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European Ombudsman

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**Report of the European Ombudsman following his visit to Eurojust
(OI/8/2012/OV)**

Dear Mr Bunyan,

By letter of 10 December 2012, I informed you that, in the interest of procedural economy, I decided to include the issues you raised in your complaint 2168/2012/BEH in my ongoing own-initiative inquiry OI/8/2012/OV, and to therefore close my inquiry into your complaint 2168/2012/BEH.

I also informed you that, as agreed, I would keep you informed of the further steps in my ongoing own-initiative inquiry and give you an opportunity to submit observations on any reply received from Eurojust.

Following my visit to Eurojust on 6 June 2012, I have now established a report which I have sent to the Director of Eurojust, with an invitation to submit comments by 30 April 2013. Please find enclosed a copy of my report. When I receive Eurojust's comments, I will send them to you with an invitation to submit observations within one month.

Yours sincerely,

P. Nikiforos Diamandouros

Enclosure:

- Report of the European Ombudsman following his visit to Eurojust



Report

of the European Ombudsman following his visit to the European Union's Judicial Cooperation Unit (Eurojust) - OI/8/2012/OV

The background to the visit

1. In May 2011, the European Ombudsman launched a programme of visits to the EU agencies with the aim of identifying and spreading best practices in their relations with citizens. Initially, the Ombudsman carried out three 'pilot' visits to the EU agencies in the United Kingdom, namely, the European Banking Authority, the European Medicines Agency and the European Police College. In October 2011, the Ombudsman visited the European Environment Agency in Copenhagen and, in November 2011, the European Monitoring Centre for Drugs and Drug Addiction and the European Maritime Safety Agency in Lisbon. In February 2012, the Ombudsman visited the European Centre for the Development of Vocational Training in Thessaloniki and, in May 2012, the European Foundation for the Improvement of Living and Working Conditions in Dublin¹.

2. By letter of 16 May 2012, the Ombudsman informed the European Union's Judicial Cooperation Unit ('Eurojust') that, in the framework of his programme of visits to agencies, he intended to visit Eurojust on 6 June 2012. Two days earlier, the Ombudsman paid a similar visit to Europol.

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



3. Eurojust was set up by Council Decision 2002/187/JHA of 28 February 2002²³ and is based in The Hague since April 2003. According to Article 85 of the Treaty on the Functioning of the European Union (TFEU), Eurojust's mission is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. Eurojust's competence covers the same types of crime and offences for which Europol has competence, such as terrorism, drug trafficking, trafficking in human beings, counterfeiting, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Union's financial interests, environmental crime and participation in a criminal organisation.

4. To date, and since Eurojust was established ten years ago, the Ombudsman has conducted only a limited number of inquiries (six in total) involving Eurojust. Between 2002 and 2010, the Ombudsman opened only three inquiries and found no maladministration in two of the cases. In the third case, the Ombudsman considered that Eurojust's follow-up to the two critical remarks was satisfactory. In 2011 and 2012, the Ombudsman opened three further inquiries involving Eurojust which are currently pending⁴). The Ombudsman's inquiries have not shown any possible instance of systemic maladministration, but rather a willingness of Eurojust to cooperate with the Ombudsman and to improve its administrative behaviour.

5. The Ombudsman sent Eurojust a draft agenda with the specific issues he wished to discuss. In addition, the Ombudsman informed Eurojust that, in response to a commitment he had undertaken following a request by the Assembly of Agency Staff Committees ('AASC'), he also intended to meet Eurojust's Staff Committee during his visit.

The visit

6. The meeting took place at Eurojust's premises in The Hague on 6 June 2012. The Ombudsman was accompanied by Mr Olivier Verheecke, Principal Legal Adviser. Eurojust was represented by Mr Klaus Rackwitz, the Administrative Director, as well as by Ms Catherine Deboyser, Head of the Legal Services Unit,

² Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ 2002 L 63, p. 1), as amended by Council Decision 2003/659/JHA of 18 June 2003 (OJ 2003 L 245, p. 44) and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (OJ 2009 L 138, p. 14). The consolidated version of the Eurojust Decision is available at:

<http://eurojust.europa.eu/doclibrary/Eurojust-framework/ej-legal-framework/Pages/ej-decision.aspx>
16 December 2008 on the strengthening of Eurojust.

³ The discussion on the establishment of a judicial cooperation unit was first introduced at a European Council meeting in Tampere, Finland, on 15 and 16 October 1999. To reinforce the fight against serious organised crime, the European Council, in its conclusion 46, agreed that a unit (Eurojust) should be set up, composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State. On 14 December 2000, a provisional judicial cooperation unit was formed under the name Pro-Eurojust, operating from the Council in Brussels. This unit was the forerunner of Eurojust. Pro-Eurojust formally started work on 1 March 2001 under the Swedish Presidency of the European Union.

⁴ As explained below, the latest inquiry to be opened, in case 2168/2012/BEH, was closed on 10 December 2012 because it is more efficient and effective to deal with the matters raised in that complaint within the framework of the present inquiry.



Mr Mike Moulder, Head of the Budget, Finance and Procurement Unit and Mr Xavier Tracol, Senior Legal Officer in the Human Resources Unit.

7. At the beginning of the meeting, Mr Rackwitz made a PowerPoint presentation on Eurojust. The Ombudsman then provided information on the purpose and context of his visit to Eurojust. He clarified that he carries out his visits to agencies of the EU on the basis of his competence to conduct own-initiative inquiries. An own-initiative inquiry implies, among others, that the usual procedural guarantees concerning such inquiries apply. These include the Agency's right to request the Ombudsman to treat information and documents on a confidential basis, in accordance with Articles 5.1, 5.2 and 14.2 of the Ombudsman's Implementing Provisions⁵. The Eurojust Administrative Director, Heads of Unit and Senior Legal Officer presented Eurojust's position on the various subjects identified by the Ombudsman in his letter of 16 May 2012. The five subjects were addressed through a question and answer session. At the end of the meeting, Eurojust also provided a copy of the relevant documents.

8. The following issues constituted the object of discussion between the Ombudsman and Eurojust's management:

- A. Eurojust's initial contacts with the public;
- B. Transparency, dialogue and accountability;
- C. Selection and recruitment;
- D. Tenders and contracts;
- E. Conflicts of interest.

9. After the meeting with Eurojust's management, the Ombudsman and Mr Verheecke met with the representatives of Eurojust's Staff Committee. The Staff Committee representatives confirmed that staff members are aware of the existence of the European Ombudsman.

The Ombudsman's findings and suggestions

10. As a preliminary point, the Ombudsman underlines that, during the visit, the Eurojust Administrative Director and Eurojust's management demonstrated a high level of commitment to a culture of service and to ethical standards within the organisation, a wish to adhere to the values and principles promoted by the Ombudsman, and a genuine readiness to further improve existing administrative practices and procedures.

(1) Eurojust's initial contacts with the public

11. The Ombudsman notes that Eurojust's website is user-friendly and contains a lot of useful information. The home page, with basic information about Eurojust's role and activities (and with links to the Annual Reports, to the Decision setting up Eurojust, and to some other documents) is available in all 23

⁵ www.ombudsman.europa.eu/resources/provisions.faces



official languages. It also informs readers that, should they wish to obtain further information, they can consult the website in English or contact Eurojust by clicking on an e-mail link. The website has the following main sections: "About Eurojust", "Practitioner's area", "Document Library", "Press Centre", "Careers", "Procurement" and "Visit and contact us". The last section contains contact information and several e-mail addresses depending of the subject of the enquiry (general enquiries, media and publications, recruitment, internships, procurement, visits and protocol, website enquiries). There is also a special form for requesting a visit to Eurojust. The "Press Centre" contains Eurojust's press releases (33 in 2011) as well as a section "news and announcements". The Ombudsman applauds the quality of Eurojust's website.

12. In his letter to Eurojust of 16 May 2012, the Ombudsman informed Eurojust that all the EU agencies agreed to adopt the European Code of Good Administrative Behaviour ('the ECGAB') at a meeting of the heads of the agencies held in Lisbon in October 2008. However, the Ombudsman had not found on Eurojust's website a link to the Code. The Ombudsman was also not aware of how Eurojust had implemented the Code, and how it ensured that its staff complies with the principles laid down in it.

13. Eurojust explained that its website indeed contains no link to the ECGAB. It however clarified that, on 26 March 2003, the then Administrative Director of Eurojust adopted the *Code of Good Administrative Behaviour for Staff of Eurojust in their Relations with the Public*. Eurojust stated that this Code, which entered into force on 1 April 2003 and which is published in the document library section of Eurojust's website, was adopted before the October 2008 meeting of the heads of the agencies in Lisbon. Eurojust however underlined that this Code is fully consistent with the ECGAB. It pointed out in particular that section 6 of the Code ("Complaints") contains the provision that complaints may be lodged with the European Ombudsman in accordance with Article 228 TFEU and the Statute of the Ombudsman, and that this provision is fully in line with Article 26 of the ECGAB. Eurojust stated that, if the Ombudsman wished so, it was ready to add a link to the ECGAB on its website.

14. The Ombudsman notes that Eurojust's Code, although covering more or less the same substance and principles as the ECGAB⁶, has a somewhat different presentation. Instead of containing 27 Articles with the different principles, it is subdivided into 6 sections. On the other hand, contrary to the ECGAB, Eurojust's Code also contains two annexes, namely Annex 1 "*Eurojust Guidance on Confidentiality and Discretion*" and Annex 2 "*Eurojust Guidance for Staff on Invitations and Gifts*". The Ombudsman understands the particularities of Eurojust's Code, considering also Eurojust's specific mandate and the fact that its main interlocutor is not the public at large, but the competent investigation and prosecuting authorities in the Member States. The Ombudsman therefore considers that, overall, Eurojust's Code can be considered to be satisfactory. However, in order to find the Code, one needs to go, in the website, to the document library, and then to "other relevant documents" under the "Eurojust legal framework". The Ombudsman considers that Eurojust's commitment to the principles set out in the Code could be made more visible to EU citizens and therefore suggests that Eurojust's Code could figure more prominently on its website.

⁶ Eurojust's Code does for instance not contain the principles of absence of abuse of power (Article 7) or fairness (Article 11).



(2) Transparency, dialogue and accountability⁷

15. The Ombudsman notes that Eurojust is making considerable efforts in terms of transparency and accountability. For instance, it is very positive that Eurojust has, under the "*Document library*" section of its website, published detailed data concerning its budget and finance (including final accounts and annual work programmes). Similarly, the "*Procurement*" section of the website, under "*completed calls for tender*" contains the list of contractors with which Eurojust concluded contracts, including the value of the contract. The Ombudsman further takes note of the fact that Eurojust's Code of Good Administrative Behaviour refers to "Quality service" and mentions that "*Eurojust and its staff have a duty to serve the European Union interest and, in so doing, the public interest. The public legitimately expects quality service and an administration that is open, accessible and properly run. Quality service calls for Eurojust and its staff to be courteous, objective and impartial*". All the above elements demonstrate that Eurojust is committed to a culture of service.

16. The EU legislation on public access to documents expressly mentions the Ombudsman as a review body. The Ombudsman notes that Eurojust's website contains a section "*Access to documents*" which explains in detail the relevant rules and contains a link to the *Decision of the College of Eurojust of 13 July 2004 to Adopt Rules regarding Public Access to Eurojust Documents*⁸. This Decision refers in its recitals to Regulation 1049/2001/EC⁹, to Article 1 of the Treaty on European Union, to Article 255 of the EC Treaty (now Article 15 TFEU) and to Article 42 the Charter of Fundamental Rights. In his letter of 16 May 2012, the Ombudsman asked Eurojust to provide additional information and to answer the following questions:

a) How does Eurojust deal in practice with requests for public access to documents? What are its guidelines and/or practical arrangements for handling such requests? Please provide examples, such as the main correspondence in the Agency's handling of the last three requests for public access to documents dealt with under the Eurojust Decision of 13 July 2004. (The *substance* of Eurojust's decision in these examples will not be examined, as this is not the purpose of this visit).

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

⁷ On 26 October 2012, the Ombudsman received a complaint (2168/2012/BEH) from the NGO Statewatch, which concerned the Decision of the College of Eurojust of 13 July 2004 to Adopt Rules regarding Public Access to Eurojust Documents. On 19 November 2012, the Ombudsman opened an inquiry into the complainant's two allegations and claim and asked Eurojust to submit an opinion by 28 February 2013. The Ombudsman, however, has now concluded that, since complaint 2168/2012/BEH concerns Eurojust's general policy on public access to documents and not the treatment of individual requests for access, it is more appropriate to deal with the issues raised by the complainant in complaint 2168/2012/BEH in the framework of the present own initiative inquiry OI/8/2012/OV. By letter of 10 December 2012, the Ombudsman therefore informed Eurojust and Statewatch that he decided to terminate his inquiry into complaint 2168/2012/BEH and to incorporate the issues subject of that inquiry into the present own initiative inquiry. The Ombudsman will send to Statewatch a copy of Eurojust's reply to the present report, with an invitation to submit observations. Statewatch has indicated that it will put its original complaint and all the correspondence concerning the present inquiry on its website.

⁸ <http://eurojust.europa.eu/about/Pages/Access-to-documents.aspx>

⁹ 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.



c) Does Eurojust operate, or intend to operate, a public register in the sense of Article 11 of Regulation 1049/2001? What is the relation with the "*Document library*" on the website? Will this be expanded?

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

17. In reply to point a), Eurojust stated that its public access policy is governed by the Decision of 13 July 2004 and pointed out that it developed a Vademecum for its staff with guidelines and practical advice on how to deal with requests for public access. Eurojust provided the Ombudsman with a copy of this Vademecum. Eurojust explained that "document" is defined in its Rules mirroring Regulation 1049/2001 and includes any content whatever its medium (written on paper or stored in electronic form, or as a sound, visual or audiovisual recording). It stated that decisions on initial applications for public access are taken by the Head of Legal Service, whereas decisions on confirmatory applications are taken by the Administrative Director of Eurojust. It also pointed out that Eurojust's Data Protection Officer is part of the standard procedure and that one of Eurojust's challenges is to reconcile public access with Eurojust specific mandate (fighting against serious crime by fostering judicial co-operation) which involves the collection of many private data and dealing with ongoing judicial investigations and prosecutions. Eurojust provided copies of its correspondence concerning the last three requests for public access. Eurojust also provided a copy of its "Access to documents - Register 2012" with further information on all requests for public access dealt with so far in 2012. The overview table makes a distinction between case-related and not-case related documents and showed that, apart from two pending requests, in most cases, full access was granted (with partial access being granted in another case). It also appears that, although the College of Eurojust's Decision of 13 July 2004 provides for a 30 working day deadline for granting or refusing access (see in this respect the following paragraphs), most replies were sent within two weeks. Eurojust also pointed out that there have been no court cases against it in relation to access to documents and that there is only one pending case before the Ombudsman (in the meantime, a second inquiry (2168/2012/BEH) concerning public access to documents was opened, see footnote 7 above).

18. The Ombudsman very much welcomes the fact that, in practice, Eurojust deals promptly with requests for public access, very often within two weeks, namely 10 working days. The Ombudsman, however, notes that, whereas Regulation 1049/2001 foresees a time limit of 15 working days for processing initial and confirmatory applications for access, the College of Eurojust's Decision of 13 July 2004 foresees in Articles 7 and 8 a time-limit of 30 working days.

19. The Ombudsman considers that it is within the prerogatives of Eurojust to establish specific procedural rules governing how it deals with requests for public access to documents provided it complies with the rules set out in Article 15 (3) TFEU, which reads as follows:



"3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

20. Thus, in light of the third subparagraph of Article 15(3) TFEU, Eurojust has a legal basis to elaborate its own Rules of Procedure regarding public access to documents. Such Rules of Procedure must, however, respect the general principles and limits on grounds of public or private interest governing the right of access to documents. Nevertheless, even if it is clear that Article 15(3) TFEU allows a certain margin of discretion as regards the establishment of specific procedural rules, such as the precise time periods for dealing with requests for public access to documents, this margin of discretion should be exercised in a manner which bears in mind the need for Eurojust to be as transparent as possible. This implies that while it is indeed possible that Eurojust could choose to apply time periods for dealing with requests for public access which are longer than those applying to other EU institutions and agencies, it would be good administration for Eurojust to justify expressly the concrete reason why it considers that such extended time periods are necessary, by referring to the particular circumstances applying to requests for public access directed to it. If there are no specific and compelling reasons for derogating from the general rule foreseen in Regulation 1049/2001, Eurojust should consider aligning its rules concerning deadlines for answering initial and confirmatory applications for access to documents with the general rules foreseen in Regulation 1049/2001.

21. The Ombudsman further notes that Article 8 of the College of Eurojust's Decision does not, in contrast to Article 8(1) of Regulation 1049/2001, refer to the possibility for the applicant to institute court proceedings or to complain to the European Ombudsman in case of a partial or total refusal of access, but merely to the more generally formulated obligation for Eurojust to "*inform the applicant of the remedies open to him or her*". The absence of such a specific declaration in the College of Eurojust's Decision does not imply that such rights do not exist - all persons who are refused full public access to a document can institute court proceedings or complain to the European Ombudsman. However, the Ombudsman considers that it is in the interests of transparency that Eurojust expressly indicate the possibility of appeal in any reply to a confirmatory application in which it refuses access or gives only partial access.



Eurojust could thus consider modifying the College of Eurojust's Decision to draw attention to the right of the applicant to institute court proceedings or complain to the European Ombudsman.

22. In reply to point b), Eurojust explained that it does not produce a separate annual report on public access to documents (considering also the limited number of requests received), but that it has a section on "*Public access to Eurojust documents*" in its general annual reports. Eurojust referred to Article 15 of the Decision of 13 July 2004 which provides that "*Eurojust shall include in its annual report the number of cases in which it refused to grant access to documents and the reasons for such refusals*". Eurojust provided the Ombudsman with the relevant extracts of its annual reports since 2004. As regards the year 2011, Eurojust received eleven requests; four were received directly by Eurojust and in the other seven instances Eurojust was consulted as a third party following requests received by other institutions. Of the four requests that were directly received by Eurojust, two were staff related and two concerned investigations and prosecutions in which Eurojust was involved. The two staff related requests were granted in full, whereas the two case-related requests were refused for a variety of reasons. As stated above, in addition to these four requests, Eurojust was consulted seven times as a third party following requests received by other institutions (in the one case-related request, access was refused, whereas full access was granted in the six not-case related requests). The Ombudsman considers that, given the limited number of requests for public access (11 in 2011) and the low number of refusals of access (3 out of 11), the inclusion in Eurojust's annual reports of information on how it dealt with requests for public access, instead of a separate report, is justified.

23. The Ombudsman however notes that, whereas Article 17 of Regulation 1049/2001 contains an obligation to prepare an annual report on access to documents with information on i) the number of cases in which access was refused, ii) the reasons for such refusals and iii) the number of sensitive documents not recorded in the register, Article 15 of the College of Eurojust's Decision does not include a reference to the number of sensitive documents not recorded in the public register. Also such a register does not yet exist. The Ombudsman however suggests that, once Eurojust has established a public register of documents (see below), information on the number of sensitive documents not recorded in the register should also be included in the "*Public access to Eurojust documents*" overview in its annual reports.

24. In reply to point c), Eurojust stated that it has no public register in the sense of Article 11 of Regulation 1049/2002 and that this Regulation does not apply to Eurojust. Eurojust however explained that the Document Library available on its website was being expanded and that it tries to make publicly available as many documents as possible. Eurojust however did not exclude establishing a public register, but pointed out that some technical issues would have to be considered in that respect. In reply, the Ombudsman referred to the public register which his own office intends to launch and pointed out that the Registry of his Office was available for any assistance Eurojust might wish in developing a public register.

25. Although Regulation 1049/2001 as such does not apply to Eurojust, it should be noted that Article 39 of the Decision setting up Eurojust provides that the College of Eurojust shall adopt rules for access to Eurojust documents "*taking account of the principles and limits stated in Regulation [1049/2001]*". A public register of documents is one of the principles foreseen in the Regulation. The Ombudsman notes however that the College of Eurojust's Decision of 13 July



2004 does not contain a provision similar to Article 11 of Regulation 1049/2001 providing for the establishment of a public register.

26. The Ombudsman underlines that the purpose of a public register is to make it easier for citizens to exercise their rights of public access. If a citizen is unaware of the existence of a document, it will be difficult, if not impossible, for the citizen to exercise his or her fundamental rights to make a request for public access thereto.

27. The inclusion of a reference to a document in a public register does not pre-determine the issue of whether a request for public access should be granted; the institution or agency may indeed put forward, in its decision relating to a request for public access, duly substantiated reasons why public access should be denied. In this context, it should be underlined that reference to a document in a register should be made in a manner which does not undermine the public and private interests protected by the exceptions to public access. As regards Eurojust, the manner in which a document is identified on the public register should not contain any information which would fall within one of the exceptions set out in Article 4 of the College of Eurojust's Decision of 13 July 2004.

28. This would be particularly the case as regards "sensitive documents". "Sensitive documents" are documents originating from the institutions or the agencies, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States, notably public security, defence and military matters.

29. The Ombudsman understands that Eurojust does deal with documents which are subject to Article 10 "*Treatment of classified documents*" of the College of Eurojust's Decision of 13 July 2004 (similar to Article 9 "*Treatment of sensitive documents*" of Regulation 1049/2001). The Ombudsman considers that Eurojust could include a reference to the existence of these documents on a public register, in a manner which would not identify their content (by, for example, using only a reference number¹⁰). The Ombudsman thus suggests to Eurojust to establish a public register of its documents in accordance with the principles of Regulation 1049/2001 and more particularly its Article 11. Eurojust could also consider amending the College of Eurojust's Decision of 13 July 2004 to bring it in line with Regulation 1049/2001.

30. With regard to the exceptions to disclosure mentioned in Article 4 of the College of Eurojust's Decision of 13 July 2004, the Ombudsman notes that both paragraphs of Article 4(3) of the Decision provide that access to a document, drawn up for internal use or received by Eurojust, which relates to a matter where the decision has not been taken by Eurojust (or access to a document containing opinions for internal use as part of deliberations and preliminary consultations within Eurojust, after the decision has been taken), shall be refused if disclosure of the document would "*undermine Eurojust's decision-*

¹⁰ Such a limited reference to a document is an exception to the rule that each document on the register should contain a reference number (including, where applicable, the inter-institutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. The Ombudsman also recognises that if the "*sensitive document*" originates from a third party, that party must give its consent in order for the document to be included on the register.



making process", whereas the corresponding paragraphs of Article 4(3) of Regulation 1049/2001 provide that access shall be refused if disclosure would "*seriously undermine the institution's decision-making process*" (emphasis added). The Ombudsman already pointed out above that he considers that it is within the prerogatives of Eurojust to establish specific procedural rules governing how it deals with requests for public access to documents, provided it complies with the rules set out in Article 15 TFEU. It would thus be good administration for Eurojust to either i) bring Article 4(3) of the College of Eurojust's Decision in line with Article 4(3) of Regulation 1049/2001 or ii) justify expressly the concrete reason why it considers that disclosure should be refused under Article 4(3) when that disclosure would undermine rather than *seriously* undermine Eurojust's decision making-process.

31. With respect to point d) concerning requests for information, Eurojust pointed out that its website is the entry-point and that it has several mail addresses on the "*Contact Us*" section of its websites for different kinds of enquiries (general enquiries, media and publications, recruitment, internships, procurement, visits and protocol, website enquiries). Eurojust stated that it received a total of 2291 enquiries in 2011 and that many enquiries concern human resources. It also pointed out that it is very open to requests for visits.

(3) Selection and recruitment

32. Eurojust staff are subject to the EU Staff Regulations and the Conditions of Employment of Other Servants of the European Communities (CEOS). Eurojust recruits temporary and contract agents, as well as seconded national experts. On the "*Careers*" section of its website, Eurojust has published extensive information on its recruitment policy and its recruitment procedures. The selection phase consists of an interview with the Selection Board. However, candidates may be asked to undergo a written test, in which case they are informed in advance.

33. The Ombudsman welcomes the fact that the "*Appeal procedures*" section mentions the possibility to lodge a complaint with the European Ombudsman in accordance with Article 228 TFEU (including the information that a complaint to the Ombudsman does not suspend the deadlines for an appeal to the Civil Service Tribunal). In his letter of 16 May 2012, the Ombudsman asked Eurojust to provide additional clarification on the following issues:

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

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

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



d) Does Eurojust systematically inform candidates in its correspondence¹¹ that they may complain to the Ombudsman, as provided for in Article 19 of the above-mentioned Code of Good Administrative Behaviour?

34. With regard to a) the communication with candidates, Eurojust pointed out that the Human Resources Unit acknowledges receipt of the applications, but that, due to the volume of applications, it afterwards sends individual letters only to the candidates who are selected to attend the interview (i.e. the short-listed candidates). Candidates are invited to follow the status of the recruitment procedure on Eurojust's website which is regularly updated. Also, the Human Resources Unit notifies the shortlisted candidates of the outcome of the selection procedure (either a formal job offer, being included on the reserve list, or a letter from the Administrative Director informing the applicant that his participation was not successful).

35. Eurojust explained that it lacks the resources that would be needed to inform all candidates of the outcome of their application. The Ombudsman however pointed out that a balance needs to be made between the right of the applicant to be informed of the outcome of his/her application and the available resources and that it should be possible to inform non-shortlisted candidates by e-mail. Eurojust stated that it would study this matter. The Ombudsman welcomes Eurojust's willingness to reconsider its practice and suggests that Eurojust could indeed consider informing also non-shortlisted candidates in selection procedures of the outcome of their application.

36. As regards b) the communication of the names of selection board members, Eurojust explained that the members of the selection board present themselves at the interview. However, if candidates request the names of the members of the selection board before the interview, Eurojust will disclose them.

37. With regard to candidates' access to the assessments of their applications, Eurojust stated that candidates may formally request access to their scores on the interview and written test as well as to the relevant excerpt of the minutes of the selection board. Those requests need to be sent to the Head of the Human Resources Unit.

38. As regards c) less formal means to resolve disputes, Eurojust referred to the information contained on its website under point 6 "*Appeal procedures*" of the application procedure. It pointed out that a less formal means to resolve disputes was also available, but that this was limited to decisions on eligibility of the candidates, who, within 20 days, can ask for review by sending a request to the Recruitment Office. In December 2012, Eurojust however informed the Ombudsman's Office that it had extended this less formal way to resolve disputes also to other decisions concerning a candidate's participation in a selection procedure (namely the invitation to the interview and possibly to a written test) and that these changes were now reflected on its website.

39. Eurojust finally explained that it does not systematically inform candidates in its correspondence that they may complain to the European Ombudsman. It however referred to the information on the possibility to complain to the Ombudsman which is contained on the "*Careers*" section of its website, under point 6 "*Appeal procedures*" of the application procedure. The Ombudsman

¹¹ As already noted above, Eurojust's website, under "*Application procedure and form*", mentions the possibility to complain to the European Ombudsman.



suggests that, in addition, Eurojust could also systematically inform candidates, in the vacancy notice, that they may complain to the European Ombudsman.

(4) Tenders and contracts

40. At the review level, disputes in relation to tender decisions and contractual relationships are most commonly dealt with by the courts. However, a significant proportion of the Ombudsman's cases has over the years concerned these areas as well. In relation to tenders, the Ombudsman draws inspiration from the Court's approach, which is to recognise the administration's broad discretionary powers in assessing the substantive aspects of tender proposals, while carefully checking whether it gave valid and adequate reasons for its decisions, whether it adequately respected applicable procedures and information rights and whether there was no manifest error. In relation to contractual disputes, the Ombudsman does not as such assess whether there is a breach of contract. He does, however, thoroughly examine whether the administration provided good reasons for its position, and also looks into the fairness of the administrative actions or omissions.

41. The Ombudsman notes that Eurojust's website contains a "*Procurement*" section which explains its procurement policy and procedure. It contains a link to the Financial Regulation applicable to Eurojust (College Decision 2009-8), Title V of which deals with Procurement. Article 74 provides that Eurojust complies with the EU Financial Regulation. There is however no reference to the possibility to complain to the Ombudsman with regard to tenders and contracts. In his letter of 16 May 2012 to Eurojust, the Ombudsman therefore asked Eurojust a) how it handles disputes in relation to these areas and b) whether tenderers and contractors are informed that they can complain to the Ombudsman.

42. Eurojust explained that there have only been two disputes in relation to procurement which were settled in-house. In one case, the Eurojust Procurement Office realised that it had committed a mistake, cancelled the tender and opened a new tender procedure. Eurojust in addition stated that it would be ready to inform tenderers and contractors that they can complain to the Ombudsman. The Ombudsman thus suggests that Eurojust could include in the relevant tender and contract documents, as well as in the relevant section of its website, information on the right to complain to the European Ombudsman.

(5) Conflicts of interest

43. Conflicts of interest arise when persons who work for the public administration may be perceived as having an inappropriate personal interest in a matter with which they are dealing. Such conflicts need to be appropriately handled in order to ensure objective decision-making, and to enhance the public's trust in the administration. Recent events and cases showed that the EU administration does not clearly enjoy the public's full confidence in relation to this issue. The Ombudsman asked Eurojust what concrete measures it applies in order to avoid conflicts of interest in relation to the a) the recruitment of staff, including senior staff and b) current and former staff members, notably regarding external activities during and after their service at Eurojust (see for instance articles 11, 11a, 12b, and 16 of the Staff Regulations).



44. As regards the recruitment of staff, Eurojust stated that the Recruitment Office requires selection board members to sign a declaration of confidentiality and of absence of conflict of interest. Eurojust provided a copy of this form which states in particular that "[t]he Selection Board Member will inform the HR unit if there could be a conflict of interest, or if there could be deemed to be a conflict of interest with respect to the assessments of any of the candidates submitted to the Selection Board for evaluation. Please note that in order for a conflict of interest to exist, the Selection Board Member has to know the applicant on a personal level. Professional knowledge of the applicant if not a reason to declare the existence of a conflict of interest. Once any information is received regarding a possible conflict of interest, the HRU will inform the Appointing Authority of the conflict of interest and he/she may take any action considered to be appropriate in the interests of preserving the transparency and objectivity of the selection procedure". The Ombudsman welcomes the declaration contained in this form, and in particular the fact that it also takes into consideration apparent conflicts of interest.

45. As regards the situation of current and former staff members, Eurojust referred to the definition of conflict of interest given by the Ombudsman in his decision in case 476/2010/ANA, namely "a 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities". Eurojust stated that staff members who take up their duties at Eurojust must sign a declaration on the obligations of other servants that they "have taken note of the provisions relating to the obligations of officials and other servants, and in particular Article ... 11 ... of the Staff Regulations". Eurojust further pointed out that external activities of current and former staff members during and after their service at Eurojust are regulated by Annex 2 "Eurojust Guidance for Staff on Invitations and Gifts" of Eurojust's Code of Good Administrative Behaviour which also reminds staff members of Article 11 of the Staff Regulations. Eurojust further pointed out that it is aware of the Commission's note (to the attention of the Heads of Administration of the Agencies) on Guidelines on gifts and hospitality for Commission staff members (SEC(2012) 167 final of 7 March 2012). In the note, the EU Agencies were invited to adopt these Guidelines. Eurojust stated that it took note of this invitation and that it will consider the issue.

46. Eurojust also pointed out that staff members who are appointed to opening or evaluation committees must all sign a form on absence of conflict of interests and confidentiality declaring that they "have no conflict of interest with the operators who have submitted a tender for this contract, including persons or members of a consortium, of the subcontractors proposed".

47. As regards Article 12b of the Staff Regulations (engaging in outside activities), Eurojust stated that, by decision of 12 September 2005, it had adopted the Commission Decision on outside activities and assignments (C(2004) 1597/10) of 28 April 2004. Article 14(2) of Eurojust's decision provides that permission for outside activities "shall in principle be granted except where the assignment or the activity could give rise to a conflict of interest or be detrimental to the interest of the Communities. A conflict of interest shall be deemed to exist where the assignment or the activity would reflect on the official's status as an official and would be detrimental to the loyalty he/she owes to the institution and its authorities but also where it would be incompatible with his/her duty to conduct him/herself in a manner that is beyond suspicion in order that the relationship of trust between that institution and him/herself may at all times be maintained". Eurojust pointed out that, on its intranet site, a form is available on "Authorisation to engage in an outside activity, whether gainful or not, or carry out an assignment outside the Communities". As



regards a "possible conflict of interest", the form asks "Does the organization have a financial and/or a contractual relationship with Eurojust?" and requires the respondent to give details in case of a positive reply.

48. With regard to the obligations after leaving the service, Eurojust pointed out that all staff members who take up duties at Eurojust must sign a declaration of confidentiality and assignment of rights in accordance with Article 16 of the Staff Regulations on the continuous "*duty to behave with integrity and discretion*". Upon departure from Eurojust, the separation letter reminds departing staff members of their obligation to comply with Article 16 of the Staff Regulations. It in particular provides that "[i]f that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit ..."

49. In addition, as regards the issue of revolving doors, Eurojust pointed out that, unlike some other EU agencies, it has not many contacts with private companies and businesses. Eurojust also underlined that many Eurojust staff members, after having worked at Eurojust, return to their Member States to take up a similar job, and that Eurojust cannot forbid them to do so. On the contrary, Eurojust is happy if its former staff members return to a similar job in the Member States. For the above reasons, Eurojust stated, there is a very low risk of conflicts of interest in relation to the issue of *revolving doors*.

50. The Ombudsman welcomes Eurojust's detailed rules on conflicts of interest, and the relevant forms that accompany those rules. The Ombudsman has no specific further suggestion to make in this regard.

51. On 19 June 2012, namely two weeks after his visit to Eurojust, the Ombudsman published Public Service Principles for the EU Civil Service¹². His main aim in publishing the principles is to help build greater trust between citizens and the EU institutions. The principles take account of best practice in the Member States and were established following an extensive period of reflection and public consultation. As the public consultation confirmed, the public service principles are not new, but represent existing expectations of citizens and civil servants. They constitute the fundamental ethical standards that govern the conduct of EU civil servants. Bearing the principles in mind can also help civil servants understand and apply the rules correctly, and guide them towards the right decision in situations where they should exercise judgment. As such, they constitute a vital component of the administrative culture of service to which the EU institutions adhere.

52. As already pointed out above, the Ombudsman notes that Eurojust is clearly committed to a culture of service and to the five public service principles (1. commitment to the EU and its citizens; 2. integrity; 3. objectivity; 4. respect for others; and 5. transparency). Although the Public Service Principles had not yet been adopted at the time of the visit and were not discussed during the visit with Eurojust of 4 June 2012, the Ombudsman considers that it would be highly desirable if Eurojust were to ensure that all members of its staff are informed of the public service principles. The Ombudsman also encourages Eurojust to make the principles available on its website. That way, citizens would be informed that it subscribes to those principles. The Ombudsman further notes

¹² <http://www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces>



that, in November 2011, the Human Resources (HR) Service Centre of Eurojust received approximately 200 hard copies of the Ombudsman's Guide to complaints. This publication contains, among other things, information on the possibility for members of staff of the EU institutions to turn to the European Ombudsman. Eurojust informed the Ombudsman that, in issue No 334 of the Eurojust Weekly, it informed its staff about the availability of the Guide to complaints and the possibility to download this publication in German, French and English.

Summary of the Ombudsman's suggestions

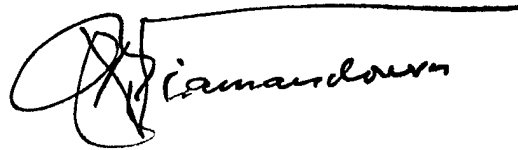
53. On the basis of his visit and the information provided to him by Eurojust, the Ombudsman makes the following suggestions:

- a) Eurojust could make its commitment to the principles set out in its Code of Good Administrative Behaviour more visible to EU citizens by making the Code figure more prominently on its website.
- b) Eurojust could consider establishing a public register of its documents in accordance with the principles (in particular Article 11) of Regulation 1049/2001, and bringing the College of Eurojust's Decision of 13 July 2004 to Adopt Rules regarding Public Access to Eurojust Documents in line with Regulation 1049/2001.
- c) Eurojust could consider bringing the Decision of the College of Eurojust of 13 July 2004 to Adopt Rules regarding Public Access to Eurojust Documents in line with the principles contained in Regulation 1049/2001, and namely (a) by either foreseeing the same time-limit of 15 working days for dealing with initial and confirmatory requests for public access, or explaining the rationale why a longer time-limit is indispensable, and (b) by indicating the possibilities of appeal (namely court proceedings or a complaint before the European Ombudsman) in case of a partial or total refusal of access
- d) Once Eurojust has established a public register of documents, information on the number of sensitive documents not recorded in the register could be included in the "*Public access to Eurojust documents*" overview in its annual reports.
- e) Eurojust could either i) bring Article 4(3) of the College of Eurojust's Decision of 13 July 2004 in line with Article 4(3) of Regulation 1049/2001 or ii) justify expressly the concrete reason why it considers that disclosure should be refused under Article 4(3) when that disclosure would undermine rather than *seriously* undermine Eurojust's decision making-process.
- f) Eurojust could consider informing also non-shortlisted candidates in selection procedures of the outcome of their application.
- g) Eurojust could systematically inform candidates, in the notice of vacancy, that they may complain to the European Ombudsman.
- h) Eurojust could include in the relevant tender and contract documents, as well as in the relevant section of its website, information on the right to complain to the European Ombudsman.



i) Eurojust could ensure that all its staff members are informed of the Public Service Principles for EU civil servants. It could consider making the Public Service Principles, as well as the Ombudsman's Guide to complaints available on its website. That way, citizens would be informed that it subscribes to those principles.

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



P. Nikiforos Diamandouros

Done in Strasbourg on 16-01-2013