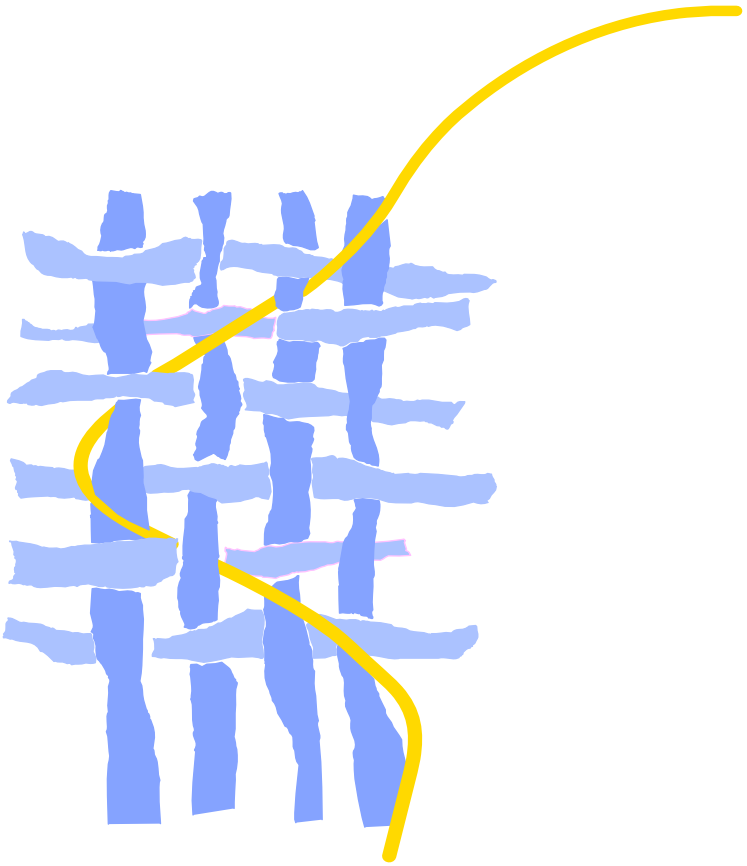
THE EUROPEAN OMBUDSMAN

FOLLOW-UP TO CRITICAL AND FURTHER REMARKS

HOW THE EU INSTITUTIONS RESPONDED TO THE OMBUDSMAN'S RECOMMENDATIONS IN 2007



Strasbourg 2008

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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 as well. The present study deals with the follow-up to the critical and further remarks made in 2007. It explains how constructive criticism and suggestions from the Ombudsman, resulting from inquiries conducted on his own initiative or following complaints, can help the Institutions to serve Europe's citizens better and win their trust.

As regards both kinds of remark, the study is oriented towards follow-up in terms of systemic improvements that raise the quality of administration, thus making maladministration less likely to occur in the future. In dealing with critical remarks, the study is focused not on the specific instance of maladministration that led to the criticism, but on the lessons that have been learned for the future.

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

A single decision may contain more than one critical remark or further remark, and both kinds of remark may be included in the same decision. In total, 69 critical remarks were made in 55 decisions and 53 further remarks were made in 48 decisions.

The following table shows the distribution of critical and further remarks made in 2007 by Institution:

Institution or body	Number of critical remarks made in 2007	Number of further remarks made in 2007
European Parliament	5	8
European Commission	36	32
Court of Justice of the European Communities	-	1
European Central Bank (ECB)	1	2
European Investment Bank (EIB)	1	3
European Economic and Social Committee (EESC)	3	-

European Anti-Fraud Office (OLAF)	10	-
Executive Agency for Competitiveness and Innovation (EACI)	1	-
European Personnel Selection Office (EPSO)	12	7
TOTAL	**69**	**53**

The present study explains the purpose of critical remarks and further remarks and the different kinds of circumstance in which they are made. It then analyses the follow-up given to critical remarks and further remarks made in 2007 and identifies the six star cases. Finally, conclusions are drawn as regards the main lessons of the study for the future.

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

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

P. Nikiforos Diamandouros, 28 November 2008

STUDY

1 INTRODUCTION

The European Ombudsman serves the general public interest by helping to improve the quality of administration by the Institutions and bodies of the European Union[1]. At the same time, the Ombudsman provides the Union's citizens and residents with an alternative remedy to protect their interests. That remedy does not necessarily have the same objective as judicial proceedings and is complementary to legal protection by the Community Courts.

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

2 THE PURPOSE OF CRITICAL REMARKS AND FURTHER REMARKS

Against this background, further remarks have a single purpose: to serve the public interest. A further remark is made when an inquiry finds no maladministration, but the Ombudsman identifies an opportunity for the Institution to improve the quality of its administration in the future. Since a further remark is premised on a finding of no maladministration, it should not contain express or implied criticism of the Institution to which it is addressed.

In contrast, a critical remark normally has more than one purpose. Like a further remark, a critical remark always has an educative dimension: it informs the Institution of what it has done wrong, so that it can avoid similar maladministration in the future. To maximise its educative potential, a critical remark identifies the rule or principle that was breached and (unless it is obvious) explains what the Institution should have done in the circumstances of the case.

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

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

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

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

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

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

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

Where the Ombudsman disagrees with the Institution and considers that there is maladministration, a critical remark provides a fair and efficient way of closing the case, if nothing can be done to remedy the maladministration.

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

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

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

When action should be taken to remedy maladministration, the Ombudsman proposes a friendly solution, or if that is not appropriate in the particular case, makes a draft recommendation.

The Institution's acceptance of a friendly solution proposal or draft recommendation normally leads to closure of the case on that ground. If the complainant rejects a proposed friendly solution that has been accepted by the Institution, the Ombudsman normally considers that no further inquiries into the case are justified.

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

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

Second, if the Institution's detailed opinion on a draft recommendation is not satisfactory, the Ombudsman may make a special report to the European Parliament.

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

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

Unfortunately there are also cases in which the Institution refuses the Ombudsman's suggestions for unconvincing reasons. Indeed, there are even cases in which the Institution refuses to accept the Ombudsman's finding of maladministration.

Such cases risk undermining the moral authority of the Ombudsman and weakening the trust of citizens in the European Union and its Institutions. International experience shows that the ombudsman institution functions most effectively where the

rule of law is well established and where there are well-functioning democratic institutions. In such contexts, the public authorities usually follow an ombudsman's recommendations despite the fact that they are not legally binding, even if they disagree with them. In political cultures where those conditions are not fulfilled, however, the ombudsman institution may struggle to establish its moral authority.

If the detailed opinion of the Institution to which a draft recommendation has been addressed is unsatisfactory, the Ombudsman may submit a special report to the European Parliament. As was pointed out in the Annual Report for 1998, the possibility to present a special report to the European Parliament is of inestimable value for the Ombudsman's work. Special reports should, therefore, not be presented too frequently, but only in relation to important matters where Parliament is able to take action in order to assist the Ombudsman.

5 FOLLOW-UP GIVEN TO CRITICAL REMARKS AND FURTHER REMARKS MADE IN 2007

In June 2008, the Ombudsman wrote to the Institutions which had not yet responded to all the remarks concerning them made in 2007 and invited responses by 31 July 2008. By early September 2008, all the Institutions, with the exception of the Commission, had provided information on their follow-up to all the remarks concerning them. The last follow-up sent by the Commission that is taken into account in the present Study (concerning case 0668/2007/MHZ) was sent on 21 November 2008, more than three months after the 31 July deadline and more than one year after the decision closing the case.

The Ombudsman regrets that, by the date of completion of the present Study, the Commission had not provided information on follow-up as regards the following eight cases, all of which concern public access to documents under Regulation 1049/2001[2].

1434/2004/PB (critical remark)
0144/2005/PB (critical remark and further remark)
1693/2005/PB (critical remark)
1844/2005/GG (critical remark)
3002/2005/PB (critical remark)
3193/2005/TN (critical remark)
2196/2006/ID (critical remark)
3697/2006/PB (critical remark and further remark)

The Ombudsman considers it particularly disappointing that the Commission has failed to provide information on the follow-up to cases 1844/2005/GG and 3697/2006/PB. The Ombudsman's Annual Report for 2007 contains summaries of the two cases. To recall briefly:

[2] 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 case **1844/2005/GG**, the Commission refused access to a document that its services had drawn up in 1995, in preparation for possible infringement proceedings against Greece in relation to the construction of a new airport. The Commission argued that disclosure of the document would seriously undermine its decision-making process. After inspecting the document, the Ombudsman was not convinced that its disclosure would have the negative consequences invoked by the Commission.

- In case **3697/2006/PB,** the further remark stated 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. The Ombudsman also criticised the delay in handling the complainant's application and the inadequacy of the Commission's reasoning for extending the deadline for replying to the complainant's confirmatory application.

The Ombudsman notes that, on 30 April 2008, the Commission put forward a proposal to revise and replace Regulation 1049/2001[3]. Publication of the present Study will inform the Community legislator of the above elements, which could be useful in examining the Commission's proposal.

The follow-up to critical and further remarks is part of a process of on-going dialogue between the Ombudsman and the Institutions. The Commission's role as Guardian of the Treaty is a continuing subject of such dialogue, both within and outside the framework of complaint-handling. In case **1212/2006/ELB,** the Ombudsman welcomed the Commission's commitment to make information on complaints as accessible as possible and its plan to create a new website dealing with infringements of Community law. The Commission subsequently informed the Ombudsman of the improvements made to the Secretariat-General's website[4] at the end of 2007 and its plans for further development and improvement of the website. In case **0446/2007/WP**, the Commission appears to have misunderstood a critical remark concerning the application of its 2002 Communication on relations with the complainant in respect of infringements of Community law[5]. The Commission and the Ombudsman are in agreement that (i) the complainant intended his correspondence to the Commission as an infringement complaint and (ii) the complaint was not investigable as an infringement complaint because the grievance which it contained fell outside the scope of Community law. The Ombudsman's view is that, in these circumstances, the Commission should have informed the complainant that it had decided not to register his correspondence as a complaint and have explained its decision using one or more of the six reasons listed in the second paragraph of point 3 of the Communication. The Ombudsman has informed the Commission accordingly.

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[3] COM(2008) 229 final.

[4] http://ec.europa.eu/community_law/infringements/infringements_en.htm

[5] 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 Ombudsman's Annual Report for 2008 will contain information on other aspects of the on-going dialogue between the Ombudsman and the Commission as regards infringement cases. It will also report on the constructive relationship that has developed between the Ombudsman and the European Personnel Selection Office (EPSO) as EPSO seeks to modernise the procedures for selecting EU Staff. Aspects of EPSO's Development Programme are mentioned in its follow-up to some of the critical and further remarks made in 2007 (**0575/2005/BB**, **2479/2006/JF**, **1993/2007/RT)**.

In some cases, issues that have not been satisfactorily resolved through the follow-up to a critical or further remark could be dealt with effectively through an own-initiative inquiry by the Ombudsman. For example, one of the cases in the present Study (**2468/2005/OV)** involved a critical remark concerning the operation of the Early Warning System (EWS). As foreseen in the 2006 Study, the Ombudsman has opened an own-initiative inquiry (OI/3/2008/FOR) into the operation of the EWS. The Commission's opinion is due by 28 February 2009. Despite the negative tone of the Commission's response on its follow-up to the critical remark in case 2468/2005/OV, research carried out by the Ombudsman's services in preparation for the own-initiative inquiry indicates that changes which the Commission has already made to the rules on the EWS appear to take account of the critical remark.

The Ombudsman will consider whether an own-initiative inquiry could usefully deal with the unresolved issues in cases **3008/2005/OV** and **240/2004/PB** concerning the Commission's systemic responsibilities as regards the conditions of employment of, respectively, consultants in "second pillar" (Common Foreign and Security Policy – CFSP) activities and national experts working in accession countries.

As mentioned in point 2 above, when the Institution takes the initiative to acknowledge and apologise for maladministration a critical remark is normally unnecessary, as illustrated by cases **1141/2006/BM** and **0847/2006/BU** in which the Commission apologised to the complainant during the Ombudsman's inquiry. In two other cases, the European Parliament (**1782/2004/OV**) and the Commission (**0871/2006/MHZ**) apologised to the complainant as part of their follow-up of the relevant critical remarks. Regrettably, however, the Commission could not bring itself to say sorry to the complainant in case **1475/2005/GG**, despite a recommendation from the Ombudsman that it should do so.

6 STAR CASES

Six of the follow-ups warrant special mention as "star cases", which should serve as a model for other Institutions of how best to react to critical remarks and further remarks. The ***European Parliament*** took several initiatives to give better effect to the principle of equal treatment of candidates in competitions in relation to pregnancy and childbirth (**3278/2004/ELB**). The ***Commission*** took a number of constructive steps, including establishing a consultancy service, to ensure that scientific fellows at the Joint Research Centre receive adequate information and advice about their contractual rights and obligations and the applicable national law (**0272/2005/DK**). The ***Commission*** also introduced new rules to fill a gap in the sickness insurance cover for ex-spouses of

officials suffering from serious illnesses and agreed to publish and widely distribute a booklet explaining the new rules (**0368/2005/BM**). The ***European Central Bank*** responded to the Ombudsman's suggestions by amending its rules on procurement so as to specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender (**1137/2005/ID).** The ***European Investment Bank*** clarified the responsibilities of its operational services as regards environmental documentation, designed new procedures for Framework Loans, including the environmental monitoring performed by the Bank's services and provided numerous concrete examples of its commitment to constructive engagement with NGOs and other civil society organisations (**1807/2006/MHZ**). The ***European Personnel Selection Office*** responded constructively to criticism of differences in the linguistic requirements in open competitions following the 2004 enlargement of the Union by deciding to apply a common linguistic regime to future EU11 and EU10 competitions (**3114/2005/MHZ).**

7 CONCLUSIONS

In general, the follow-up given by the Institutions to critical and further remarks in 2007 has been satisfactory, showing that the Ombudsman's efforts to reach out to the Institutions and to promote a culture of service to citizens are bearing fruit. 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.

This Report makes clear that where issues have not been satisfactorily resolved through the follow-up to a critical or further remark, the Ombudsman may opt 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.

Most institutions sent timely information on their follow-up to the critical and further remarks addressed to them. It is disturbing, however, that 11 months after the end of the year in which the cases concerned were closed, some of the relevant information has still not been provided. This hampers the Ombudsman's ability to respond fully to complainants' legitimate expectations that their complaints will lead to real improvements in the EU administration. As announced in the 2006 study, critical remarks and further remarks now systematically invite the Institution concerned to report on the follow-up within six months. Information on remarks made towards the end of 2008 should therefore be provided at the latest by the end of July 2009.

The Ombudsman intends to publish the Study of the follow-up of critical and further remarks made in 2008 in September 2009.

ANNEXES

A DETAILED ANALYSIS OF CASES

Star Cases

The complainant in case **3278/2004/ELB** was a candidate in an internal competition. She was unable to take the tests because she had given birth the day before. Parliament refused to allow her to take the tests at a later date. The Ombudsman considered that the refusal did not reflect a fair balancing of the competing principles and interests involved. However, the case was closed because the complainant had meanwhile withdrawn her claims and Parliament had made a commitment to revise the conditions for the participation in future competitions of women who have recently given birth and its policy on the setting of the date of tests for pregnant candidates. The Ombudsman welcomed Parliament's commitment in his further remark. In response, Parliament reported several initiatives to give better effect to the principle of equal treatment of candidates in relation to pregnancy and childbirth. Firstly, a short paragraph has been inserted in all notices of competition directly organised by Parliament to draw the attention of candidates in a particular situation (e.g. pregnant, breastfeeding) to the need to carefully fill in the relevant part of the application form so that Parliament is able to make any arrangements that are considered necessary. Secondly, Parliament has modified the letters of invitation in order to remind candidates of the importance of informing Parliament of any special circumstances that may exist. Thirdly, the Competitions and Selection Procedures Unit may adapt the dates of the tests in specific cases. Finally Parliament has asked EPSO to look at the possibility of adopting the same practice for all the open competitions which EPSO organises.

The complainant in case **0272/2005/DK** applied for scientific fellowships at the Joint Research Centre (JRC), at Ispra, Italy. The Ombudsman found that the JRC should have provided the complainant with a translation into a language that the he could understand adequately of the work contract in Italian which he was required to sign. The Ombudsman also encouraged the Commission to verify, in consultation with the competent national authorities, the accuracy of the information it provides about the applicable national rules on the rights and obligations arising from such contracts. In response, the Commission stated that candidates in ongoing and future recruitment processes will be provided with an English, French or German version (depending on which language they best command) of their contract. As regards the Ombudsman's further remark, the Commission stated that the JRC offices in Brussels, Ispra, Seville, Patten, Geel and Karlsruhe have been instructed to provide candidates (before signing a contract) with a detailed *vademecum* explaining all the rights and obligations with regard to the working conditions, and with comprehensive information concerning the mobility allowance and health insurance. The Commission added that, where the JRC continues to utilise this type of contract, national labour law consultants will support the JRC administration to inform and assist future research fellows. This consultancy service will be at the disposal of research fellows, at the sites where they work for the duration of the work contract. Following the end of the contract, the consultancy service will be

available to assist the fellows (and all other persons concerned) in complying with national tax regulations.

The complainant in case **0368/2005/BM** was the divorced former spouse of an official of the Commission. She was diagnosed with a serious illness. The Ombudsman's inquiry revealed that the Commission had agreed to grant her an additional period of insurance cover under the Joint Sickness Insurance Scheme (JSIS) as regards expenses resulting from the serious illness. The Ombudsman also noted that the Commission had taken the initiative to invite the complainant to contact its services if the treatment of the serious illness had to be continued once the JSIS coverage had expired. The Ombudsman considered the approach taken by the Commission in the complainant's case to be consistent with her fundamental rights to health care and to good administration, taken together. As regards the general issue raised by the complaint, the Commission acknowledged, in the course of the inquiry, that it had become aware of a lacuna in the area of sickness insurance cover for ex-spouses of officials and announced its intention to introduce a new general implementing provision to allow the JSIS to continue, subject to certain conditions, to cover officials' ex-spouses suffering from serious illnesses.

The Ombudsman made a further remark welcoming the Commission's announcement and requesting the Commission to provide a report on progress in relation to the introduction of the new rules. The Commission subsequently reported that it had introduced the new rules with effect from 1 July 2007.

The Ombudsman also encouraged the Commission to consider making available, in an easily accessible form, general information on the rights and duties of all persons covered under an official's insurance. In response, the Commission explained that it plans to publish a booklet explaining the new rules, which will be widely distributed to all active and retired members of the JSIS, as well as to all new recruits.

Case **1137/2005/ID** concerned the rejection of the complainant's bid for translation and terminology services. The Ombudsman criticised elements of the relevant tender procedure and award decision. In response, the ECB noted that it had accepted the Ombudsman's proposal for a friendly solution, but the complainant had not accepted its offer of compensation. The Ombudsman also welcomed the ECB's decision to amend its rules on procurement so as to specify, in future, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender[6].

In case **1807/2006/MHZ**, the Ombudsman criticised the EIB for not having reacted to official reports which suggested that the Polish authorities considered that an environmental impact assessment was unnecessary for certain flood reconstruction and repair works. The Ombudsman also noted the valuable role played by NGOs in bringing relevant information to the EIB's attention and encouraged the EIB to continue to engage constructively with NGOs. In response, the EIB issued an internal note clarifying the responsibilities of its operational services as regards obtaining, checking and publication of environmental documentation relating to EIB-financed projects. Moreover, the EIB

[6] *Decision of the ECB of 3 July 2007 laying down the Rules on Procurement (ECB/2007/5),* OJ 2007 L 184, p. 34.

designed new procedures applying to Framework Loans, including the environmental monitoring performed by the Bank's services. The EIB also acknowledged the valuable input of civil society organizations, including NGOs, and other interest groups and emphasised that it continues to develop a proactive approach to create new ways of dialogue and working together. In this context, the EIB presented a non-exhaustive list of its meetings with NGOs about specific projects and topics, as well as its participation in events organised by NGOs.

In case **3114/2005/MHZ**, the Ombudsman found that the linguistic requirements in the open competitions organised by EPSO following the 2004 enlargement of the Union were discriminatory. In the Ombudsman's view, EPSO had not adequately explained why only the 11 "old" languages were acceptable as a second language, nor why it was essential for candidates from the new Member States to know at least one of English, French, or German, whilst this was not a requirement for candidates from the old Member States. The Ombudsman encouraged EPSO to take his criticism into account in establishing the language requirements for future competitions. EPSO's Administrative Board subsequently reviewed the matter and decided to apply a common linguistic regime to future EU11 and EU10 competitions.

Other cases by institution

1 The European Parliament

Case **1782/2004/OV** concerned the complainant's request for reconsideration of his mark in the oral test of an open competition. The Ombudsman criticised Parliament's response, which did not even indicate whether the request had been submitted to the Selection Board. The Ombudsman noted that the report of the Selection Board merely contained the marks that it had awarded to the candidates. He also pointed out that, when a competition consists only of an oral test, it would be helpful if Parliament could encourage Selection Boards to document their appraisals of the candidates in a more detailed way. In response, Parliament confirmed that each request for reconsideration is examined by the Selection Board and apologised to the complainant for the fact that he was not adequately informed of the procedure. Parliament also stated that the possibility to request reconsideration is now limited, in the internal competitions and selection procedures which it launches, to the stages of admission to the competition procedure and to the compulsory tests. As regards the suggestion of better documentation of the appraisal of candidates' performance in oral tests, Parliament stated that its services clearly draw the Selection Boards' attention to the importance of establishing objective criteria so as to ensure equal treatment of candidates.

Case **2825/2004/OV** concerned the rejection of the complainant's candidature for the post of Head of one of Parliament's Information Offices. The Ombudsman criticised the fact that two and a half years elapsed before Parliament replied to a registered letter from the complainant. In response, Parliament established new procedures. Candidates are now given the e-mail address of the official dealing with their file and deadlines have

been established for each step of the procedure so that candidates can regularly monitor their files.

Case **3500/2004/MF** concerned recruitment from the reserve list of an open competition organised by the European Parliament. The Ombudsman made a further remark noting that a quota system appeared to be used in recruiting candidates. The Ombudsman expressed the view that such a quota system raises a number of questions that would justify examination. In response, Parliament pointed out that the quota system is now administered by EPSO.

In case **1917/2005/IP**, the Ombudsman criticised Parliament for publishing a recruitment notice in only the English, French and German versions of the Official Journal. In response, Parliament made clear that its policy is to publish a reference to all recruitment procedures in all language versions of the Official Journal. It also sent the responsible official a written reminder of the policy.

Case **3513/2005/MF** concerned the decision-making process to determine the place of origin of a temporary agent for one of Parliament's political groups. According to Article 4 of the relevant Decision of Parliament's Bureau, the powers of the appointing authority are to be exercised by the authority designated by each political group. In practice, however, Parliament's services intervened in decisions concerning individual entitlements. The Ombudsman accepted that Parliament's practice was conducive to ensuring good administration, respect for legal certainty and equality of treatment and suggested that Parliament consider amending the rules in force in order to take due account of this practice. In response, Parliament informed the Ombudsman that the possibility of revising the existing internal rules was being considered and that, pending such modification, Parliament had suggested to the political groups that they delegate their powers, as far as individual entitlements were concerned, to the head of the competent unit.

In case **1131/2006/BU**, Parliament's reply to a request for information about a translation contract was delayed because of a failure to transfer the request to the competent service. The Ombudsman criticised the delay and suggested that Parliament could inform citizens of the time-limits within which they have the right to expect an answer to requests submitted to the Correspondence with Citizens Unit. In response, Parliament instructed its Directors, Heads of Unit and Heads of Service to implement strictly Article 15(1) of the European Code of Good Administrative Behaviour, in order to ensure that files erroneously sent to the wrong department are transferred without delay to the competent service. Parliament also stated that it had revised its procedures so that mail sent to the Correspondence with Citizens Unit reaches the appropriate official within a matter of days and replies are sent within a maximum of one week and usually within 48 hours.

Case **1364/2006/MHZ** concerned the selection of candidates following the call for expressions of interest to select a core group of Bulgarian and Romanian-language staff to constitute a database of potential contractual agents. The Ombudsman made two further remarks. The first suggested that once the selection procedures had been completed, those candidates who had not been recruited from the database could be

thanked for their participation and informed of the reason why they had not been selected. The second further remark suggested that, even if no specific rules require Parliament to recruit contractual agents of the highest standard of ability, efficiency and integrity, it should nonetheless do so, in accordance with objective criteria. In response, Parliament pointed out that General Implementing Provisions concerning the selection and the recruitment of contractual agents, adopted in November 2007 recognise the general rule of objectivity and transparency. It also noted that the current contractual agents' recruitment procedure is carried out by EPSO. Finally, it stated that all candidates are informed about the results of their application after each stage of the procedure.

In case **1398/2006/WP**, the Ombudsman criticised the fact the complainant's staff report was completed nearly three months behind schedule. In response, Parliament instructed its first assessors to give the utmost importance to the completion of staff reports within the time frame foreseen. It added that, in the last two assessment exercises, the complainant's staff reports and the staff reports of all other officials of his DG had been completed in April.

2 The European Commission

Cases **240/2004/PB**, **242/2004/PB** and **756/2004/PB** concerned the daily subsistence allowances paid to national experts in an accession country. It was undisputed that the very significant drop in the value of the payments (in certain cases around 30%) had not been due to falling living costs in the country concerned, but rather due to currency fluctuations and a delay by the Commission in carrying out a global revision of the *per diem* rates. The Ombudsman did not consider that the Commission's actions constituted, as such, a violation of its legal obligations, but he criticised as maladministration the Commission’s failure to ensure that the daily allowances reflected actual changes in living costs. The Ombudsman also encouraged the Commission to examine a specific problem relevant to the calculation methods it had used. In response, the Commission re-iterated its view that the relevant rules entitled it to carry out the calculations in dispute. It also stated, in summary, that it is not aware of a relevant alternative to the disputed system for calculation of *per diem* rates in situations such as those of the complainants. The Ombudsman regrets that the Commission’s response does not take into account the distinction between, on the one hand, the Commission’s legal obligations and, on the other hand, the requirements of good administration. The Ombudsman repeats that his finding of maladministration did not question the legality of the Commission's actions. The Ombudsman emphasises that as a matter of good administration, the Commission could and should regularly and adequately check the functioning of the calculation methods, which appear to be still in use, with a view to findings ways to avoid similar detriment to individuals in the future.

The complainant in case **2763/2004/JMA** was an official of the Commission who worked in the Delegation in Nepal. He complained about the conditions under which he was re-assigned to work in Brussels. The complaint gave rise to the following critical remark:

On the basis of the oral instructions given to the complainant on (Monday) 1 March 2004, requesting him to take up his new duties on (Monday) 8 March 2004, the Commission only granted him four working days to carry out all necessary arrangements for a complex and burdensome move from Nepal to Belgium. It should be noted that, at the time, the complainant was in Brussels and would thus have had to return to Nepal immediately in order to prepare his departure. It should further be noted that the complainant had been granted leave and that this leave had not yet been cancelled. The formal decision to reassign the complainant as of 8 March 2004, was only adopted by the appointing authority on 23 March 2004, that is, two weeks after the move ought to have taken place.

In the absence of any evidence which could show that the complainant's move had to be carried out as rapidly as the Commission wished, the Ombudsman finds that the Commission has not been able to justify why it imposed such severe conditions on the complainant's reassignment. Having regard to the above circumstances, the Ombudsman takes the view that the Commission manifestly ignored the interests of the complainant in defining the conditions of his reassignment, failing to act with diligence and care towards him. This constitutes an instance of maladministration.

In response, the Commission stated that it regrets that the Ombudsman had not taken fully into account the circumstances of the case in order to assess whether the conditions for the complainant's return were inadequate in this situation. The Commission noted that, although the Community courts have recognised as reasonable a delay of 14 days to reassign a civil servant from a Delegation to the Commission's headquarters, nothing would prevent the Institution from imposing a shorter delay if the factual circumstances of the case justify it.

The Ombudsman regrets the Commission’s failure to acknowledge the instance of maladministration in this case but considers that no useful purpose would be served by further discussion of the case.

The complainant in case **3321/2004/DK** asked for and received information from the Commission concerning her eligibility for a Marie Curie fellowship. She subsequently applied for and was awarded a fellowship, but was later declared ineligible. The Ombudsman considered that the Commission had failed to answer the complainant’s inquiry in an appropriate way because the information provided was likely to lead her to the reasonable, albeit erroneous, conclusion that she was eligible. The Ombudsman also encouraged the Commission to avoid formulating the disclaimer it uses when it provides such information in a way that could suggest that it relieves the Commission of its duty to give to potential applicants clear and accurate information that is not misleading. In response, the Commission changed the text of the disclaimer as follows:

"The answer or information contained in this message is based on the information provided by you, which may not be sufficiently detailed or complete to provide a full and correct answer or response to your question. The Commission is committed to providing accurate information through enquiry services; however, the information provided has

no binding nature. The Commission cannot be held liable for any use made of this information or for its accuracy."

In addition, for specific cases on the eligibility of individual researchers, the following is added to the text of the disclaimer:

"A formal decision can only be taken following the submission of complete information as foreseen by the procedures. In particular, with reference to the eligibility of researchers of the individual actions [,] the official decision is taken on the basis of a complete proposal in the frame of a call. In case of the host actions, the eligibility of researchers lies ultimately with the host institution."

The Ombudsman considers that the changes effected by the Commission to the text of the disclaimer are reasonable and in line with the Ombudsman's further remark.

The Ombudsman subsequently dealt with a similar individual case; **2776/2005/ID**. The Ombudsman's inquiry revealed that the Commission had decided to prolong the complainant's medical coverage by the JSIS for almost two years, because the complainant was suffering from a grave illness, the treatment of which apparently required considerable expenses. The Ombudsman made a further remark praising the Commission for its decision to prolong the JSIS coverage, noting that it reflected a sensitive and pragmatic consideration of the complainant's medical condition.

Case **0452/2005/BU** concerned a leak to the Press of the names of candidates for the post of Head of the Commission's Representation in Malta. The Ombudsman's inquiry found that the Commission had provided the relevant personal data to a large number of recipients and that it was subsequently unable to establish lists of its staff members and/or third parties who were authorised by it to have access to the personal data. The Ombudsman found that this situation was not compatible with the Commission's obligations under Article 22(1) of Regulation 45/2001. In response, the Commission informed the Ombudsman that it has revised its procedures for senior management recruitment in the light of Regulation 45/2001 and has notified the European Data Protection Supervisor of the new procedures.

In case **1475/2005/GG**, the Ombudsman found that material published by the Commission about new rights for air passengers wrongly implied that compensation had to be paid in every case where a flight is cancelled and that this was likely to mislead passengers. The Ombudsman recommended that the Commission should correct these statements and apologise to the complainant. In its detailed opinion, the Commission informed the Ombudsman that it had withdrawn the material in question from its website and that replacement material had been sent to the stakeholders concerned for comments. Although the substantive question was thus resolved, the Ombudsman criticised the Commission's failure to apologise, pointing out that it was very likely that the inaccurate and misleading wording had given rise to a considerable number of disputes between passengers and airlines that could easily have been avoided. In these circumstances, the Ombudsman considered that a service-minded, courteous and accessible administration should have presented an apology. In response, the Commission merely pointed out that when preparing new versions of the documents criticised by the Ombudsman, it had

consulted the complainants and taken their comments into account. The Ombudsman regrets that the Commission could not bring itself to say sorry to the complainant.

The complainant in case **1836/2005/ID** addressed the Commission about a suspected infringement of EU competition law. The Commission declined to deal with the matter as a complaint, essentially on the ground that there was insufficient Community interest in the subject-matter. The Ombudsman found no maladministration, given that the complaint did not fall within the Commission's exclusive competence. He made a further remark encouraging the Commission to continue the good administrative practice, which it seemed to have followed in this case, of advising complainants in such circumstances of the possibility to pursue the matter before the relevant national competition authorities. In response, the Commission expressed its agreement with the remark. It also informed the Ombudsman that it had checked and found that the national competition authority was dealing with the same suspected infringements and that it had informed the complainant accordingly.

The complainant company in case **2468/2005/OV** had been placed on the "Early Warning System" (EWS). The Ombudsman found that the Commission had maintained the listing of the complainant on the EWS even after the attachment order that had led it to make this listing had been limited to EUR 50,000 and after the Commission had instructed one of its services to block the payment of this sum. The Ombudsman criticised the continuation of the listing as unfair.

In its response to the critical remark, the Commission stated that the court decision which limited the amount of the attachment order to EUR 50 000 could not be considered as definitely lifting the attachment order and that the listing in the EWS needed to remain active since it remained the responsibility of the Accounting Officer to continue to follow-up the correct execution of the attachment order. The Commission also rejected certain of the Ombudsman's findings as regards the likely detrimental effect on the complainant of its continued inclusion in the EWS. Finally, the Commission stated that it "strongly dismisses any notion of bias against the complainant which might result from the conclusions drawn by the Ombudsman".

The Ombudsman is not convinced by the Commission's explanation for the continued listing of the complainant in the EWS. As was explained in point 2.22 of the Ombudsman's decision, it was no longer necessary to maintain that listing after the amount of the attachment order had been limited to EUR 50 000, because the Commission had already requested one of its services to block the said amount. The Commission itself had explained that this was sufficient to comply with the attachment order. As regards detrimental effects, the Ombudsman considers that inclusion in the EWS is inherently likely to have a detrimental effect, because the Commission itself has stated that the EWS was established mainly with a view to warning its services of entities suspected of serious irregularities or fraud. The Ombudsman also considers it important to state that his decision on the complaint did not suggest, either directly or indirectly, that the Commission might have been biased against the complainant.

On 29 October 2008, the Ombudsman opened an own-initiative inquiry into the operation of the Early Warning System (OI/3/2008/FOR). Research carried out by the Ombudsman's services in preparation for the own-initiative inquiry indicates that changes which the Commission has already made to the rules on the EWS appear to take account of the critical remark in this case.

The complainant in case **2539/2005/ID** responded to the Commission's call for expression of interest to become a seconded national expert. His application was rejected as ineligible. The Ombudsman considered that the Commission should have stated, in a clear and unequivocal fashion, the reason for the exclusion as well as the condition or conditions the complainant did not fulfil. If there were a large number of candidates, the Commission could initially have stated the reasons in a summary manner and informed the candidates only of the criteria and the result of the selection, subsequently give an individualised, adequate explanation to those candidates who asked for it. In response, the Commission stated that it had taken note of the critical remark and would endeavour to provide clear, accurate and sufficiently precise information in the future.

The complainant in case **2838/2005/BU** successfully participated in an Open Competition COM/B/1/02 and was placed on the reserve list in March 2004. On 1 May 2004, the new Staff Regulations entered into force, which provided for significantly less favourable conditions of recruitment than those in the Notice of Competition. The Ombudsman criticised the Commission for its failure to inform the complainant personally of the consequences of the new Staff Regulations before their entry into force. In response, the Commission stated that it took note of and accepted the critical remark. The failure properly to inform candidates was an unfortunate omission in Open Competition COM/B/1/02 only and the Commission did properly inform candidates in other Competitions running at the time.

The complainants in case **3008/2005/OV** were employed as International Contracted Civilians with the European Union Police Mission in Skopje. Their contracts were renewed on less favourable terms. The Ombudsman found no maladministration as regards most aspects of the case. However he criticised the Commission's failure to inform the complainants in good time of their new conditions of employment and of their social security entitlements. In its response, the Commission contested the findings of maladministration, essentially on the grounds that the Commission had given the relevant information to the Head of Mission and could reasonably expect that it would be passed on to staff, including the complainants, employed by the Head of Mission. The Ombudsman notes that the Commission does not appear to contest that the complainants were the victims of maladministration. The Ombudsman therefore regrets that the Commission has not addressed the question of its own responsibility to establish systems for avoiding the risk of maladministration in the employment of consultants in CFSP missions.

In case **3057/2005/MF**, the Ombudsman took the view that the Commission should have sent the complainant a holding letter informing him that the issue was complex and that a substantive reply would be sent as soon as reasonably possible. In response, the

Commission acknowledged that a holding letter was unfortunately not sent in this case. The Commission confirmed that the Commission's services apply and will continue to apply the rule in its Code of Good Administrative Behaviour that, if a substantive reply to a citizen's request for information cannot be sent within fifteen working days, a holding reply must be sent.

In case **3067/2005/MF**, the Ombudsman criticised the late payment of the fees of auxiliary conference interpreters. In response, the Commission stated that it was confident that the major changes in procedures and improvements in payment software which it had put in place would prevent any recurrence of problems of this kind.

Cases **3095/2005/TN** and **3842/2006/TN** concerned the Commission's handling of two project proposals submitted under the programme "Integrate and strengthen the European Research Area". In both cases the Ombudsman criticised the Commission's acceptance of major changes to the proposal without the prior agreement of all the parties who had jointly submitted the proposal. The Ombudsman also encouraged the Commission, in future such cases, to examine whether acceptance of a revised proposal would be compatible with the principle of equal treatment, even before it asks all the participants for their agreement to the changes. In response, the Commission re-stated its view that there had been no substantial changes to the proposals and that the withdrawal of a limited number of participants did not endanger the projects' prospects for success, nor justify a re-evaluation of the proposals. The Ombudsman regrets the Commission's failure to acknowledge the instances of maladministration in these cases but considers that no useful purpose would be served by further discussion of the cases.

Case **3296/2005/ID** concerned an alleged failure of the Commission fully to investigate a potential conflict of interest in a tender procedure for award of a contract for a project under the Tacis Programme. The Ombudsman's closing decision, which found no maladministration, contained two further remarks. The first pointed out that when an Evaluation Committee deals with a potential conflict of interest on the part of one of its members, the member in question cannot, in accordance with the principles of good administration, participate in the Committee's consideration of and decision on the matter. The second further remark encouraged the Commission, in its future replies to complaints regarding a potential conflict of interest, to provide the complainants with sufficient information about the Commission's compliance with its obligations as regards the investigation of such complaints.

In response, the Commission first addressed the above remarks in the context of the case at hand. It pointed, in particular, to the constraints placed on its replies to the Ombudsman by the need to strike the balance between strict respect for the principle of confidentiality of the tender evaluation and tenderers' right to information and recalled in this context that the Commission had suggested the possibility of an inspection of the file by the Ombudsman's services. The Commission also explained the measures it will take for the future in response to the further remarks. In particular, it will inform all its Delegations and operational units entrusted with procurement tasks about the further remarks issued by the Ombudsman in the closing decision. For this purpose, EuropeAid will include in its intranet a

short operational summary of the decision together with a link to the full decision on the Ombudsman's internet site.

Case **3360/2005/DK** concerned the Commission's rejection of the complainant's application for a traineeship on the ground that she did not meet the minimum academic requirement. The Ombudsman found no maladministration but addressed the following further remark to the Commission:

"*it seems that the Dutch educational system does not provide for the university degree of "Bachelor". It thus appears that Annex 1 to the Rules is not accurate to the extent that it refers to "Bachelor" as regards the Dutch educational system. It also appears that this inaccuracy has not been remedied following the Commission's opinion on this complaint. Therefore, the Commission is invited to take appropriate action in this regard, as soon as possible.*"

In response, the Commission informed the Ombudsman that its Traineeships Office has taken action in accordance with the Ombudsman's suggestion.

In case **3427/2005/WP**, the complainant wrote to the Commission asking certain questions concerning his infringement complaint. The Commission sent a reply which did not refer to the complainant's questions at all. The Ombudsman criticised this failure, on the basis that, if the Commission considered that it had good reasons not to answer the complainant's questions it should have informed the complainant of those reasons. In response, the Commission stated that it could possibly have replied that no further information on the state of the assessment or on the further procedure could be provided as long as the assessment was ongoing. However, the complainant's comment had been interpreted as a rhetorical question complaining about the length of the procedure rather than a concrete request for information, given that the Commission had already clearly indicated that he would be notified of the Commission's assessment. Thus, it had had nothing to add to the reply already provided and had sent a simple acknowledgement of receipt. In view of these considerations, the Commission did not consider the absence of such explanation to be maladministration. The Commission also pointed out that, according to its Communication of 2002, complainants were kept informed of each *decision* of the Commission. Moreover, its services could not enter into prolonged, repeated and detailed correspondence with each individual complainant. The Commission also recalled that, according to case law of the Court of Justice, Member States were entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. Finally, the Commission suggested that the Ombudsman should consider publishing its comments, which it believed clarified certain issues, on his website.

The Ombudsman agrees that the Commission cannot and should not be expected to conduct a detailed correspondence with each individual complainant. However, the present case would not have required the Commission to do so. As the Ombudsman pointed out in his decision, the Commission could at least have explained to the complainant that it was not entitled to provide any further substantive information to him at the stage when he sent his request. This could have been done in a short paragraph

that would not have required much more work than the preparation of the acknowledgement of receipt which the Commission actually sent. Furthermore, the Ombudsman does not find any indications to justify the Commission's interpretation of the complainant's question as a rhetorical one, particularly in view of the fact that the complainant had received very little information during the more than two and a half years the Commission had already been dealing with the matter, a fact to which the Ombudsman's decision refers.

As regards the Commission's suggestion concerning publication of its comments, the Ombudsman recalls that the present Study will be published on his website.

The complainant in case **3487/2005/DK** sat a translation test, organised by the Commission, to recruit contractual agents. After being informed that the Selection Committee had decided not recruit him, he requested and was provided with, a copy of his corrected script together with the evaluation sheet. The complainant then sent a complaint to the Commission containing six points. The Ombudsman found that the Commission's reply had adequately addressed only two of the six points and made a critical remark accordingly.

In response, the Commission stated that it had shown transparency and service-culture throughout the handling of this case. The complainant was granted access to his translation test, together with the evaluators' corrections and comments. It recalled that the Ombudsman had found that it had adequately addressed the most important matters raised by the complainant. The Commission added that it considered that its reply to the other points was adequate and should not have been considered an instance of maladministration. The Commission concluded that it remains fully committed to answering all citizens' enquiries in the most appropriate manner and will endeavour to keep the highest standards in this domain, in accordance with the Code of Good Administrative Behaviour.

The Ombudsman welcomes the latter statement by the Commission. He notes the Commission's views as to the finding of maladministration, but considers that no useful purpose would be served by further discussion of the case.

Case **3693/2005/ID** concerned the participation of a European Economic Interest Grouping (EEIG) in a tender procedure which covered 13 domains. Tenderers were allowed to submit only one application per domain and six applications in total. In the present case, a member of an EEIG had submitted a number of applications and the EEIG itself had also submitted applications. The Commission concluded that the applications submitted by the EEIG were also to be considered applications submitted by its members. Because of this, the Commission considered the above-mentioned member to have submitted applications for more than six domains and so rejected all its applications. The Ombudsman found that the Commission's decision had been inadequately reasoned because it had failed properly to address certain relevant passages contained in a Commission communication on which the complainant appeared to have relied. Those passages, when read in their relevant context, were not clearly supportive of the Commission's position. The Ombudsman therefore made a critical remark. He

also made a further remark encouraging the Commission to examine more closely the compatibility of the relevant legal framework and the information contained in its above-mentioned communication.

In response, the Commission repeated its view that applications submitted by the EEIG were also applications submitted by its members. It did not consider that it had failed to provide adequate reasons for its disputed decisions. As for the Ombudsman's further remark, it emphasised that the Communication was purely of interpretative nature, whilst conceding that a misunderstanding could have happened in light of specific correspondence with the complainant.

The Ombudsman regrets the Commission's failure to acknowledge the instance of maladministration in this case. He trusts that in future the Commission will pay attention to ensuring consistency between the relevant legal rules and the information provided to potential tenderers. In particular, the Ombudsman expects that the Commission will draft calls for tender in a way that allows all reasonably well-informed and normally diligent tenderers to interpret them in the same way and that it will avoid issuing interpretative statements (in communications or elsewhere) that, in effect, hamper this objective.

Case **3917/2005/DK** concerned the electronic submission of a research proposal. The deadline for submission was 9 November 2005 at 17:00 (Brussels time). That provision did not determine whether the closure time was 17:00 sharp (i.e., 17:00:00) or the end of the minute of 17:00, that is to say, 17:00:59. In the closing decision, which found no maladministration, the Ombudsman encouraged the Commission to add an unambiguous clarification concerning this issue in the text of the call for proposals for the Seventh Framework Programme and in similar future calls. In response, the Commission explained that it had already clarified the issue for the Seventh Framework Programme by adding seconds to the deadline for submission, that is to say, DD/MM/YYYY at 17:00:00 (Brussels local time). The Commission also undertook to ensure that all future "call fiches" will show seconds in the deadline.

In case **3939/2005/DK**, the Ombudsman invited the Commission to take note of remarks concerning the need properly to evaluate whether a candidate for a job meets the eligibility requirements, before inviting the candidate for interview, or a medical examination, or discussing possible dates of recruitment. In response, the Commission welcomed the fact that the Ombudsman had found no instance of maladministration in the case and recalled that it had already informed the Ombudsman of the measures that have been put in place to ensure that procedural rules on engagements are followed in a uniform manner by all Commission services.

In case **3962/2005/ELB**, the Ombudsman made the following further remark:

"The Ombudsman recalls that principles of good administration, embodied in the Commission's Code of Good Administrative Behaviour (part 4) and in the European Code of Good Administrative Behaviour (Article 13), require that the Commission reply to correspondence from citizens.

The Ombudsman further recalls that the Commission's Code of Good Administrative Behaviour (in part 4) also provides for an exception to this rule in the case of correspondence which can reasonably be regarded as improper, for example because it is repetitive, abusive and/or pointless. The European Code of Good Administrative Behaviour contains a similar exception (in Article 14).

The Ombudsman suggests that, in future, the Commission should avoid characterising correspondence as repetitive, or pointless, in a letter which also appears to provide new information on the substance of the matter.

The Ombudsman also suggests that the Commission should, in future, bear in mind that the exception in its code applies only in the case of correspondence which "can reasonably be regarded as improper". Invocation of the exception is, therefore, unlikely to be an appropriate and courteous way for the Commission to convey to the other party, for the first time, its view that further correspondence on the matter would not be useful."

In response, the Commission expressed its agreement with the Ombudsman's remarks. It underlined that it was constantly aiming to improve their application throughout its services. In this spirit, the Commission services have been informed about the Ombudsman's decision.

Case **0191/2006/MHZ** concerned the peer review carried out by a team of experts appointed by the Commission in order to examine the qualifications of Polish nurses and midwives. A draft of the peer review report had been published on the website of a private organisation. The Ombudsman found no maladministration by the Commission. In a further remark, he suggested that the Commission could consider giving written instructions as regards the requirements of confidentiality to the national experts who take part in peer reviews. In response, the Commission informed the Ombudsman that all experts taking part in peer reviews and peer-based assessment missions are now required to sign a declaration of confidentiality before undertaking the mission.

Case **0441/2006/MF** concerned the complainant's participation in an open competition. Among other things, the complainant sought access under Regulation 1049/2001 to the list of questions which were put to him during the oral test. Since no such list existed, the Ombudsman found no maladministration in relation to the complainant's allegation. However, the Ombudsman encouraged the Commission to provide the complainant with those questions that were available. In response, the Commission did not consider that the opinion expressed by the Ombudsman in the further remark contained new elements which could lead it to give the complainant access to a document containing some of the questions which had been put to the complainant. The Ombudsman notes the Commission's position and considers that no useful purpose would be served by further discussion of the case.

The complainant in case **0847/2006/BU** wrote to the Commission's Representation in Greece about problems related to the movement of private aircraft registered in Greece. He complained to the Ombudsman that he had received no reply. In its opinion, the Commission presented its apologies to the complainant, to whom it had meanwhile sent

an answer. The Commission also explained the actions it took in relation to the complainant's letter, and explained the reasons for the delay in answering it, which included problems in transmitting the complainant's letter from the Representation in Greece to Brussels. The Ombudsman suggested that the Commission could consider introducing appropriate changes in the system of internal transmission of files between its Headquarters and its Representations/Delegations in order to ensure that such transmission is always prompt and efficient. In response, the Commission informed the Ombudsman that it will examine the possibility of establishing a procedure that would systematically inform the Representations and Delegations about (i) the registration date of the complaint, and (ii) the Commission Directorate General or service to which it has been assigned. The Ombudsman welcomes the Commission's constructive response to his suggestion.

In case **0871/2006/MHZ**, the Commission's reply to the complainant's correspondence contained an ironical comment, which the Ombudsman criticised as inappropriate. The Commission apologised for the comment. The Ombudsman welcomes the Commission's response.

In case **0962/2006/OV**, the decision on an infringement complaint was not taken until nearly two years after the Commission had received the reply from the national authorities to its reasoned opinion. In the absence of specific explanations from the Commission, the Ombudsman criticised the delay as excessive. In response, the Commission repeated that the complex legal issues raised by the case had required extensive legal analysis. However, the Commission agreed that it should work towards avoiding such delays even in exceptional cases and stated that it will endeavour to take decisions more quickly in future infringement cases.

Case **1013/2006/JF**[7] concerned the handling of a complaint lodged with the Commission's Directorate-General (DG) Competition concerning alleged anti-competitive behaviour. Although the Ombudsman's inquiry did not concern the complainant's related request for access to documents, both the complainant and the Commission made reference to that request in their submissions. In the decision closing the inquiry, the Ombudsman encouraged the Commission and the complainant to reach an agreement on the request for access to documents. In response, the Commission provided information on its handling of the request, including its on-going attempt to seek a fair solution under Article 6(3) of Regulation 1049/2001 to part of the request which covered a number of files comprising hundreds of binders and thousands of pages, many of which originated from third parties.

In case **1141/2006/BM,** the Ombudsman made a further remark inviting the Commission to consider reminding its services of the obligations laid down in the European Code of Good Administration and also in the Commission's Code of Conduct concerning the need to respond adequately and in a timely manner to citizens' requests, and, with regard to matters for which they have no competence, to transfer, without delay, those requests

[7] The decision on this confidential complaint was not published on the Ombudsman's website as it was not possible to produce a satisfactory anonymised version.

to the competent services. In response, the Commission acknowledged that the delays that occurred in dealing with the complainant's initial query were due mainly to the failure to transfer his complaint in a timely manner to the competent service. The Commission pointed out that it had presented its apologies to the complainant and subsequently took all necessary steps to ensure the proper processing of the file. The Commission also stated that it took note of the invitation expressed by the European Ombudsman to remind its services of the obligations laid down in the Commission's Code of Good Administrative Behaviour.

The complainant in case **1212/2006/ELB** was dissatisfied with the part of the Commission's website dealing with infringement complaints. In its opinion on the complaint, the Commission provided the complainant with information on how to lodge a complaint either electronically, or by ordinary post. It also stated its determination to make information on complaints as accessible as possible and explained that it was in the process of creating a new, more user-friendly website. The complainant was satisfied with the Commission's reply. The Ombudsman therefore closed the case, welcoming the Commission's commitment to make information on complaints as accessible as possible and its plan to create a new website dealing with infringements of Community law. He hoped that the new website would be available as soon as possible. In response, the Commission informed the Ombudsman of the improvements made to the Secretariat-General's website[8] at the end of 2007. The information on infringements of Community law is more structured, more accessible and more readable. The next step will be the creation of a dynamic website. The Commission put particular emphasis on the revision of the part entitled "exercising your rights", which now presents information on how to lodge a complaint, the different stages of the infringement proceedings, the advantages of the national means of redress, the administrative guarantees for the complainant, the protection of the complainant and personal data and the possibility to lodge a complaint with the European Ombudsman. The complaint form is now available in 22 languages. The Ombudsman welcomes the improvements to the Commission's website. The Ombudsman notes, however, that although the complaint form is indeed available in 22 languages, much of the material concerning infringements is available in only two languages; English and French.

In case **1368/2006/MF**, the Ombudsman suggested that, in the interests of proper communication with citizens, and also in order to allow citizens to identify potential errors, each reply to a citizen's request should mention his/her address on the letter itself, and not only on the envelope. In response, the Commission agreed with the Ombudsman's further remark and stated that it would make sure to apply this rule in future correspondence with citizens.

In case **1868/2006/ID**, the Commission did not reply to correspondence within the time limit laid down in its code of good administrative behaviour. The Commission expressed its regret for the error, which was due to an administrative oversight as had been explained in its opinion on the complaint.

[8] http://ec.europa.eu/community_law/infringements/infringements_en.htm

Case **2216/2006/JF** concerned the publication of tenders in the Tenders Electronic Daily (TED) database of the Official Journal. Tenders are named on the basis of a Common Procurement Vocabulary (CPV). If one tender comprises multiple subjects, the Office for Official Publications names the tender based on the first CPV, unless the Contracting Authority stipulates another title which better suits the subject-matter of the tender. The tender in the present case comprised five different subjects the first of which was "designing, drafting and copywriting, in a journalistic style, of information materials". The second ("multimedia Internet portal, webstreaming, video on demand and related services") was the one in which the complainant was interested. Since the Commission did not make use of the possibility to name the tender differently, OPOCE named it after the first CPV ("copywriting agency service"), which led to the complainant not being able to find it on the TED. The Ombudsman found that the title "copywriting agency services" could not be reasonably perceived as appropriate for potential tenderers to get sufficiently acquainted with the overall kind of services procured by the Commission in the contract notice and therefore criticised the Commission's failure to use the possibility to request a change of title. The Ombudsman also made a further remark emphasising the importance of EU public procurement tools both for EU Institutions and the activity of its service providers and encouraging the Commission to make sure that the publication of its invitations to tender is made in as clear and as easy to identify a manner as possible. In response, the Commission acknowledged that the description of the tender could have been changed to a more appropriate description and emphasized that it does make wide use of the possibility to change titles to more appropriate ones than those based on CPVs.

In case **3191/2006/MHZ**, the Ombudsman made a further remark encouraging the Commission, as far as possible, to provide citizens with the information they request in a language that they understand, even when that information concerns internal documents, publications or communications (including those published on the Europe Direct Intranet website), which exist in a language different from the language of the applicant. In response, the Commission stated that it had taken note of the remark and that it will endeavour to provide - within the limits of its resources and possibilities - information requested by citizens in a language they understand.

The complainant in case **3543/2006/FOR** wrote to the Commission concerning the alleged failure of Ireland to transpose the Insurance Mediation Directive into its national law. The Ombudsman criticised the Commission's failure to register the complainant's correspondence as a complaint in accordance with its 2002 Communication and encouraged the Commission to either issue a letter of formal notice to Ireland or to close the case. In response, the Commission accepted that it had not registered the complainant's correspondence as a complaint in accordance with its 2002 Communication and reaffirmed its commitment to abide by the Communication. The Commission also informed the Ombudsman that it had issued a letter of formal notice to Ireland on 2 April 2008 and undertook to keep the complainant informed of further progress in the case.

Case **OI/4/2006/JF** concerned the recovery of part of a *Leonardo da Vinci* grant from a secondary school in Iceland. In a first further remark, the Ombudsman encouraged the

Commission to consider (i) explaining clearly to beneficiaries that they are responsible for all the documentation to be submitted to the Commission and (ii) advising the national Agencies to inform beneficiaries that the Agencies do not have management powers and that they cannot provide binding advice. The Ombudsman also encouraged the Commission to provide advice and assistance to the complainant. In response to the first further remark, the Commission explained that the *Leonardo da Vinci* programme has entered a second phase in which the national Agencies are now responsible for the administrative, contractual, and financial management of the projects. The Commission regularly reminds the Directors of the National Agencies, at meetings held two or three times a year, of their responsibility to inform beneficiaries about their rights and obligations. In response to the second further remark, the Commission provided the complainant with copies of the requested partnership declarations so as to allow it to exercise its rights *vis-à-vis* its partners.

Case **0446/2007/WP** concerned an alleged failure properly to deal with a letter in which the complainant asked the Commission to open infringement proceedings against Germany based on Article 10 of the EC Treaty. When opening the inquiry, the Ombudsman pointed out that the Commission's 2002 Communication could be applicable. The Commission argued that it lacked competence to investigate the issue because the complaint related to Article 35 of the EU Treaty. In his decision closing the case, the Ombudsman expressed surprise that the Commission had based its position on the EU Treaty, although the complainant had alleged an infringement of the EC Treaty. He considered that the Commission should have treated the infringement complaint as such and criticised its failure to do so. The Ombudsman also noted, however, that the complaint set out a grievance which clearly fell outside the scope of Community law and that the Commission's conclusion that it could not investigate the complainant's concerns was correct in substance.

In response, the Commission acknowledged that the complainant clearly intended his complaint to constitute an infringement complaint. However, it maintained its position that the Communication was not applicable because the complaint was not investigable as an infringement.

The Ombudsman considers it possible that the Commission may have misunderstood his critical remark. According to Article 3 ("Recording of complaints") of the 2002 Communication**:**

"Any correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission.

Correspondence shall not be investigable as a complaint by the Commission, and shall therefore not be recorded in the central registry of complaints, if:

[six possible reasons are set out] "

Points 1 and 4 of Article 4 of the Communication read as follows:

"The Secretariat-General of the Commission shall issue an initial acknowledgement of all correspondence within 15 working days of receipt.

(…)

(…)

Where the Commission departments decide not to register the correspondence as a complaint, they shall notify the author to that effect by ordinary letter setting out one or more of the reasons listed in the second paragraph of point 3."

The Ombudsman's critical remark was based on the view that the Commission should have acted in accordance with the fourth paragraph of Article 4 of the Communication quoted above: i.e.; it should have informed the complainant that it had decided not to register his correspondence as a complaint and have explained its decision using one or more of the six reasons listed in the second paragraph of point 3. The response from the Commission appears to be based on the misunderstanding that the Ombudsman considered that the case should have been registered as a complaint in the central registry of complaints in accordance with the first paragraph of Article 3. That is not the case. The Ombudsman has informed the Commission accordingly.

In case **0668/2007/MHZ**, the Ombudsman criticised the delay in publishing the Commission's annual report for 2005 on access to documents. He pointed out in a further remark that reports are a key mechanism of accountability to, and communication with, European citizens and encouraged the Commission to set a good example to the many new Community agencies which have recently been established, by giving high priority in future to ensuring the timely publication of reports. In response to the criticism, the Commission stated that the delay in publishing the report for 2005 was due to exceptional circumstances, which the Commission considers as a case of *force majeure*. There was no intention on the part of the Commission to unduly delay the publication of the report. It is a regrettable incident which does not reflect the Commission's normal practice. In response to the further remark, the Commission points out that it has published its reports for 2006 and 2007 in accordance with the Regulation and states that it will ensure timely publication of its reports as a matter of priority.

The Ombudsman is puzzled by the reference to *force majeure* in the Commission's response. According to the case law of the Community courts, that concept "must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the party relying thereupon, the consequences of which, in spite of the exercise of all due care, could not have been avoided"[9].

The Ombudsman welcomes the Commission's commitment to give priority to timely publication of its reports in the future.

Complaint **1206/2007/WP** mainly concerned alleged age discrimination in the Commission's refusal to recruit the complainant as an auxiliary agent. The Ombudsman found no maladministration as regards this aspect of the case. Another allegation was that the Commission had failed to reply to a letter in due time. The complainant had sent

[9] See e.g., Case C-377/03 *Commission* v *Belgium* [2006] ECR I-9733, paragraph 95.

the letter in question following the Ombudsman's advice to make prior administrative approaches to the Commission in relation to the alleged discrimination, as required by Article 2 (4) of his Statute. In its opinion, the Commission argued that it had treated the complainant's letter as a complaint under Article 90 (2) of the Staff Regulations and that its reply had been sent within the statutory deadline of four months. According to the Commission, the complainant was perfectly aware of that deadline, given that he had followed express advice by the Ombudsman to lodge a complaint under Article 90 (2) of the Staff Regulations.

The Ombudsman's decision clarified that he had not advised the complainant to lodge a complaint under Article 90 (2), but to give the Commission an opportunity to comment on his allegations and claims on the basis of Article 2 (4) of his Statute. The Ombudsman also noted that an internal circulation slip enclosed with the Commission's opinion on the complaint stated: "*The President's cabinet asks the relevant service to decide on an appropriate course of action for a letter, within 15 working days. The action taken should be in accordance with the code of good administrative behaviour.*" Taking those instructions into account, the Ombudsman considered that the Commission, after having discovered the apparent administrative malfunctioning, should have prepared a reply as soon as possible and apologised to the complainant for the delay. Since it had not done so, the Ombudsman made a critical remark.

In response, the Commission maintained that the ordinary deadline of 15 days for replies under its code of good administrative behaviour did not apply to the complainant's letter. It argued that Article 2(8) of the Ombudsman's Statute required the exhaustion of internal remedies for staff cases, and that, according to relevant case-law, Article 90 of the Staff Regulations also applies to cases where an authority has rejected an application. Since the letter in question was headed "complaint", the Commission was obliged to treat it as a complaint under Article 90 (2) rather than as an ordinary letter. The Commission also stated that the Ombudsman's critical remark had neglected the fact that the Commission had responded to 257 e-mails from the complainant in good time.

The Ombudsman points out that Article 2 (8) of his Statute is not applicable to applicants because they do not belong to the group of persons to whom the Staff Regulations apply, unless they choose to make use of the procedures under Article 90 of the Staff Regulations. Furthermore, although the letter in question was headed "complaint", the complainant expressly referred to Article 2 (4) of the Ombudsman's Statute, thus making clear that he intended to make prior administrative approaches in line with the Ombudsman's advice, of which the Commission had been informed. In light of the above, the Ombudsman does not understand why the Commission considered that it was obliged to treat the complainant's letter as a complaint under Article 90 (2) of the Staff Regulations.

Moreover, the Ombudsman notes that the Commission has not commented on the fact that the internal circulation slip enclosed with the Commission's opinion asked the relevant service to take appropriate action within 15 working days and in accordance with the code of good administrative behaviour. As regards the Commission's comment that it replied to a very large number of e-mails from the complainant in good time, the

Ombudsman regrets that the Commission did not continue this record of good administration by offering an apology to the complainant for the delay in answering the letter in question.

3 The Court of Justice of the European Communities

Case **2451/2005/DK** concerned a negotiated tender procedure for the translation of legal texts. In the second round of the procedure, the Court provided information to the selected candidates only in English and French. During the inquiry, the Court made clear that any of the selected candidates could have requested the Court to produce the information in another official language. The Ombudsman found no maladministration by the Court of Justice. In a further remark, he invited the Court to make reference in future invitations to tender to the possibility to request information in an additional language. In response, the Court informed the Ombudsman that upcoming invitations to tender for translation services, to be published in the beginning of 2009, will contain the above-mentioned reference.

4 The European Central Bank (ECB)

Case **1008/2006/MHZ** concerned the ECB's policy about languages on its website. On the basis of information contained in the ECB's opinion, the Ombudsman made a further remark suggesting that the ECB consider informing European citizens, through its website, of the possibility of requesting translations of its documents. In response, the ECB clarified the information contained in its opinion. It also made clear that the ECB does not have sufficient linguistic resources to provide translation of documents into all official languages on request. If information requested is available in English only, the ECB usually guides the requestor to the website of the respective national central bank(s), where the information may be available in the language of the person making the request. By letter of 4 March 2008, the Ombudsman thanked the ECB for the clarification of its opinion and for additions to the ECB's website, which informs citizens in all languages that the websites of the national central banks could be a useful source of information in the relevant language and includes links to those websites.

5 The European Investment Bank (EIB)

In case **0948/2006/BU**, the Ombudsman held that the EIB was entitled to refuse an NGO's request for access to a finance contract concerning a railway modernisation project in Slovakia, on the basis of an exception in its rules on public access to documents. The EIB had made clear during the inquiry that it would have no objection to the disclosure of the finance contract by the borrower or the Slovak Government. The Ombudsman made a further remark encouraging the EIB, in dealing with future access requests of this kind, to consider contacting the national authorities itself in order to ascertain the possibility of disclosure. The EIB could, in this way, usefully contribute to mitigating language problems that some citizens may encounter in addressing requests for public access to the authorities of the Member State concerned. In response, the EIB explained that it had followed the suggested procedure in handling a request for

disclosure of a framework agreement with the Republic of Albania. The document was disclosed in January 2008, with the agreement of the Albanian authorities. Moreover, in March 2008, the EIB disclosed to the same applicant the finance contract between the EIB and an Albanian corporation for a thermal power plant project, as well as the guarantee agreement between the EIB and Albania, with the exception of the annexes to the finance contract. In June 2008, as a result of intensive liaison with the Albanian authorities in Brussels, the EIB also disclosed the annexes.

In complaint **1779/2006/MHZ**, the Ombudsman made a further remark suggesting that the EIB might wish to consider, in the future, establishing channels of communication with, and seeking information from, relevant national and regional control instances, such as ombudsmen, which can serve as an additional source of information concerning compliance with national and European law of projects financed by the EIB. In response, the EIB stated, that following the signature of the Memorandum of Understanding between the European Ombudsman and the EIB on 9 July 2008, the EIB is committed to meeting the Ombudsman at least once a year to discuss the improvements to cooperation and possibly taking advice on the compliance of the specific EIB-financed projects with the principle of good administration. The EIB also pointed out that on 24 June 2008, it established its own Complaints Office through which the EIB will be able to secure existing contact channels and create new ones with the other financial institutions and control instances, such as national ombudsmen.

6 The European Economic and Social Committee (EESC)

In case **1027/2005/ELB,** the Ombudsman criticised the EESC for failing to deal properly with a complaint which cast doubt on the ability of a member of the joint evaluation Committee to perform his duties in a demonstrably impartial and objective way. The Ombudsman also criticised the EESC for not replying to the complainants' letters. In response, the EESC regretted the failure to comply with the principles of good administration and expressed the view that the errors mentioned by the Ombudsman were the result of exceptional circumstances rather than structural problems. It also stated that the person referred to in the complaint was no longer a member of the joint evaluation committee.

7 The European Anti-Fraud Office (OLAF)

Three complaints concerning the right of public access to documents under Regulation 1049/2001 led the Ombudsman to make a number of critical remarks. In case **3402/2004/PB**, these concerned the grounds that OLAF had given for refusing the request and various aspects of its procedural handling of the application. In case **0554/2005/FOR**, the criticism concerned failure to register a letter and to reply within 15 working days from registration of the request. In case **2350/2005/GG**, a number of procedural errors were detected: the complainant was not informed of his right to make a confirmatory application and, subsequently, of his right to go to court or to complain to the Ombudsman. Furthermore, the person who dealt with the initial request for access also decided on the confirmatory application. The Ombudsman underlined that his

conclusions on these points would have been different if OLAF had made clear from the very beginning that it considered the complainant's request to be a request for information and not a request for access under Regulation 1049/2001. The Ombudsman also criticised the fact that, after having received the confirmatory application, OLAF indicated to the complainant that it would not reply to further letters from him. As regards the substance of the case, the Ombudsman considered that OLAF had failed to provide a valid reason for failing to provide the complainant with a complete list of its correspondence with services of the German federal government and of governments of the German *Länder* in 2000, 2001, 2002, 2003 and 2004.

OLAF accepted that the Ombudsman's criticisms were justified and circulated the Ombudsman's remarks internally. In response to the remarks in case 2350/2005/GG, OLAF also stated that, in the future, it will (i) consider even more carefully from the very beginning whether a case concerns a request for information or a request for access to documents and what could constitute a disproportionate administrative burden and (ii) regard the possibility of refusing to reply to repetitive requests as a last resort, after careful consideration and in the most exceptional circumstances.

In case **2582/2006/WP**, the Ombudsman criticised OLAF's failure to reply to several requests for information that the complainant sent in relation to a selection procedure. In response, OLAF stated that it entirely accepted the Ombudsman's remarks and had circulated them internally.

Case **3134/2006/JMA** concerned OLAF's handling of information supplied to it by the complainant, a Commission official. The Ombudsman criticised OLAF's failure to reply to some of the complainant's letter, its delay in replying to others and the fact that some replies were sent in English instead of the language used by the complainant, Polish. In response, OLAF accepted the need to reply in a consistent manner and within 15 working days, but expressed the view that the case was an example of a citizen using his rights in what it considered an inappropriate manner and that the complainant was known to be fluent in German, English and French.

8 The Executive Agency for Competitiveness and Innovation (EACI)[10]

In case **2207/2005/MF**, the Ombudsman criticised the delay of over two months in the Agency's reply to the complainant's request for information on the progress of his job application. The Agency acknowledged that the delay was excessive and stated that a new electronic system allows a more standardized processing of applications and reduces delays.

9 The European Personnel Selection Office (EPSO)

Case **3346/2004/ELB** concerned the requirement that candidates in open competitions must register and communicate with EPSO on-line. The Ombudsman criticised EPSO's

[10] Formerly the Intelligent Energy Executive Agency. The change of name was effected by Commission Decision 2007/372/EC of 31 May 2007.

failure to provide for an exception for (non-disabled) persons who have considerable and objectively justifiable difficulty in having access to the internet. In response, EPSO stated that it would be ready to examine requests for exceptions to the requirement, but that up to the present it had received no such request.

The complainant in case **0575/2005/BB** failed to attain the pass mark for the written test in a competition. He requested a review and asked some questions about the information provided as part of the test. The Selection Board confirmed the result of his test, but did not answer his questions, which the complainant repeated in a subsequent letter. The complaint to the Ombudsman raised several issues. In relation to most of them, the Ombudsman found no maladministration. As regards the complainant's questions, EPSO stated in its opinion that it is neither the purpose of a competition nor the task of the selection boards to enter into discussions with candidates about the questions or subjects of tests. The Ombudsman, however, failed to see why the complainant could not have received a reply to his questions, in accordance with the European Code of Good Administrative Behaviour. A critical remark was made accordingly.

In response, EPSO referred extensively to the secret and collegial nature of the work of selection boards. It also made, in summary, the following main points:

- selection boards are independent administrative organs and EPSO's role in relation to them is simply that of an administrative secretariat;
- candidates in open competitions do not have the same rights as ordinary citizens;
- the work of selection boards can only be supervised by the courts;
- every new right given to a certain candidate in a competition would constitute a new fact that could be used by other candidates to bring an action to court.

In conclusion, however, EPSO pointed out that the existing recruitment procedures could be improved to accommodate better the legitimate wish of candidates to obtain as complete a reasoning as possible, within the limits of the legal framework. EPSO also emphasised that it is always ready to take account of the Ombudsman's critical remarks either by adapting, if possible, the applicable rules, or by putting in place procedural innovations to achieve even better administration of future competitions.

The Ombudsman does not find the four bullet points above convincing. Nor does he see their relevance to the critical remark. However, he welcomes EPSO's openness to change and is aware of its commitment to modernise selection procedures so as to make them fit for purpose. He looks forward to continuing good co-operation with EPSO towards this objective as EPSO implements its Development Programme.

In case **2348/2005/ELB**, the complainant had appealed to EPSO against the decision to exclude him from an open competition. He sent his appeal to EPSO using the form for making a complaint to the Ombudsman. EPSO did not treat the appeal as such, taking the view that it had been sent, for information, a copy of a complaint to the Ombudsman. In his decision on the case, the Ombudsman encouraged EPSO to take action to avoid such problems in the future by informing the person concerned that it is EPSO's understanding that a copy of a complaint was sent to it for information purposes only.

The Ombudsman also asked EPSO to review the text used in notices of competition to inform candidates that they can only complain to the Ombudsman after having first made appropriate administrative approaches to EPSO. In response, EPSO promised to be more precise in future when it sends acknowledgements of receipt to correspondence that it considers as for information purposes only. EPSO also pointed out that the notice of competition in question dated from 2003 and that, since December 2005, notices of competition have made reference to the condition that a complaint to the Ombudsman must be preceded by appropriate administrative approaches.

The complainant in case **1234/2006/WP** had complained to EPSO under Article 90 (2) of the Staff Regulations about his exclusion from an open competition. The Ombudsman criticised two procedural errors in EPSO's handling of the Article 90 (2) complaint. First, although the complaint had been written in German, EPSO sent its decision in English and informed the complainant that he could request a translation. Second, EPSO had not given the complainant correct information as to when time began to run towards the deadline for an appeal against its decision.

As regards the first critical remark, EPSO's response referred to the case law of the Community courts, according to which a reply to a complaint in a language other than the candidate's mother tongue or the language of the complaint constitutes a lawful and valid notification if the person concerned can properly take note of its content[11]. However, in the interests of good administration, EPSO would in future take all necessary steps in order to send its reply to candidates directly in the language of their complaint if the complaint was written in French, English or German, that is, in one of the three languages used to communicate with candidates in competitions. The Ombudsman considers it reasonable for EPSO to communicate a decision in the language the candidate chose for corresponding with EPSO during the competition. He therefore welcomes EPSO's announcement that it will, in future, reply to candidates directly in the language of their complaint if the complaint was written in French, English or German. The Ombudsman also welcomes EPSO's recognition that good administration does not only involve complying with legal requirements. Since an open competition is often the first point of contact between candidates and the EU Institutions, it is particularly important that the administration of such competitions be as citizen-friendly and service-oriented as possible. In this context, it is relevant to note that the judgment to which EPSO referred in its response concerned an internal competition.

As regards the second critical remark, EPSO's response was that the same case law had established that, if the recipient of a decision was not able to understand its content in the language in which it was written, he had to approach the Institution with a request for translation. Only if the candidate made such a request in a reasonable time would the court fix the deadline for lodging an appeal as starting on the date of receipt of the translation. EPSO pointed out that it had informed the complainant that his request for translation "could have repercussions on the deadline for appeals". Therefore, EPSO took the view that it had respected the rules established by the case law. The

[11] EPSO referred to paragraphs 12-19 of the judgment of the Court of First Instance of 7 February 2001 in Case T-118/99, *Brighina v Commission*.

Ombudsman notes that EPSO did not mention during the Ombudsman's inquiry that it had drawn the complainant's attention to the fact that his translation request "might have repercussions as regards the deadline for an appeal". Although the Ombudsman recognises that only the Court can determine authoritatively whether an appeal has been made within the time-limit, he doubts whether the vague statement mentioned by EPSO constitutes useful information for candidates.

In case **2479/2006/JF,** the Ombudsman criticised the high number of errors in the written tests of an open competition, which suggested a lack of due care and attention in the preparation of the competition and raised doubts in candidates' minds about the accuracy of the selection procedure. The Ombudsman also made further remarks encouraging EPSO to act as diligently and carefully as possible when preparing competitions and to reply to correspondence, telephone calls and e-mails in as helpful, accurate and complete a way as possible. In response, EPSO explained that it has discussed the problems experienced in the competition in question and enhanced its control of the quality of its translations. EPSO also explained that, as part of its Development Programme, it put in place a contact centre for candidates on 1 April 2008. The operation of the centre will take due account of the requirements of good administration. As mentioned in relation to case **0575/2005/BB** above, the Ombudsman is aware of and welcomes EPSO's Development Programme.

In case **2899/2006/ELB**, the Ombudsman criticised several aspects of the complainant's treatment in an open competition. In response, EPSO acknowledged that the complainant's request for re-examination should have received a holding reply and that his request for information should have been answered. EPSO also promised to ensure that the appropriate procedures would be followed in the future and provided the complainant with the information which he had requested concerning the mark required to proceed to the next stage of the competition. Finally, EPSO stated that its practice is systematically to reply to Article 90(2) complaints within the statutory deadline.

In case **3406/2006/JF,** a participant in an open competition requested EPSO to provide her with copies of her written tests and evaluation sheet. EPSO declined on the grounds that her request had been made after the deadline for such requests set out in the Guide for Applicants. In its opinion on the complaint, EPSO agreed to provide the requested documents, given that the Guide for Applicants was not legally binding. In a further remark, the Ombudsman encouraged EPSO to consider reviewing other cases, if any, in which it had refused requests because they were out of time. In response, EPSO stated that if it were to receive requests similar to that of the complainant, it would adopt the same approach as in the present case.

In case **1993/2007/RT,** the complainant was excluded from an open competition because his diplomas were not in a field relevant to the duties described in the notice of competition. No maladministration was found. To help avoid misunderstandings in the future, the Ombudsman suggested that EPSO consider providing examples of relevant fields of studies in future notices of competition. In response, EPSO explained the difficulties created by differences in educational systems in the EU. Despite these difficulties, it is reflecting on a policy to provide a set of examples of diplomas for every

competition in the future. In addition, EPSO aims to have a professional Selection Board in future, working over a longer period. This development could make it easier to give as examples diplomas that have been accepted in previous competitions.

B LIST OF CASES IN WHICH A CRITICAL REMARK WAS MADE

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
0240/2004/PB	EN	-
0242/2004/PB (Confidential)	EN	-
0756/2004/PB	EN	-
1434/2004/PB	EN	DE
1782/2004/OV	EN	EL
2468/2004/OV (Confidential)	EN	-
2763/2004/JMA	EN	FR
2825/2004/OV	EN	NL
3321/2004/DK	EN	-
3346/2004/ELB	EN	FR
3402/2004/PB	EN	DE
0144/2005/PB	EN	DE
0272/2005/DK	EN	-
0452/2005/BU (Confidential)	EN	-
0554/2005/FOR	EN	-
0575/2005/BB	EN	-
1027/2005/ELB	EN	FR
1137/2005/ID	EN	-
1475/2005/GG	EN	-
1693/2005/PB	EN	DA
1844/2005/GG	EN	DE
1917/2005/IP	EN	IT
2207/2005/MF	EN	FR

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
2350/2005/GG	EN	DE
2539/2005/ID (Confidential)	EN	-
2838/2005/BU	EN	-
3002/2005/PB	EN	DE
3008/2005/OV	EN	-
3067/2005/MF	EN	FR
3095/2005/TN	EN	-
3114/2005/MHZ	EN	-
3193/2005/TN	EN	-
3427/2005/WP (Confidential)	EN	DE
3487/2005/DK (Confidential)	EN	-
3693/2005/ID (Confidential)	EN	-
0871/2006/MHZ	EN	FR
0962/2006/OV	EN	NL
1131/2006/BU	EN	CS
1234/2006/WP	EN	DE
1398/2006/WP	EN	DE
1807/2006/MHZ	EN	-
1868/2006/ID	EN	-
2196/2006/ID (Confidential)	EN	-
2216/2006/JF (Confidential)	EN	-
2479/2006/JF (Confidential)	EN	-
2582/2006/WP	EN	DE
2899/2006/ELB	EN	FR

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
3134/2006/JMA	EN	-
3543/2006/FOR	EN	-
3697/2006/PB	EN	DE
3842/2006/TN	EN	-
0370/2007/MHZ	EN	FR
0446/2007/WP	EN	DE
0668/2007/MHZ	EN	-
1206/2007/WP (Confidential)	EN	DE

C LIST OF CASES IN WHICH A FURTHER REMARK WAS MADE

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
0240/2004/PB	EN	-
0242/2004/PB (Confidential)	EN	-
0756/2004/PB	EN	-
1782/2004/OV (Confidential)	EN	EL
3278/2004/ELB	EN	FR
3321/2004/DK	EN	-
3500/2004/MF	EN	FR
0144/2005/PB	EN	DE
0272/2005/DK	EN	-
0368/2005/BM (Confidential)	EN	ES
1137/2005/ID	EN	-
1836/2005/ID (Confidential)	EN	-
2348/2005/ELB	EN	-
2451/2005/DK	EN	HU
2776/2005/ID (Confidential)	EN	EL
3057/2005/MF	EN	FR
3095/2005/TN	EN	-
3114/2005/MHZ	EN	-
3296/2005/SAB	EN	-
3360/2005/DK	EN	-
3513/2005/MF (Confidential)	EN	-

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
3693/2005/ID (Confidential)	EN	-
3917/2005/DK	EN	-
3939/2005/DK	EN	-
3962/2005/ELB	EN	-
0191/2006/MHZ	EN	-
0441/2006/MF (Confidential)	EN	FR
0847/2006/BU	EN	
0948/2006/BU	EN	-
1008/2006/MHZ	EN	FR
1013/2006/JF (Confidential)	*	*
1131/2006/BU (Confidential)	EN	CS
1141/2006/BM	EN	
1212/2006/ELB	EN	FR
1364/2006/MHZ	EN	FR
1368/2006/MF	EN	-
1779/2006/MHZ	EN	-
1807/2006/MHZ	EN	-
2216/2006/JF (Confidential)	EN	-
2479/2006/JF (Confidential)	EN	-
3191/2006/MHZ	EN	FR
3406/2006/JF	EN	-
3543/2006/FOR	EN	-
3697/2006/PB	EN	DE

* The decision on this confidential complaint was not published on the Ombudsman's website as it was not possible to produce a satisfactory anonymised version.

CASE REFERENCE	LINK TO TEXT (EN)	LINK TO TEXT (OR)
3842/2006/TN	EN	-
OI/4/2006/JF	EN	-
0668/2007/MHZ	EN	-
1993/2007/RT	EN	FR