thus intended to enhance road safety. The Commission postponed the date originally foreseen in the relevant EU legislation

(Regulation 2135/98) for introduction of the digital tachograph several times, by introducing what it referred to expressly as a "moratorium". The Ombudsman criticised the Commission's failure to demonstrate that it had legal authority to adopt the moratorium, insofar as the latter involved regulatory measures which were clearly distinguishable from, and went well beyond, a decision simply to abstain from opening infringement procedures.

In response, the Commission insisted that its moratorium merely provided a period of tolerance during which the Commission abstained from initiating infringement proceedings against Member States for failure to respect the deadline, and that its actions were therefore covered by the wide margin of discretion that it enjoys in respect to infringement proceedings. It also recognised, however, the importance of including in future legislation provisions that allow for flexibility on dates, so as to avoid this kind of situation in the future.

The Ombudsman cannot agree with the Commission's analysis of its actions in this case, but welcomes its commitment to avoid such situations in the future.

Case **554/2006/FOR** concerned cost of living allowances for a Young Expert in the European Commission's Delegation in Trinidad and Tobago. The Ombudsman found no maladministration. However, he suggested that the Commission review, on a periodic basis, whether the system for calculating cost of living allowances applicable to Young Experts continues to be the most appropriate system. He also pointed out that an effective internal dispute resolution procedure for dealing with complaints from Young Experts would be highly beneficial.

In response, the Commission informed the Ombudsman that, in future, the contractual rights of Young Experts as regards allowances for living conditions would be harmonised with the rules applying to officials and contractual agents. Furthermore, it would examine the issue of an internal dispute resolution system during a forthcoming review of the Young Experts.

The Ombudsman welcomes the Commission's positive response.

In case **1021/2006/JF**, the Ombudsman criticised the Commission's failure to explain the different treatment it had given to the complainant's professional experience for purposes of his grading under two successive contracts.

In response, the Commission stated that it noted the Ombudsman's critical remark and agreed that it is very important to give reasons for grading decisions. It also recalled that the complainant became a Contract Agent after having worked under an ALAT contract. In this regard, it emphasised that decisions recruiting Contract Agents do not have the effect of changing the classifications of those persons who had previously been recruited as ALATs. Consequently, there was no legal basis for changing the complainant's classification as ALAT.

The Ombudsman regrets that the Commission's response does not address the question of how to avoid, in the future, similar inconsistency in the treatment of professional experience under successive contracts.

The complainant in case **1084/2006/MHZ** was a consultant involved in the implementation of a project in Uzbekistan. The decision closing the case suggested that the Commission consider, in future:

1 recommending to its contractors that their subcontracts with the individual experts include (i) a clause informing them that the presence of EU experts is subject to acceptance from the local project partner, who may refuse further to work with an expert providing the relevant reasons in writing, and (ii) the legal implications for the expert in case of such refusal and of the termination of the contract;

2 requiring from the local project partner an explanation for its non acceptance of a EU expert, and establishing measures within the Tacis funding procedure in cases where it regards such an explanation to be abusive or contrary to EU standards.

In response, the Commission informed the Ombudsman that the most recent version of its Practical Guide to contract procedures for EC external actions foresees that, for centralised tender procedures, the beneficiary country's approval is necessary when accepting key experts proposed by the contractor involved. The beneficiary country may not withhold its approval unless it submits substantiated and justified objections to the proposed key expert in writing. In practice, the beneficiary country nominates one member of the evaluation committee and acceptance by the evaluation committee means that all the key experts proposed by the successful tenderer are accepted. The Commission also expressed its intention to amend (i) the Practical Guide, so that experts may only be replaced if the beneficiary country so requests and provides duly substantiated and justified objections in writing, and (ii) the Instructions to Tenders which are annexed to the Practical Guide. The latter amendment will aim to ensure that agreements between contractors and experts provide that the agreement may be subject to the beneficiary country's approval and that the beneficiary country may request a replacement if it provides duly substantiated and justified objections in writing.

The Ombudsman welcomes the Commission's positive and detailed response.

The Ombudsman's inquiry in case **1213/2006/PB** concerned, in part, the Commission's alleged failure to reimburse the complainant for unduly high contributions he had paid to the European Union's *Centre Polyvalent de l'Enfance* in Luxembourg. Having concluded that further inquiries were unnecessary, the Ombudsman encouraged the Commission to take steps to update the information contained in its salary programme

on the service and financial status of its officials, for the purposes of determining contributions, such as the ones made to the CPE.

In response, the Commission explained (in summary) that it uses a payment and deduction system that is to a large extent automatic, but which does permit manual corrections in case of problems.

The Ombudsman welcomes the Commission's clarification of its procedures.

In case **1584/2006/OV**, the Ombudsman criticised the Commission's failure to reply to certain e-mails sent by the complainant and its failure to take the opportunity of the Ombudsman's inquiry to apologise to the complainant for this omission. The Ombudsman also criticised the Commission for having failed to keep its promise to the complainant that he would be invited for an interview and that it would contact him again in that regard.

In response, the Commission informed the Ombudsman that it has put in place Internal Control Standards ("ICS") in order to avoid similar instances of maladministration. The ICS 2 ("Ethical and organisational values") indicate that management and staff are aware of and share appropriate ethical and organisational values, and uphold these through their professional behaviour and decision-making. The application of the ICS is the responsibility of the management of each Commission service which must include in its Annual Activity Report conclusions on the effectiveness of the internal control systems in place.

The Secretariat General regularly sends information on the ICS and on the Commission's code of good administrative behaviour to the Commission services with a view to its dissemination to all staff. In light of the above, the Commission does not consider it appropriate to introduce further measures, but will continue to ensure the application of the rules already put in place.

The Ombudsman welcomes the Commission's positive response.

Case **1881/2006/JF** concerned the Commission's investigation of alleged abuse by the mobile communications company O2 of a dominant position in the telecommunications market for the provision of wholesale international roaming services on its network between 1998 and 2003.

The Ombudsman found no maladministration. He considered it useful to remind the Commission, in a further remark, that keeping adequate records of its files and drafting appropriate enumerative lists of its documents is a practice which, apart from facilitating factual access to documents by the parties involved in competition infringement proceedings, is also in accordance with the Commission's Notice of access to the file and principles of good administration. The Ombudsman expressed his trust that the Commission would, in the future, apply its good practice in this respect to all its competition cases.

In response, the Commission introduced modifications to its information system designed to collect and keep documents related to antitrust cases ("Natacha"). Each antitrust document is filed according to its description, type, accessibility, receiving and sending parties, and date. Natacha facilitates access to these files by allowing, *inter alia*, the creation of electronic files; identification of confidentiality claims; production of lists of documents; and export of documents to, for instance, CD-ROMs. Since September 2006, Natacha produces tables of contents that list, in Excel format, all documents of a given antitrust case. It also allows for a control list of documents, which is designed to check the completeness and consistency of the information contained in those documents. In 2007, the Commission reduced the number of document types from 2500 to approximately 300, with a view to simplifying the description of documents and to avoiding inconsistencies. It has also devoted additional resources to training and support activities related to access to files and established a 'knowledge pool on access to file', aimed at disseminating best practices. If necessary, it will make appropriate modifications to its antitrust manual.

The Ombudsman welcomes the Commission's positive and detailed response.

Case **2782/2006/RT** concerned the Commission's handling of the complainant's indemnity insurance claim. The Ombudsman criticised the fact that the Commission took three years to pay the complainant's claim. He also criticised the unnecessary reference to a psychiatric consultation contained in the Commission's opinion on the case.

In response, the Commission repeated its view that the complexity of the file and the need for assessment of expert medical opinions justified the delays which occurred. The Commission provided, for the first time, a detailed chronology of the events which occurred between the issuance of the complainant's injury consolidation report and the final decision on the complainant's invalidity.

As regards the second critical remark, the Commission repeated that it was never its intention to prejudice the complainant in any way and reiterated the content of its letter of apology to the complainant.

The Ombudsman notes the detailed chronology provided by the Commission and welcomes its response to the second critical remark.

In case **2914/2006/WP**, the Ombudsman pointed out that a letter written by the complainant to the Commission clearly stated that it was an infringement complaint pursuant to Article 226 of the EC Treaty. The Ombudsman criticised the Commission's failure to deal with this letter in accordance with its 2002 Communication on relations with the complainant in respect of infringements of Community law[15].

[15] 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.

In response, the Commission conceded that the complainant intended his submission to constitute an infringement complaint. However, it maintained the position it had adopted in its opinion, that is to say, that the allegation raised by the complainant was not investigable in the framework of an infringement procedure and that, as a consequence, the Communication could not be applied.

The Ombudsman notes that the present case concerns the same issue that was raised in case 446/2007/WP, which is discussed on pages 30-31 of the report on the follow-up to critical and further remarks in 2007. In that case, the Ombudsman expressed the view that the Commission's response to the critical remark was based on a misunderstanding. The Commission appeared to believe that the Ombudsman's view was that the relevant letter should have been registered as an infringement complaint. The Ombudsman explained that what the Commission ought to have done was to inform the complainant that it had decided *not* to register the letter as a complaint and based its decision on one or more of the six reasons listed in the second paragraph of point 3 of the 2002 Communication.

Case **3199/2006/MHZ** concerned an investigation by the Commission of a possible infringement of Community law relating to the recognition of Polish medical qualifications in Germany. The Ombudsman made a further remark encouraging the Commission to give a due and timely follow-up to the matter. In response, the Commission assured the Ombudsman that it would handle the complaint in accordance with the procedures defined in its 2002 Communication on relations with the complainant in respect of infringements of Community law[16].

The Ombudsman welcomes the Commission's assurance.

Case **3208/2006/GG** concerned the Commission's public register of documents. The Ombudsman closed the case with the following critical remark:

Article 11(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents stipulates that each institution shall provide public access to a register of documents. References to documents shall be recorded in the register without delay. According to Article 11(2) of Regulation 1049/2001, for each document the register shall contain a reference number. In the Ombudsman's view, the register referred to in Article 11 can only achieve its aim "[t]o make citizens' rights under this Regulation effective" if it was as comprehensive as possible. The Commission has not disputed the complainant's statement that only a "fraction" of its documents is listed on its registers. In view of the above, the Ombudsman arrives at the conclusion that the Commission has failed to comply with Article 11 of Regulation by omitting to include all relevant documents in its register of documents. This constitutes an instance of maladministration.

[16] 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.

The Commission sent a response which may be summarised as follows:

1 It cannot be inferred from Article 11 of Regulation 1049/2001 that there is an obligation to include in the register all documents falling under the definition set out at Article 3(a) of the Regulation.

2 Transparency is particularly important in the legislative area. This was confirmed by the judgment of the Court of Justice of 1 July 2008 in the *Turco* cases (C-39/05 P and C-52/05 P, paragraphs 46-48). The Commission has achieved a very high level of transparency in this field, as have the European Parliament and Council.

3 As regards fields like trade and competition policy, it would be very difficult to set up a public register without undermining the protection of interests foreseen in Article 4 of the Regulation. Moreover, in the area of infringement proceedings the Commission has a duty of confidentiality *vis-à-vis* Member states.

4 Relevant information is available on websites or through other registers.

The Ombudsman notes that points 1, 2 and 4 of the Commission's response repeat arguments that were already addressed by the Ombudsman in his decision. As regards point 2, it is true that the judgment of the Court of Justice in the *Turco* case underlined the importance of transparency in the legislative field. However, this judgment does not provide support for the Commission's suggestion that registers of documents do not need to be complete in other fields.

As regards point 3 of the Commission's response, the Ombudsman takes the view that the need to protect the interests foreseen by Article 4 of Regulation 1049/2001 cannot justify excluding entire fields of the Commission's work from the register. The Ombudsman recalls that during his inquiry, the Commission consistently argued that it was going to expand the scope of its registers and led the Ombudsman to believe that the problem was mainly a technical one (i.e., the absence of a harmonised data base for the registration of documents). The Ombudsman notes, with regret, that the Commission's new argument suggests that it has no intention of trying to complete its registers.

Case **3579/2006/TS** concerned the Commission's decision not to recruit the complainant for the post of IT Officer in its Delegation to Mauritania. The Ombudsman made the following further remark:

The Commission correctly pointed out that recruitment can only take place after verification of an applicant's qualifications and his/her complete personal file. However, it appears that the late point in time during the recruitment procedure when this verification is carried out may easily lead to misunderstandings on the part of candidates. It is furthermore not evident that a practice of late verification enhances administrative efficiency.

The Commission could therefore consider the possibility of carrying out an adequate preliminary check of candidates' qualifications before inviting them for interviews and prior to involving them in related procedural steps, such as medical examinations. The Commission could furthermore consider ensuring that candidates do not receive messages that may lead to the erroneous understanding that their recruitment is imminent.

In response, the Commission stated that, as far as possible, its services do check the relevance of diplomas and professional experience, whenever contract agents are interviewed. However, a definitive check is not possible at this time for practical reasons. Given the complexity and diversity of university studies in the EU Member States, it is often not feasible for the Commission services to understand and properly check the exact nature of qualifications. Furthermore, it is difficult to evaluate the relevance of professional experience on the basis of the information available at the beginning of the procedure. The Commission added that it would be inefficient to check candidates' eligibility on several occasions and that slower procedures would be against candidates' interests. It also stated that instructions will be given to all services that they should remind candidates who are called for interview that no commitment can be made, even if the interview is positive, before a definitive check is made. Finally, the Commission noted that the problem encountered in this complaint occurred rarely.

The Ombudsman notes the Commission's detailed explanation of its procedures.

The complainant in case **1411/2006/JMA** worked as co-director of an EU-funded project designed to improve the Peruvian health system. The Commission Delegation in Peru requested her dismissal and informed the Peruvian authorities that her visa should not be extended. The Ombudsman criticised the Commission's letter requesting the complainant's dismissal as manifestly inadequate since it did not meet the necessary requirements to constitute a formal protest or complaint under the agreement with the contractor. He also criticised the fact that, when the Commission modified its position, it took three months to launch the necessary procedures for the renewal of her visa. The Ombudsman also suggested, in a further remark, that although the Commission has no direct legal relationship with sub-contractors, it could, in the future, consider ensuring that any remarks made to its consultants concerning the quality of the work of its sub-contractors are based on proper reasoning, so that consultants can adequately convey these reasons to sub-contractors who, in light of these arguments, can decide how best to exercise their rights.

In response, the Commission stated that the legal basis for the Delegation's actions was a contractual provision that allowed it to request a change of staff due to "incapacity, inadequacy or any other cause". The Commission also explained that the Delegation had sent a letter to the Ministry of Foreign Affairs requesting the renewal of the complainant's visa on the very same day it received the complainant's request. A copy of the Delegation's letter was enclosed. The Commission asked the Ombudsman to review the critical remarks.

As regards the further remark, the Commission stated that it will continue to do its utmost to ensure the best possible information to contractors about subcontractors' performance.

The Ombudsman replied by letter to the request for a review of the critical remarks. As regards the first critical remark, the Ombudsman stated, in summary, that the Commission should have taken great care to ensure that any communications to the contractor as regards the complainant were accurate and reasoned, in order to respect principles of good administration which are binding on the Commission, regardless of the legal framework in which it operated. As regards the second critical remark, the Ombudsman pointed out that if the Commission had provided the relevant information at the time of the inquiry, there would have been no need for him to issue it.

The Ombudsman also welcomed the Commission's positive response to the further remark.

The complainant in case **3617/2006/JF** was a trade association representing mobile phone operators. The complaint concerned the Commission's procedures for the adoption of a proposal for a Regulation on tariffs for international roaming services. The Ombudsman criticised the Commission's decision substantially to shorten the public consultation periods below the normal minimum of eight weeks foreseen by its Communication on consultation and dialogue[17]. The Ombudsman also suggested that, in the future, if the Commission considers it necessary to reduce a consultation period, it should justify this reduction at the moment the consultation is launched, preferably in the consultation documents themselves, with a view to enhancing transparency and citizens' trust in the overall consultation process.

In its response to the critical remark, the Commission first emphasised, in summary, that the timetable it had adopted allowed customers to benefit from lower charges in the summer of 2007 rather than having to wait until the autumn of that year. The Commission also recalled that the Ombudsman's decision stated that he was "*(...) not convinced that <u>all interested parties</u> had the opportunity to express their views before the first call for comments was launched.*" The Commission argued that, in making this point, the Ombudsman had relied on an argument invoked by the complainant in its observations and on which it was not invited to reply. The Commission pointed to the large number of inquiries it received from individual consumers before the first public consultation and expressed the view that the Ombudsman could not have concluded that the general public, including consumers, had not had the possibility to express itself. Finally, the Commission mentioned that the Communication on consultation and dialogue does not refer to "*<u>all</u> interested parties*", but to "*interested parties*".

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[17] Communication from the Commission towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission COM(2002) 704 final.

The Ombudsman recognises and welcomes the benefit to consumers that flowed from the Regulation's entry into force in summer 2007 and agrees that delay would have been undesirable. However, given that a period of almost one year elapsed between the Commission's adoption of its proposal (12 July 2006) and the entry into force of the Regulation (30 June 2007), the Ombudsman is unable to understand why respecting the normal periods of consultation would have prevented the Regulation from entering into force in summer 2007. As regards the phrase quoted by the Commission in its response, the Ombudsman has no doubt that the general public was adequately consulted. The quoted phrase was intended to mean that the Ombudsman was not convinced that the economic actors involved in roaming had also been adequately consulted. The Ombudsman's doubts on this point were not based on the complainant's observations.

The Ombudsman therefore continues to take the view that neither of the two conditions ("*[i]n urgent cases, or where interested parties have already had sufficient opportunities to express themselves…")* laid down in the Communication on consultation and dialogue for shortening the normal period of consultation was met in this case.

In response to the Ombudsman's suggestion, the Commission stated that its procedures include control mechanisms to ensure the respect of minimum standards for consultation, including the eight-week consultation period. The Impact Assessment Board systematically assesses the quality of stakeholder consultation, including respect for the eight-week minimum consultation period, and pays attention both to the consultation process and to the reporting on its results. The Commission constantly emphasises the need to respect the eight-week minimum consultation period in training and guidance given to officials. Furthermore, in 2007, the Commission committed itself to strengthening the application of the minimum standards for consultation in its Communication on the Follow-up to the European Transparency Initiative[18]. It also decided to establish a standard presentation of consultations on the Internet, which includes specific reference to respect for the eight-week time-frame as well as to the fact that justification for any departure from this time-limit should always be given when the consultation is published. An inter-service contact group dealing with issues concerning civil society and stakeholder consultation monitors all the above measures.

The Ombudsman welcomes the Commission's commitment to respecting the normal eight-week minimum consultation period and to justifying any departures from this time-limit at the time when the consultation is published.

In case **3737/2006/JMA**, the Ombudsman criticised the Commission's failure to inform the complainant in writing that it would not be able to respect the normal one-year time-limit for dealing with his infringement complaint, as foreseen by its 2002 Communication on relations with the complainant in respect of infringements of Community law[19]. The Ombudsman took the view that the obligation to inform the

[18] COM(2007)127.

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

complainant of the reasons why the one-year time-limit has not been respected is not contingent on a prior request from the complainant, but, on the contrary, appears to be unconditional and that such information must therefore be given in all cases in which the time-limit is exceeded.

In response, the Commission recalled that the Ombudsman had made a similar critical remark in case 880/2005/TN (dealt with on pages 10 and 29-32 of the 2006 study). The Commission continues to take the view that it is not obliged to inform the complainant of the reasons why the one-year time-limit to issue a letter of formal notice in connection with a complaint has been exceeded, unless the complainant so requests. The Secretary General of the Commission confirmed this position in a letter to the Ombudsman dated 31 March 2009. That letter also informed the Ombudsman that the Commission's website on infringements[20] has been modified accordingly.

The Ombudsman notes that the relevant part of the website now reads as follows

(c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.

(d) When this time limit is exceeded, the service of the Commission responsible for the infringement file will, at your request, inform you in writing. The English and Swedish language versions of point 8 of the Communication differ from all other language versions which state that the Commission services will inform complainants on the current position regarding their complaint after one year if so requested by the complainant. You will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep you informed of the course of any infringement procedure.

The Ombudsman presumes that the first sentence of paragraph (d) above does not mean that, if the complainant writes to point out that the time-limit has been exceeded, the Commission will merely confirm that the complainant's calendar is accurate. The Ombudsman can only understand this sentence to mean that the Commission will inform the complainant, on request, of the reasons why the time limit has been exceeded.

The Ombudsman also suggested that the Commission consider informing citizens of the standards of good administration to be followed by its services in pursuing infringement proceedings. Such standards could include estimates of the time needed for the investigation of complaints following the issuance of a letter of formal notice, or the information to be given to complainants after such a letter has been sent. The Ombudsman expressed the view that such information could help to avoid unrealistic expectations on the part of citizens lodging complaints with the Commission, which are often the cause of dissatisfaction and complaints.

[20] http://ec.europa.eu/community_law/your_rights/your_rights_en.htm

As regards the Ombudsman's suggestion, the Commission explained that delays in the infringement procedure often result from slow replies by Member States to letters of formal notice. It is not possible therefore, to predict with accuracy how long the procedure will take.

The Ombudsman takes the view that if delay in handling an infringement complaint is the fault of a Member State it would be in the interests of transparency and the empowerment of citizens in the national democratic framework for the Commission to inform the complainant accordingly. The complainant could use such information as the basis for a complaint to the national ombudsman against the delay in replying to the Commission, or to bring political and media pressure to bear on the government of the Member State.

In case **3738/2006/TS,** the Ombudsman criticised the reasoning offered by the Commission for its decision not to recruit the complainant for a position on the Training Programme for Junior Experts (JED) in the Commission Delegations. In response, the Commission informed the Ombudsman of practical measures it had taken to avoid similar problems in the future.

The Ombudsman welcomes the Commission's positive response.

In case **193/2007/JMA,** the Commission's Delegation in Syria sent a letter to a consultancy in which it rejected the complainant's participation in a bid for the appointment of short-term experts in an EU-funded project, on the grounds that his performance in other EU-funded projects had been unsatisfactory. The Commission had informed the complainant orally of its position and the grounds for it before its services conveyed that position to a third party. Whilst finding no maladministration, the Ombudsman suggested that, in similar cases in the future, the Commission might find it useful to record in writing its efforts to respect the right to be heard, and include these records in the appropriate file.

In response, the Commission informed the Ombudsman that it fully agrees with the need to record in writing the minutes of any such meetings and that, following the Ombudsman's remark, it has consistently done so on all occasions.

The Ombudsman welcomes the Commission's positive response.

Case **255/2007/PB** concerned the handling of an application for access to documents. The Commission explained the delay that occurred by reference to the heavy workload of the service involved. The Commission's responses to the Ombudsman's inquiry were also delayed, due, apparently, to the work of the above-mentioned service on the reform of Regulation 1049/2001. In a letter to the Commission, the Ombudsman

regretted the delays. He requested the Commission to inform him of specific and concrete measures that it would take in order to ensure that the said reform would not prevent it from respecting the relevant deadlines in relation to applications for access to documents and subsequent complaints.

In reply, the Commission informed the Ombudsman that it had decided to take measures with respect to the reorganisation of the service that handles applications for public access to documents. It had first of all decided to recruit new staff to this service. One vacant post had already been filled, and the recruitment procedure for a second post had been initiated. Furthermore, the handling of Ombudsman inquiries would henceforth be shared by two staff members. Finally, in order to accelerate the handling of requests, a new procedure had been put in place for the registration of confirmatory applications. The Commission expressed confidence that the positive results of this reorganisation would soon be apparent.

The Ombudsman's decision on the case included a further remark welcoming the Commission's decision to take the above-mentioned measures. **No follow-up to this remark is necessary, since the Commission took the necessary action during the course of the Ombudsman's inquiry.**

Case **327/2007/GG** concerned a procedure to establish whether an official suffered from permanent invalidity. The case was closed with the following critical remarks:

When an error occurs, it is good administrative practice to apologise for it and to endeavour to correct it. In the present case, the Commission made an incorrect statement in its decision on the complainant's Article 90(2) complaint (…) by claiming that she [the complainant] *had not indicated what documents had been provided to the Commission in order to be forwarded to the doctors that were to examine her. The Commission has nevertheless refrained from correcting this statement and apologising for it, even though its attention has been drawn to the error that had occurred. This constitutes an instance of maladministration.*

The Ombudsman takes the view that the duty, incumbent on the Community institutions and their bodies, to have regard to the interests of their staff (the "obligation de solicitude") makes it necessary to ensure that the doctors who are to carry out an examination of the state of health of an official are able properly to communicate with this official. In the present case, the Ombudsman concludes that the Commission has failed to make sure that all the doctors that examined the complainant in the present case were able properly to communicate with her. This constitutes a further instance of maladministration.

In response to the first critical remark, the Commission repeated that it was not clear which documents the complainant referred to. The Commission could not see an error. Hence it refrained from correcting and apologising for its statement. As regards the second critical remark, the Commission maintained the position it had taken during the

inquiry. It also submitted that the actual use of languages did not result in any harm or disadvantage to the complainant.

The Ombudsman notes that the Commission's comments on the first critical remark ignore what the Ombudsman said on the issue in his decision and that its comments on the second critical remark fail to address the difficulties the complainant had in communicating with some of the doctors who examined her. The Ombudsman regrets that the Commission's response to the critical remarks reflects the same unwillingness to address the relevant issues that already marked the submissions made by the Commission during the course of the inquiry.

Case **743/2007/MF** concerned the transfer to the Belgian national pension system of the pension rights that the complainant had acquired whilst working as a temporary agent at the Commission. The Ombudsman made a further remark suggesting that the Commission systematically draw the attention of its agents to the possibility to maintain pension rights in the national system, which is offered by Article 42 of the Conditions of Employment of Other Servants (CEOS).

In response, the Commission informed the Ombudsman that it already draws the attention of agents to this possibility during the induction course for new staff members. The Paymaster's Office (PMO) includes a presentation on "Pensions and other post-activity rights", where the possibility offered by Article 42 of the CEOS is mentioned. Slide 5 of the presentation states that temporary agents "may request the institution to maintain pension rights in his/her country of origin (maximum 20.50% of basic salary- art 42 CEOS)".

The Ombudsman welcomes the Commission's detailed response to the further remark.

Case **885/2007/JMA** concerned the development of an industrial harbour in Granadilla, in the island of Tenerife (Spain). The Ombudsman criticised the Commission's failure (i) to respond to a letter in which the complainant contested the Commission's intention to close the infringement complaint he had submitted; (ii) to inform the complainant of the formal closure of the complaint; and (iii) to provide the complainant with individual reasoning in support of its decision.

In response, the Commission first recalled that the letter informing the complainant of the intention to close the complaint had explicitly stated that the reasons were contained in the Commission's formal opinion of 6 November 2006. The Commission then pointed out that the Ombudsman had concluded, in point 2.8 of his decision, that the said formal opinion had taken account of the issues raised by the complainant in his correspondence and had given a detailed explanation of the reasons which led it to conclude that, subject to certain conditions, the planned port in Granadilla could proceed for reasons of overriding public interest. The Commission concluded that it was

inconsistent for the Ombudsman to conclude, in point 3.6 of his decision, that the Commission had failed to provide the complainant with individual reasoning in support of its position. The Commission also pointed out that the complaint was not formally closed until the meeting of the College of Commissioners held on 26 June 2008. The complainant was informed of the formal closure on 21 November 2008. Finally, the Commission undertook that, in the future, it would acknowledge receipt of all letters relating to infringement cases.

The Ombudsman notes the points made by the Commission in its response and welcomes its commitment to acknowledge receipt of all letters relating to infringement cases in the future.

Case **1054/2007/MHZ** concerned the dismissal of the complainant from the position of a junior expert in a Commission Delegation ("JED"). The Ombudsman criticised the Commission's failure to explain why it did not give the complainant the opportunity to challenge his evaluation report before his dismissal. The Ombudsman also suggested that the Commission could sensitise staff in its delegations to the importance of their training tasks towards the JEDs. Furthermore, he suggested that, in order to avoid any misunderstandings, the Commission's offers of training posts could include information as to how the JED training is to be understood in terms of supervision and coaching.

In response, the Commission acknowledged that the critical remark was justified. It informed the Ombudsman that it regularly explains the role and tasks of Heads of Delegation or of Heads of Section, supervising one or several JED, during pre-posting information seminars. The Commission intends to strengthen its written communication towards JED supervisors at the occasion of the launching of the next JED round for 2008-2010. Moreover, the Commission has already improved its communication to the Delegations, underlining the need for proper supervision and coaching, but also of a proper and fair dialogue.

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

Case **1360/2007/TS** concerned the rejection of the complainant's candidacy for a post in the Commission's EuropAid co-operation office. The Ombudsman made the following further remarks:

In its opinion, the Commission appears to have conceded that the job description, sent to the complainant by way of information, contained irrelevant information regarding the possibility for candidates to compensate for university studies through experience. It appears that this information caused the complainant to misunderstand the relevant conditions. The Ombudsman considers that it would be useful, in similar future

cases, if the Commission were to examine the relevance of the information contained in such documents sent to candidates.

The Ombudsman notes the Commission's statement that it would be inefficient administration to carry out a full check of all the profiles contained in databases such as the RELEX database in this case; he fully appreciates the Commission's concern in this respect. However, in the present case, the misunderstanding occurred at a point when the Commission decided to invite only four persons for interview. The Ombudsman considers that, in such future situations, it would be useful to check the candidates' profiles before inviting them for an interview, in order to avoid misunderstandings and the unnecessary administrative work of interviewing candidates who do not fulfil the minimal conditions for recruitment.

In response to the first further remark, the Commission informed the Ombudsman that it would, in the future, ensure that job descriptions provide as precise information as possible, especially if and when specific fields of education or studies are considered essential for a certain job, and if and when certain practical experiences in the requested field can compensate for the requirement of studies in the field concerned.

The Commission’s response to the second further remark was, in substance, the same as in case 3579/2006/(SAB)TS above.

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

Case **1512/2007/JMA** concerned the Commission’s handling of an infringement complaint. The Commission had referred the matter to the Court of Justice, which ruled that the Directive concerned had not been properly transposed into national law. In these circumstances, the Commission considered that there was no longer any interest in pursuing individual complaints made before the Court’s ruling. The Ombudsman found no maladministration. He also made a further remark encouraging the Commission, in similar cases in the future, to explain in its correspondence with the citizens the various possibilities that exist as regards enforcing Community law. Such possibilities include (i) invoking the Court of Justice's ruling before a national court in order to ensure that national law is applied in accordance with Community law as interpreted by the Court of Justice; (ii) complaining to a competent ombudsman in the Member State; or (iii) contacting the national body charged with ensuring compliance with the national law transposing the Directive.

In response, the Commission agreed to consider ways to improve the explanations given in its correspondence with citizens concerning the various possibilities that exist as regards enforcing Community law.

The Ombudsman welcomes the Commission's positive response.

Case **1515/2007/JF** concerned the rules governing admission to the European Schools. The Ombudsman made the following further remark:

In order to avoid potential misunderstanding on the part of the public in general, and of the parents of pupils in particular, the Commission could consider suggesting to the Secretary-General of the European Schools to update the information made available on the European Schools' website so as to make clear that the Office of the Secretary-General of the European Schools is not part of the Commission.

In response, the Commission explained that it had informed the Secretary-General of the European Schools of the Ombudsman's remark and that the Secretary-General took steps to implement it. The website of the European Schools now clearly states, at the bottom of the webpage relating to the Office of the Secretary-General, that the European Schools are an intergovernmental organisation, independent of the European Commission.

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

Case **1641/2007/VIK**, concerned competitions for temporary agents organised by the Commission. In the decision closing the case, the Ombudsman made a further remark suggesting that the Commission consider providing, in future competitions, further information on the documents that candidates could or should submit in order to prove their professional experience.

In response, the Commission informed the Ombudsman that it had modified the text of the application form specifying the documents which must be presented by the applicants. Candidates are now required to provide a statement of employment proving the length of the professional experience. It is explained that the documents must establish without any doubt the start and end date, as well as the continuity of each period of professional experience. It is further noted that candidates should preferably submit certificates from previous and current employer(s) and that, if these cannot be provided, the following will be accepted:

- employment contracts accompanied by the first and latest salary statement as well as the last salary statement for each year if the contract has been concluded for longer than one year;
- appointment decisions accompanied by the last salary statement;
- work record book,
- tax declarations.

Furthermore, the Commission has given applicants the possibility, in case they have doubts concerning the nature or the validity of supporting documents, to contact the secretary of the selection panel, via an e-mail address, at the latest 10 days before the closing date of the submission of applications.

The Ombudsman welcomes the Commission's constructive and detailed response.

Case **2137/2007/ID** concerned the handling of applications submitted by NGOs for the signature of a Framework Partnership Agreement. In a further remark, the Ombudsman invited the Commission to give applicants in similar procedures the possibility to remedy shortcomings in their supporting documentation and to consider adopting clear provisions to that effect. He further invited the Commission to consider providing potential applicants with clearer guidance as to the required content of the accounts to be certified and submitted in accordance with Article 173(4) of Regulation 2342/2002.

In response, the Commission informed the Ombudsman that it is currently reviewing its on-line application procedure. The Ombudsman's suggestions and remarks have been taken into consideration in order to provide more precise information and guidance to the applicant NGOs. Furthermore, the Commission explained that, whilst applications that are not duly submitted and signed are declared null and void, in cases where some documents already submitted are erroneous or unclear, applicants are given the opportunity to complete their application. This practice complies with the principle of equal treatment.

The Ombudsman welcomes the Commission's constructive and detailed response.

Case **2393/2007/RT** concerned the change to the complainant's job title and job description, following the reorganisation of DG ADMIN of the Commission. In his decision closing the case the Ombudsman made the following further remark:

The Ombudsman recalls that the principles of good administration require that the Commission provide accurate information to staff and to the general public. The Ombudsman trusts that the Commission complies with this principle when providing, internally, such information to its staff using the different means of information at its disposal.

In response, the Commission explained that the harmonisation of job titles in the Job Information System “Sysper 2” carried out in 2007/2008, which included the introduction of standard job titles, should prevent similar incidents in the future.

The Ombudsman welcomes the Commission’s constructive response.

Case **2597/2007/**RT concerned payment to a company which was part a consortium carrying out work under a project supported by the Commission. The Ombudsman criticised the Commission's failure to reply to the complainant's e-mail directly and to provide it with the required information, including the reasons for its delay in paying the complainant.

In response, the Commission stated that the present case was an isolated one which should not be repeated in the future. The Commission normally has direct contacts with all contractors in a project, in order to ensure that each contractor will participate in the project under the best conditions. One of the Commission's standards of internal control relates exclusively to the management of correspondence. Furthermore, in 2008, the Information and Society Directorate-General launched a campaign to sensitise its staff as regards the implementation of the code of good administrative behaviour.

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

In case **2681/2007/PB**, the Commission informed the complainant that it could not grant him access to a document since the document did not exist. This proved to be inaccurate and the Ombudsman criticised the Commission for having failed to exercise sufficient care before concluding that the document did not exist. The document concerned the European Regulators Group (ERG - www.erg.eu.int), which was set up by a Commission decision. The document was a submission note on subjects that could have been discussed at an ERG plenary meeting.

In response, the Commission stated that it had searched for the document where its services usually register such documents, and that it had not found it. Subsequently - following the complainant's submission of a copy of the document that he had obtained through the internet - the Commission found the document on the CIRCA website (www.circa.europa.eu/), which is normally used for exchanges among the delegates of national regulatory authorities and not for the storage of Commission documents.

The Ombudsman appreciates that the Commission looked for the document concerned in the place where that document would normally be found. The Ombudsman also recognises the value of administrative and regulatory cooperation between the EU institutions and national authorities. In the Ombudsman's view, however, this case illustrates the need for the Commission to take concrete and proactive measures to ensure clear responsibility for guaranteeing public access to information and documents about such co-operation.

In case **431/2008/ELB,** the Ombudsman made a further remark suggesting that if the Commission decides not to register correspondence from a citizen in respect of an infringement of Community law by a Member State as a complaint, it should always inform the citizen of the reasons for doing so.

In response, the Commission explained that it was working on a development of its system for the registration of enquiries and complaints concerning the correct application of Community law. The objective is to respond more directly to the interests expressed by correspondents and complainants. All correspondence will be registered, either as correspondence raising a question concerning the application of Community law, or as a

complaint, according to clear or express indications in the correspondence. The system is being developed with a view to its introduction later in 2009.

The Ombudsman welcomes the Commission's constructive response and is closely following developments in the Commission's handling of complaints about infringements.

Case **1200/2008/BU** concerned the Commission's handling of a State aid complaint, which a lawyer submitted to the Commission on behalf of an association. Attached to the complaint was a power of attorney for the lawyer, by which the association empowered him to represent it. The Ombudsman criticised the fact that the Commission subsequently sent two letters, explaining its assessment of the substance of the case and inviting the association to make comments within a specified time-limit, only to the association and not to the lawyer.

In response, the Commission maintained that it is normal practice to address correspondence relating to the substance of a State aid complaint directly to the complainant identified in the complaint form. According to the Commission, such a practice, based on the normal close relationship between a lawyer and his client, does not create any prejudice to the lawyer nor does it harm his rights to advise his client.

The Ombudsman regrets that the Commission does not accept his conclusions that it should be service-minded and respond positively to the association's wish to be represented in the procedure.

Remarks made in 2007 that were not dealt with in the 2007 study

Information from the Commission on its follow-up to the following cases was not received in time to be included in the 2007 study. All the cases concerned access to documents under Regulation 1049/2001[21].

In case **1434/2004/PB**, the Ombudsman criticised the Commission's refusal of a request for access to certain documents. He found that the Commission was not entitled to rely on the exception concerning the protection of the privacy and integrity of the individual (Article 4 (1) (b) of Regulation 1049/2001) in order to refuse access to a document containing the applicant's own personal data, given that the applicant had expressly consented to the general public disclosure implied by granting access under Regulation 1049/2001. He also found that the Commission was not entitled to rely on the exception for protection of its decision-making procedures (Article 4(3), second sub-paragraph of Regulation 1049/2001) in order to refuse access to certain other documents.

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

In addition, the Ombudsman made a further remark encouraging the Commission to take appropriate organisational steps to ensure timely replies to requests for access to documents.

As regards the first criticism, the Commission took the view that Regulation 1049/2001 is not the appropriate instrument to grant an individual access to his or her own personal data and that such access generally falls within the ambit of Article 13 of Regulation 45/2001[22]. The Commission concluded by stating that the consent given by the complainant to disclosure of his personal data to third parties was formulated in such a way as to remove the barrier of personal data protection and force the Commission to disclose the relevant documents under Regulation 1049/2001.

As regards the second criticism, the Commission maintained its view that the exception was applicable. It pointed out that the documents concerned formed part of a file relating to an administrative decision of individual scope. According to the Commission, the public interest in transparency does not carry the same weight as regards preparatory documents for administrative decisions of individual scope. The Commission also repeated its view that members of its staff would refrain from expressing their views in full independence if they had to take into account the possibility that their contributions to the decision-making would become public.

As regards the further remark, the Commission accepted, in principle, that it should take appropriate organisational steps to ensure timely replies to access requests. It also pointed out that the present case was exceptional.

The Ombudsman agrees with the Commission that, in general, Article 13 of Regulation 45/2001 is the appropriate basis for the disclosure to individuals of their own personal data. The Ombudsman understands the Commission to have accepted that, in this specific case, it had an obligation to disclose the relevant documents under Regulation 1049/2001.

As regards the exception for protection of decision-making procedures (Article 4(3), second sub-paragraph, of Regulation 1049/2001), the Ombudsman's draft recommendation to the Commission in June 2009 (in case 355/2007/TN) contains an in-depth analysis, taking into account case-law[23] which post-dates the Commission's response to the critical remark in the present case. The Ombudsman therefore considers it would not be useful to pursue the matter in the present study.

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[22] Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8 p. 1

[23] Case T-121/05, *Borax Europe Ltd v Commission*, judgment of 11 March 2009 (not yet reported).

The critical remarks in cases **144/2005/PB** and **3002/2005/PB** concerned the exception for protection of decision-making procedures (Article 4(3), second sub-paragraph, of Regulation 1049/2001).

The remarks and the Commission's responses were similar to those in case 1434/2004/PB above and the Ombudsman's comments on the response in that case also apply here.

In case **3002/2005/PB**, the Ombudsman also criticised the Commission's failure, in dealing with the complainant's confirmatory application, to respond as regards one document that had been identified (but kept confidential) by the services initially dealing with the complainant's request. In its response, the Commission explained that the team dealing with the confirmatory application took the view that the document concerned was not covered by the complainant's original request. As regards this document, the confirmatory application had therefore been considered as a new request. The Commission accepted that this should have been made more explicit in its reply to the confirmatory application.

The Ombudsman welcomes the Commission's further explanations and constructive response as regards this aspect of the case.

In case **1693/2005/PB**, the Ombudsman criticised the Commission's failure adequately to explain its refusal of a request for access to the names of recipients of EU agricultural aid. This information was contained in a large database of the Commission, albeit not readily available in a document as such. In the Ombudsman's view, the Commission failed adequately to explain why it would have involved an unreasonable administrative burden to retrieve and grant access to the information. He also found that it had not adequately explained why a confidentiality provision in a particular Commission Regulation prevented access from being granted. The Commission had argued that the confidentiality provision should be seen in light of Regulation 1049/2001, but it refrained from explaining, in a specific and concrete manner, its invocation of the said provision in light of that Regulation.

In response, the Commission essentially repeated that the database concerned was very large and that reprogramming would have been necessary in order to meet the request for access. With regard to the invocation of the confidentiality provision, the Commission stated that it did not consider Regulation 1049/2001 to be applicable to the complainant's information request. It therefore considered that its invocation of the said provision did not require the same degree of justification.

The Ombudsman points out that this was the first inquiry in which his office examined the issue of public access to documents and information in relation to a large and complex database. Partly in light of the case here concerned, the Ombudsman, with the assistance of Members of the European Network of

Ombudsmen, subsequently carried out a study on the issue of public access to the content of public databases. The report is available on the Ombudsman's website[24]. The information and findings in this study, which has been drawn to the Commission's attention, should help both the Ombudsman and the institutions to deal more efficiently and appropriately with future cases involving databases. The Ombudsman does not, therefore, consider it useful to examine the Commission's above-mentioned response on the issue of a possibly excessive administrative burden.

The Ombudsman also notes that the Commission's response gave an account of the Union's 2007 and 2008 legislative reform, which obliges Member States to ensure the annual ex-post publication of the beneficiaries of the European Agricultural Guarantee Fund, and of the European Agricultural Fund for Rural Development and the amounts received per beneficiary under each of these Funds. Detailed information on this reform is available on the website of the Commission's Directorate for Agriculture[25].

In case **3697/2006/PB**, the Ombudsman criticised the Commission's failure to (i) inform the complainant in advance that it would extend the deadline for replying to his confirmatory application for access to documents and (ii) give detailed reasons for the extension, as required by Regulation 1049/2001. He also made a further remark to the effect that the legal obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration of applications for access normally takes place, at the latest, on the first working day following receipt of an application.

In response, the Commission agreed that the e-mail informing the complainant of the extension should have been sent earlier and should have contained more detailed reasons. The Commission also explained that applications for access are normally registered upon receipt, or on the first working day following receipt, and that the delay in registering the complainant's application was due to exceptional circumstances.

The Ombudsman welcomes the Commission's positive response and its explanation of its normal practice as regards registration.

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24 http://www.ombudsman.europa.eu/resources/otherdocument.faces/en/4160/html.bookmark

25 http://ec.europa.eu/agriculture/funding/index_en.htm

3 The European Economic and Social Committee (EESC)

Case **2617/2005/MF** concerned a selection procedure to fill vacant positions for assistants/secretaries. In his closing decision, the Ombudsman criticised the EESC's failure to act in accordance with its own implementing rules on the selection of contractual agents and for failing to answer the complainant's request for information about the selection procedure and its outcome. The Ombudsman also suggested that, in future, staff should not advise a candidate in a selection procedure to resign from his/her current job, and should not give any other information concerning the outcome of a selection procedure, unless they are specifically instructed to do so by the relevant competent authority. Furthermore, when staff have telephone contacts with candidates, an appropriate note of the call should be made.

In response, the EESC gave additional instructions to staff as regards the information to be given to candidates and the procedures to follow in doing so. It also undertook to revise its Principles of Good Administrative Behaviour and model them to a greater extent on the European Code of Good Administrative Behaviour.

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

4 The Committee of the Regions of the European Union ("CoR")

In case **2472/2005/MF**, the Ombudsman pointed out that a letter from the Committee of the Regions ("the CoR") had led a candidate in a recruitment procedure to presume that it would offer her a contract. In these circumstances, the CoR should have written to the candidate again when it decided not to recruit her. That letter should have contained an explanation for the decision and an apology for the inconvenience that may have been caused.

In response, the CoR informed its services of the Ombudsman's comments and took measures to avoid sending out letters in the future that could lead candidates to believe they would be offered a position or contract. The CoR also informed the Ombudsman that its working procedures have been improved since the case arose and that all candidates are now duly informed by official mail of the results of selection procedures.

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

5 The European Data Protection Supervisor ("EDPS")

In case **1034/2006/WP**, the Ombudsman suggested to the European Data Protection Supervisor ("the EDPS") that it would be helpful to potential future complainants, if the EDPS were to announce, in a general policy document, the criteria or guidelines that he intends to apply when exercising his discretion in opening inquiries and investigating complaints presented to him under Regulation 45/2001.

In response, the EDPS welcomed the Ombudsman's conclusions and stated that he was particularly pleased that the Ombudsman had recognised that he enjoys a certain margin of discretion.

He informed the Ombudsman that, as a result of ongoing work involving the adoption of Rules of Procedure and the revision of existing case manuals, he intended to provide appropriate information for the public, together with practical tools for interested parties, such as complaint forms, on his website. Although the ways in which this information would be provided had not been decided yet, it would certainly also cover the criteria and guidelines that he intended to apply when exercising his discretion.

The Ombudsman welcomes the positive response to his suggestion and looks forward to receiving further information in due course on the criteria and guidelines to be applied by the EDPS in exercising his discretion as to whether to act on complaints presented to him under Regulation 45/2001.

6 The Office for Official Publications of the European Communities ("OPOCE")

Case **1128/2004/GG** concerned the award of a contract by OPOCE. At the conclusion of his inquiry, the Ombudsman criticised OPOCE's failure to carry out appropriate checks after the complainant had raised objections concerning the outcome of a certain call for tenders. The Ombudsman also criticised the fact that OPOCE appeared to have excluded the possibility of extending a certain contract, for which the complainant was a sub-contractor, on the basis of two reasons that were clearly unfounded or erroneous.

In response, OPOCE stated that it continues to believe that there was no maladministration in this case. OPOCE noted, however, that it is constantly trying to improve the transparency of its procedures and that it would endeavour to learn from what it called "this unfortunate case".

The Ombudsman welcomes OPOCE's commitment to transparency and to learning from its experience with this case.

7 The Centre for the Development of Vocational Training ("Cedefop")

In case **1180/2006/ID**, the complainant requested that Cedefop suspend the decision to reassign him to another post. The Ombudsman criticised Cedefop's failure to make a reasoned decision on the request. Cedefop subsequently informed the Ombudsman of the outcome of a case in the Civil Service Tribunal involving the complainant and Cedefop, and asked the Ombudsman to review his decision in light of the Tribunal's decision.

The Ombudsman subsequently explained to Cedefop that there is no reason to reconsider his decision, since the subject matter of the case dealt with by the Ombudsman was different from that dealt with by the court.

The Ombudsman regrets Cedefop's poor handling of this case.

8 The European Police Office ("Europol")

Case **3130/2006/ID** concerned the rejection of a recruitment application. The Ombudsman criticised Europol's failure to reply to the complainant's request for information on the qualifications of the selected candidates. Europol should either have provided the information, or given valid and adequate grounds for not doing so. The Ombudsman also suggested that Europol look again at a comment it had made about possible over-qualification of the complainant.

In response to the criticism, Europol expressed its commitment to avoid similar maladministration in the future. As regards the suggestion, Europol emphasised that the issue of possible over-qualification had not played a determining role in the decision not to recruit the complainant.

The Ombudsman welcomes Europol's commitment to avoid similar maladministration in the future.

9 The Translation Centre for the Bodies of the European Union

Case **948/2007/JF** concerned the Translation Centre's assessment of work performed by a Portuguese freelance translator. The Ombudsman criticised the Translation Centre's failure to reply to the complainant, on the grounds that (i) the person concerned should be informed of any decision to discontinue correspondence on the grounds that it is repetitive and/or abusive and (ii) in the present case, the unanswered letter contained a new element, something which must have been obvious to the Translation Centre. The Ombudsman also advised the Translation Centre to ensure, in the future, that the composition of the assessment committee is in accordance with the applicable rules.

In response, the Translation Centre emphasised that it had exchanged about forty letters with the complainant and that the letter in question was pointless since it did not refer to a contract concluded with the Translation Centre.

The Translation Centre also informed the Ombudsman that the assessment committee no longer exists in its previous structure; that it is currently carefully assessing whether any similar problem might exist as regards its internal re-ranking committee; and that it will, if necessary, take all appropriate steps to resolve any issue in this respect.

The Ombudsman notes that it would have been sufficient for the Translation Centre to have written to the complainant pointing out that he was erroneously referring to his contract with the Commission and not with the Translation Centre, and informing him that, unless he submitted new elements, no further replies would be sent to him.

10 The European Personnel Selection Office ("EPSO")

The complainant in case **2214/2006/IP** took tests at the examination centre in Rome. According to the complainant, the tests were disrupted by noise due to a technical problem. The Ombudsman did not make a finding of maladministration. However, he made the following further remark:

It falls within the remit of the chief invigilator in each exam centre to carry out a factual assessment of any anomaly that occurs during tests and to inform thoroughly and precisely the relevant coordinating staff. The factual assessment of the chief invigilator to be transmitted to the coordinating staff should specifically seek to determine whether the anomaly gives rise to a "substantive irregularity capable of distorting the results of the tests". If the relevant event does give rise to a "substantive irregularity capable of distorting the results of the tests", it is incumbent upon the relevant coordinating staff to give instructions to the chief invigilator as regards the measures that need to be taken. It goes without saying that the chief invigilator should make sure that all invigilators present convey the same agreed message to all candidates.

In response, EPSO explained that, as a general rule, it organises meetings with invigilators the day before the relevant tests. During these meetings, the invigilators receive precise and detailed instructions about the organisation of the test and how to deal with problems which may occur. EPSO also emphasised that the chief invigilator should make sure that all invigilators present apply the same rules to all candidates.

The Ombudsman welcomes EPSO's constructive response.

Case **2990/2006/OV** concerned the cancellation, after the pre-selection tests, of a field of interest in the CAST 25 competition. In his decision on the case, the Ombudsman encouraged EPSO to remind the Community institutions and bodies of the need to carry out a careful assessment of their staff needs before launching recruitment procedures. In response, EPSO emphasised that the change of the CAST 25 profiles was not EPSO's responsibility. EPSO nevertheless regretted the inconvenience that this created for candidates and took note of the Ombudsman's further remark.

The Ombudsman welcomes EPSO's recognition of the inconvenience created for candidates by the cancellation of the field of interest.

In case **3131/2006/PB**, the complainant alleged that EPSO had applied too short a deadline for the submission of applications. The Ombudsman did not find maladministration, but pointed out that, in calls similar to the one dealt with in the present case, EPSO had set a four-week deadline for the submission of applications. The Ombudsman suggested that, in the future, similar calls should have a four-week deadline. In response, EPSO informed the Ombudsman that a normal deadline of four weeks is indeed being applied.

The Ombudsman welcomes EPSO's positive response and its confirmation that the normal deadline of four weeks is being applied.

In case **3147/2006/IP**, the Ombudsman considered it useful to encourage EPSO to provide citizens with convincing and relevant explanations in response to their queries. In response, EPSO emphasised the importance it attaches to communication with candidates and informed the Ombudsman that the improvement of communication with candidates is one of the goals of EPSO's Development Programme.

The Ombudsman welcomes EPSO's emphasis on the importance of good communication with candidates.

In case **3224/2006/TS,** the Ombudsman pointed out that the communications from EPSO to the complainant could have conveyed the impression that the Selection Board decided on the inadmissibility of the complainant's application solely in light of the title of the complainant's diploma, and did not carry out an examination of the full application file. The Ombudsman suggested that EPSO consider, in the future, providing applicants with clearer explanations regarding the thoroughness and completeness of the selection boards' re-examination of candidates' files.

In response, EPSO underlined its commitment to making selection boards aware of the importance of properly specifying the reasons for the non-admission of candidates in the context of their requests for re-examination. Following analysis of re-examination requests by the relevant board, EPSO would be prepared to provide more specific explanations to the candidates, at their request, concerning the situation and the elements in the files justifying the refusal of their applications.

The Ombudsman welcomes EPSO's positive and constructive response.

In case **2256/2007/RT**, the Ombudsman emphasised the importance of providing candidates with accurate information in all the linguistic versions of the Notice of Competition. In response, EPSO informed the Ombudsman that it has implemented a more rigorous control of all the linguistic versions of Notices of Competition, which includes a check on the quality of translations.

The Ombudsman welcomes EPSO's positive and constructive response.

In case **2596/2007/RT**, the Ombudsman encouraged EPSO to continue its efforts to ensure that the special measures taken in order to facilitate the participation of people with disabilities in the selection procedure do not generate additional difficulties which could render more difficult their overall performance.

In response, EPSO stated that it attaches great importance to the principle of equal treatment between candidates. Specific measures have already been taken as regards the participation of people with disabilities in the selection procedures. EPSO intends to strengthen its policy in the future and has appointed a person in charge of coordinating EPSO's policy in this area.

The Ombudsman welcomes EPSO's positive and constructive response.

In case **688/2008/RT**, the Ombudsman suggested that EPSO consider revising its rules that aim to prevent selection board members having conflicts of interest. He also suggested that EPSO could sensitise the institutions to the fact that the officials they propose as selection board members should not have been involved in training candidates on how to succeed in EPSO competitions.

In its response to the Ombudsman, EPSO recalled that members of a selection board must inform EPSO as soon as possible of any links with candidates that could lead to suspicions of partiality. EPSO has drawn the attention of all institutions to the fact that officials who take part in selection boards must comply with the various principles that govern their work: that is to say, independence, impartiality, confidentiality and respect for the provisions governing personal data of candidates. Moreover, EPSO's management board has decided to separate clearly the functions of members of a selection board from those of training candidates in preparation for EPSO competitions. To avoid any perception of a conflict of interest, these roles must not be undertaken at the same time, nor consecutively within a period of at least one year.

EPSO considers that the one year rule is reasonable, since it is in line with the indicative period of one year for completion of competition procedures. EPSO also pointed out that extending the period beyond one year would cause significant difficulties in light of the problems already encountered by the institutions in designating the members of selection boards.

Finally, EPSO pointed out that it intends to employ permanent selection boards as from 2010. The members of these selection boards will also be sensitised as to the importance of a clear separation of functions, in order to avoid any perception of a conflict of interest.

The Ombudsman welcomes EPSO's careful examination of the issue raised in the further remark.

II LIST OF CASES IN WHICH A CRITICAL REMARK WAS MADE

The five cases closed with a critical remark in 2007 and dealt with in this study appear in italics in the list below.

COMPLAINT REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (ORIGINAL LANGUAGE)
0101/2004/GG	EN	DE
1128/2004/GG	EN	-
1434/2004/PB	EN	DE
1744/2004/BB(Confidential)	EN	-
2283/2004/GG	EN	DE
3203/2004/DK	EN	-
3464/2004/TS	EN	-
0144/2005/PB	EN	DE
0259/2005/GG	EN	DE
0576/2005/GG	EN	DE
0789/2005/ID	EN	EL
1693/2005/PB	EN	DA
1785/2005/OV	EN	
1962/2005/IP	EN	IT
3002/2005/PB (Confidential)	EN	DE
2472/2005/MF (Confidential)	EN	LV
2477/2005/GG (Confidential)	EN	DE
2617/2005/MF (Confidential)	EN	LV
2675/2005/MF (Confidential)	EN	FR
2819/2005/BU	EN	SK
3051/2005/WP (Confidential)	EN	DE
3303/2005/GG (Confidential)		
3346/2005/MHZ	EN	-
3643/2005/WP	EN	-
3697/2006/PB	EN	DE
0262/2006/OV	EN	NL
0284/2006/PB	EN	-
1021/2006/JF (Confidential)	EN	-
1180/2006/ID (Confidential)	EN	EL
1411/2006/JMA	EN	ES
1473/2006/TS	EN	FR
1584/2006/OV (Confidential)	EN	NL
2782/2006/RT	-	
2914/2006/WP	EN	DE
2989/2006/OV	EN	NL

3130/2006/ID	EN	EL
3208/2006/GG	EN	-
3617/2006/JF	EN	-
3737/2006/JMA	EN	ES
3738/2006/TS (Confidential)	EN	-
0327/2007/GG (Confidential)		
0747/2007/MF (Confidential)	EN	FR
0885/2007/JMA	EN	ES
0948/2007/JF (Confidential)	EN	-
1054/2007/MHZ (Confidential)	EN	-
2597/2007/RT	EN	FR
2681/2007/PB	EN	DE
1200/2008/BU (Confidential)	EN	-

III LIST OF CASES IN WHICH A FURTHER REMARK WAS MADE

The two cases closed with a further remark in 2007 and dealt with in this study appear in italics in the list below.

COMPLAINT REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (ORIGINAL LANGUAGE)
0144/2005/PB	EN	DE
0184/2005/GG (Confidential)	EN	-
0186/2005/ELB	EN	FR
1105/2005/MF	EN	FR
2617/2005/MF (Confidential)	EN	LV
0554/2006/FOR	EN	-
0655/2006/ID (Confidential)	EN	-
0720/2006/DK (Confidential)	EN	FR
1034/2006/WP	EN	DE
1084/2006/MHZ	EN	-
1213/2006/PB	EN	DE
1411/2006/JMA	EN	ES
1473/2006/TS	EN	FR
1881/2006/JF	EN	-
2214/2006/IP	EN	IT
2990/2006/OV	EN	NL
3130/2006/ID	EN	EL
3131/2006/PB (Confidential)	EN	DE
3147/2006/IP (Confidential)	EN	-
3199/2006/MHZ (Confidential)	EN	PL

3224/2006/TS (Confidential)	EN	FR
3579/2006/TS (Confidential)	EN	FR
3697/2006/PB	EN	DE
3737/2006/JMA	EN	ES
3738/2006/TS (Confidential)	EN	-
OI/8/2006/BU	EN	DE
0193/2007/JMA (Confidential)	EN	-
0255/2007/PB (Confidential)	EN	DE
0743/2007/MF	EN	FR
0747/2007/MF (Confidential)	EN	FR
0948/2007/JF (Confidential)	EN	-
1054/2007/MHZ (Confidential)	EN	-
1360/2007/TS (Confidential)	EN	FR
1512/2007/JMA	EN	ES
1515/2007/JF	EN	-
1641/2007/VIK (Confidential)	EN	-
2137/2007/ID	EN	EL
2256/2007/RT	EN	-
2393/2007/RT	EN	-
2596/2007/RT (Confidential)	EN	FR
3148/2007/BEH (Confidential)	EN	-
0431/2008/ELB	EN	-
0688/2008/RT (Confidential)	EN	FR
1235/2008/ELB	EN	FR