



Good administration in practice:
The European Ombudsman's decisions in

2013



Contents

Ombudsman introduction	2
Transparency - the right to know and to understand what is going on	4
Why transparency is so important	4
The right of access to documents	6
Privacy and personal data - the interplay between Regulation 1049/2001 and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data	11
Right of access to your own file	12
Institutional and policy matters	13
The Commission and legislative proposals	13
Good administrative procedures – a way to ensure that citizens understand what is going on and why	16
Service-mindedness and courtesy – the right to be taken seriously	18
Delays in administration	19
Conflicts of interest - Can I trust that the EU administration acts for the good of the EU and, for the good of me as a citizen?	19
Whistleblowing	21
The Commission as the Guardian of the Treaties – making sure that EU rules are respected by the Member States	23
Execution of contracts and grants	25
Award of tenders and grants	26
Staff matters - in the double sense	27
Competitions and selection procedures	28



Ombudsman introduction

Like public sector Ombudsman Offices generally, the European Ombudsman brings a particular set of values and principles to bear in dealing with complaints. A public sector Ombudsman seeks to represent the citizen to the administration and to redress the power imbalance between the two. The Ombudsman encourages the administration to treat the citizen as an individual in his or her own right and to have regard to his or her particular circumstances. The Ombudsman encourages the administration to be flexible and to use its discretion, where possible, in favour of the citizen. Above all, the Ombudsman works to ensure that citizens' encounters with the administration are marked by civility and courtesy.

In the case of the EU, the European Ombudsman's values and principles reflect a concern to promote good public administration and, in particular, a concern that EU citizens and businesses will be treated fairly, reasonably and sensitively by the EU administration.

A fundamental tenet of Ombudsman thinking is that good public administration involves more than simply acting in a manner that is legal. The Ombudsman approach goes beyond that of the courts which, in general, focuses solely on the legality of actions. An Ombudsman should never ask a public institution to act contrary to the law; but an Ombudsman will expect an institution to do whatever is possible within the law in order to achieve outcomes which are fair and reasonable in all of the circumstances.

Since becoming European Ombudsman in October 2013, I have been struck by the extent to which EU institutions respond to complaints primarily in terms of the legality of their actions. In many cases, as demonstrated by the outcomes of complaints dealt with by my Office, the institution will have taken an entirely acceptable and reasonable approach based on the law. But in some other cases, it is almost as if the law is being used to limit the options for what might be done to help the complainant. I must say, I would prefer to see responses which take a more holistic or problem-solving approach. It is absolutely appropriate that such responses should include a legal analysis but the analysis should examine what else might be done, within the law, in the particular case rather than being used to defend rigidly the institution's original position.

Almost all public administrations, to a greater or lesser extent, struggle to earn the trust of the citizens whom they serve. Sometimes, public distrust of the public administration is not warranted and may reflect no more than a lazy assumption that the bureaucracy, by definition, serves its own interests over those of the public at large. But sometimes public distrust is well-grounded in the actual practices of the public administration or, perhaps as importantly, in the public perception of those practices.

The EU public administration is in a particularly difficult place as regards earning and maintaining the trust of the citizens it serves. Some of these difficulties are not of the administration's own making; they arise from the fact of being at a considerable remove, both geographically and culturally, from



many citizens. Furthermore, much of what happens at the EU administration level is inherently complex and difficult to understand. More than most public administrations at national or regional level, the EU administration must work hard at building trust. My job as European Ombudsman includes encouraging and supporting the EU administration in this regard.

I think it is reasonable that the EU administration should recognise that the conclusions reached by the European Ombudsman, reflecting general Ombudsman values and principles, must be taken very seriously. Rejecting a proposed solution or draft recommendation from the European Ombudsman should be a rare event. It is the business of the Ombudsman, acting on behalf of ordinary citizens, to advise EU institutions on how they should respond to citizen complaints. And it is the business of the institutions, acting also on behalf of the same citizens, to accept the Ombudsman's advice. Only where they are quite clearly wrong, should the Ombudsman's conclusions and recommendations be rejected by the administration.¹

The case work of my Office provides what I believe to be a valuable insight into how Ombudsman values and principles should apply in real life situations. Accordingly, in addition to our [Annual Report 2013](#), we are publishing *Good administration in practice: the European Ombudsman's decisions in 2013*. This publication follows the inquiry categories used by the European Ombudsman in recent years:

- Transparency
- Institutional and policy matters
- The Commission as guardian of the Treaties
- Execution of contracts and grants
- Award of tenders and grants
- Staff matters
- Competitions and selection procedures

The publication shows how Ombudsman values and principles were applied in action in the case of inquiries concluded during 2013². I hope that it will be of value to the EU administration and to all who take an interest in promoting good public administration within the European Union.

Emily O'Reilly
European Ombudsman
15 September 2014

¹ As a former UK national Ombudsman once put it, Ombudsman findings should be acted upon in all cases except where "the Ombudsman has gone off her trolley".

² The decisions closing inquiries referred to are normally published on the Ombudsman's website (www.ombudsman.europa.eu) in English and, if different, the language of the complaint.



Transparency - the right to know and to understand what is going on

In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. (Article 15(1) TFEU)

Why transparency is so important

Transparency makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. Openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability.³ It is not enough for the EU administration simply to say that it is doing its best to be trusted by citizens. Citizens are entitled to see and decide for themselves whether that is the case. Accordingly, openness and transparency are the key elements which can help build trust between the EU institutions and citizens.

In a multilingual environment such as the EU, the right to know and to understand also has a linguistic aspect. As far as communications of the EU administration that are addressed to citizens in general are concerned, it would be ideal for the material intended for such purposes to be published in all official languages. This position is based on the rationale that, in order for communication to be effective, it is necessary that citizens can understand the information provided to them. However, given that there is no general principle of EU law which confers on every citizen a right to have, in all circumstances, a version of anything that might affect his or her interests drawn up in his or her language, good administration requires that, as far as possible, the EU administration should provide information to citizens in their own languages. The EU administration should aim to make the homepage of their websites, as well as information on their functions and language policy, available in all 24 official languages.⁴

It is easier to accept that things do not always go your way, or as smoothly as expected, if you understand why. It is the Ombudsman's belief that explaining properly, from the outset, why a particular decision has been taken or, for instance, why there was a delay, results in fewer additional requests and approaches to the EU administration and thus gives the administration more time to serve and improve the EU. If the EU administration is handling a complaint from a citizen which is taking longer than expected, it is helpful for the citizen to be informed of the reason for the delay.⁵ In the absence of such information, a citizen may, for instance, feel compelled to make a request for public access to documents, with the resource implications that such a request entails.⁶ To give an example, the Commission's DG Environment for a short

³ Case 1649/2012/RA

⁴ Case 1363/2012/BEH

⁵ Cases 48/2012/MHZ and 412/2012/MHZ

⁶ Case 277/2012/RA



period adopted a more liberal approach than previously to the granting of public access to documents. When it abandoned the more liberal approach, this led to complaints to the Ombudsman. However, the Commission hesitated to acknowledge openly that DG Environment had tried out a new approach. The Commission could have been franker towards the complainant in this regard, instead of suggesting that the complainant had misunderstood what had happened. It is potentially embarrassing to any organisation to be seen to have important divergences of views. However, the common understanding of openness in the EU public administration requires that the citizen be told the truth from the outset.⁷

When the actions of the EU administration directly affect the interests of citizens, it is particularly important to enhance legitimacy by promoting a culture of openness and transparency. There are certain areas of the EU administration where truth and transparency may even be a matter of life and death. The European Medicines Agency (EMA) is responsible for the protection of public health through the scientific evaluation and supervision of medicines, including decisions relating to the safety and efficacy of such medicines. The potential for serious errors occurring if proper procedures are not followed by EMA is obvious. Transparency is a vital means by which EMA can ensure the accuracy of its decisions. The openness and transparency of EMA serves to foster scientific discussion and progress, by enabling independent scientists to scrutinise the conclusions of EMA, and the data and arguments taken into consideration by EMA when reaching those conclusions. By making its fully documented opinions available, EMA can ensure that all its work stands up to scrutiny and is, ultimately, correct. It is vital, for the public, that EMA takes correct decisions.⁸

Sometimes, it still requires a complaint to the Ombudsman for citizens to obtain proper explanations. The Ombudsman is ready to assist in that respect, and the Ombudsman has done so during 2013, for instance in respect of the Commission's handling of infringement complaints⁹ and in respect of employment conditions for staff in EU Delegations¹⁰. Where the lack of reasoning is remedied during the course of the inquiry, the Ombudsman will usually close her inquiry without making a finding of maladministration.¹¹ A failure to provide reasons, although a sufficiently serious problem in itself, does not necessarily mean that there was a failure by the EU administration properly to assess a complaint submitted to it.¹²

It is the Ombudsman's wish, however, that the further remarks made, encouraging the EU administration better to reason and explain its position, will indeed lead to improvements in the near future.

⁷ Cases 1947/2010/PB and 2207/2010/PB

⁸ Cases 2575/2009/RA and 1877/2010/FOR

⁹ Cases 846/2010/PB and 1786/2011/MHZ

¹⁰ Case 706/2010/RT

¹¹ Cases 846/2010/PB and 48/2012/MHZ

¹² Case 48/2012/MHZ



The right of access to documents

An important aspect of transparency is the right of access to documents.

Any citizen of the Union ... shall have a right of access to documents of the Union's institutions, bodies, offices and agencies. (Article 15(3) TFEU)

A citizen requesting access to documents does not have to give reasons for the request.¹³

In accordance with the presumption of legality attaching to acts of the EU institutions, where the institution concerned asserts that a particular document to which access had been sought does not exist, there is a presumption that this statement is correct. The applicant may rebut that presumption with relevant and consistent evidence. An investigation by the Ombudsman may, for instance, be warranted if an applicant argues that temporal gaps or gaps in relation to the involvement of particular individuals are evident from correspondence already obtained from the institution and that these gaps suggest that certain correspondence may have been left out in the institution's analysis of an access request.¹⁴

The right of public access to documents is not absolute. However, it is important to ensure that the exceptions to access are applied correctly and narrowly so that the right of access is not unnecessarily limited.

For instance, Article 6 of Annex III to the Staff Regulations of EU civil servants provides that the proceedings of selection boards acting in procedures for recruiting EU staff, shall be secret. This does not mean that public access cannot be given to declarations of conflict of interest by members of such selection boards. A distinction has to be made between disclosure of the *views* expressed by Selection Board members and disclosure of *any other information* related to a selection procedure. A declaration of conflict of interest does not contain, and its disclosure cannot reveal, the attitudes adopted by individual members of a Selection Board in relation to the individual or comparative assessment of candidates in a recruitment procedure. It is therefore difficult to understand how disclosure of the declarations could prejudice the independence of the Selection Boards, given that the sole purpose of such declarations is precisely to guarantee the objectivity and impartiality of the members of Selection Boards.¹⁵

One of the main tools for citizens in exercising the right of access to documents is Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, as well as similar rules applicable to other EU institutions, bodies, offices and agencies.

As a general rule, a three-stage examination has to be carried out in order to determine whether one of the exceptions to access set out in Article 4 of Regulation 1049/2001 applies. First, it has to be determined if the documents fall

¹³ Case 524/2012/MMN

¹⁴ Cases 531/2012/MMN and 375/2013/ANA

¹⁵ Case 1403/2012/CK



within the category covered by the invoked exception. Second, it must be determined if disclosure of the document would (seriously) undermine the protected interest. That is, a “harm test” has to be carried out. Third, if it is established that public disclosure of a document would harm the interests concerned, the institution must ascertain (when applicable for the exception in question), by carrying out a balancing exercise, whether any overriding public interest in disclosure nevertheless exists.¹⁶

The institution normally has to carry out the relevant analysis as to whether one of the exceptions to access applies (i) “on a document-by-document basis” and (ii) “in an individual and specific way”. An individual and specific examination of each document may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused, or, on the contrary, granted.¹⁷

The EU administration sometimes refuses to grant public access to parts of documents because it does not consider the parts in question to be relevant to the request. It should be underlined that the concept of “relevant parts of a document” does not exist in Regulation 1049/2001, which provides that access to parts of a document can be refused only if an exception, as set out in Article 4, is applicable.¹⁸

However, Article 6(3) of Regulation 1049/2001, which aims at finding a fair solution in the case of a long document or of a large number of documents, may be applied to redact parts of a document that the institution does not consider to be relevant to the request. This may be done in order to avoid having to do an in-depth and time-consuming analysis of whether any exception to access applies. However, the institution has to explain clearly to the applicant that, in its view, the parts in question are not relevant to the applicant and why that is.¹⁹ It is also important that this approach does not lead to abuse of Regulation 1049/2001. In particular, it should not lead to the evasion of the requirement to fully justify any non-disclosure of a requested document. If an applicant, after receiving partial access, insists on obtaining a document in its entirety, the document should be provided to the applicant, unless the institution shows that an exception set out in Article 4 applies to all of the document. Accordingly, if the institution has redacted a very large document in order to provide a complainant with an answer to a broad and unclear request, and to empower the complainant to make a more precise request, the institution should state that the applicant has a right to request access to the entire document.²⁰

The aim of Article 6(2) of Regulation 1049/2001 is to clarify a request for access, that is, to allow the applicant clearly to identify the document(s) to which access is sought and to allow the institution to identify precisely which document(s) is/are being requested. Instead of making assumptions about which documents an applicant is asking for, the institution should thus ask for clarifications. If an applicant states that it is difficult to know exactly what to

¹⁶ Case 1817/2010/RA

¹⁷ Case 2048/2011/OV

¹⁸ Case 277/2012/RA

¹⁹ Case 693/2011/RA

²⁰ Case 1877/2010/FOR



ask for because he/she does not know what exists, the institution should explain which documents exist.²¹

As to the exceptions:

Article 4(1)(a), third indent, of Regulation 1049/2001 - protection of the public interest with regard to international relations

As regards the Council, the duty to be as transparent as possible applies with particular force in relation to its legislative role. However, there is a distinction in terms of transparency requirements when an institution is acting in a legislative capacity or as a party to intergovernmental negotiations. While transparency is important also in the area of intergovernmental negotiations, which concerns commitments made by the EU on behalf of its citizens and which can affect their fundamental rights, it is important to be conscious of the context in which the document in question was produced.²²

The Council should be proactive in intergovernmental negotiations, informing its negotiating partners of its obligation to work as openly as possible. The Council would thereby know from the outset whether the negotiating partner is seeking secrecy, and it would be able to inform applicants of the origin of the opposition to disclosure.²³

Article 4(1)(a), fourth indent, of Regulation 1049/2001 - protection of financial, monetary and economic policy

As established in case-law, the institution has a broad margin of discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by this exception could undermine the public interest, given that such a refusal decision is of a complex and delicate nature which calls for the exercise of particular care and that the criteria in Article 4(1)(a) are very general.²⁴

Article 4(2), third indent, of Regulation 1049/2001 - protection of the purpose of inspections, investigations and audits

There exists a general presumption that public access to documents relating to an ongoing OLAF investigation could, in principle, undermine the purpose of that investigation. In addition, where an OLAF investigation report constitutes evidence in ongoing national proceedings, public access to this report could undermine the purpose of the ongoing national proceedings. The main reason why this is the case is because the public disclosure of evidence from an ongoing investigation could prejudice the use of that evidence in a future trial, especially if the investigation could lead to a criminal trial. However, it cannot be presumed, except in obvious cases, from the mere fact that OLAF has sent an investigation report to the national authorities, that those authorities will act on that report. It is always possible, for example, that the national authority will

²¹ Case 693/2011/RA

²² Case 1649/2012/RA

²³ Case 1649/2012/RA

²⁴ Case 531/2012/MMN



find that there are no grounds to follow up on a report or that they will simply ignore the report. It is thus incumbent on OLAF to contact the national authorities to verify whether there is an on-going investigation (or at least the immediate prospect that such an investigation will be undertaken) and to verify what impact the release of the report might have on that investigation.²⁵

Article 4(3), first paragraph, of Regulation 1049/2001 – protection of the decision-making process when a decision has not yet been taken

The term “decision-making process” covers all processes of internal consultations and deliberations within an institution and the term “decisions” relates to the positions adopted as a result of those internal consultations and deliberations, even if such positions do not constitute legally binding “decisions”. In other words, the term “decision” has a broad meaning, reflecting the purpose of Article 4(3). A document may relate to a decision-making process that has been completed, and *also* to another on-going decision-making process. However, the institution has to explain how disclosure of the document would seriously undermine the on-going decision-making process. When the EU institution refers to the risk of “external interference” and “pressures”, it has to show not only the likely existence of such pressure on decision-makers, but also that it is reasonably foreseeable, and not purely hypothetical, that such undue pressure on decision-makers would be of such nature and intensity as to undermine seriously the decision making process.²⁶

Article 4(3), second paragraph, of Regulation 1049/2001 – protection of the decision-making process after a decision has been taken

This provision allows for refusal of access to *opinions*, that is, views or judgements expressed by the author at his or her discretion, even *after* the decision has been taken. Undue pressure cannot be exerted on decision-makers for the purposes of altering the decision once it has been taken. Nonetheless, an author of an *opinion* gives his or her point of view and there is at least the possibility that such views will not be expressed freely and frankly if they could be made public. The risk of self-censorship, to the detriment of the decision-making capacity of an institution, is acute only if the opinions expressed are *particularly sensitive*, for example if they are (self) critical, speculative, or controversial.²⁷ The institution must indicate a specific characteristic of the opinion which would make it particularly sensitive and which could lead to self-censorship if disclosed.²⁸

The collective nature of a decision does not, as such, mean that disclosure of individual opinions would seriously undermine the decision-making process. That would be against the very letter of Article 4(3), second paragraph. In fact it is arguable that the knowledge that there will be future public access may lead to even better reasoning on the part of, for instance, an evaluator, who is

²⁵ Case 598/2013/OV

²⁶ Cases 1817/2010/RA and 1877/2010/FOR

²⁷ Case 1817/2010/RA

²⁸ Case 2781/2008/FOR



providing opinions based on scientific expertise and not opinions of a personal nature.²⁹

Article 4(5) of Regulation 1049/2001 – a Member State requesting that a document should not be disclosed

The Euratom Treaty pools knowledge, infrastructure and funding of nuclear energy within the EU. Its Article 44 provides that the Commission may, with the consent of the Member States, persons and undertakings concerned, publish any investment projects communicated to it. In respect of requests for access to documents related to nuclear energy projects, it is important to take into account the nature of the right to public access, as it has developed within the European Union to become a general principle of Union law and a fundamental right, and to read Article 44 of the Euratom Treaty in conjunction with Regulation 1049/2001. The solution devised by the Court in the context of Article 4(5) of Regulation 1049/2001 should also apply to the interpretation of Article 44 of the Euratom Treaty: The Member State, undertaking or person concerned objecting to the granting of access, thus has to state reasons for its objection on the basis of the exceptions set out in Article 4 of Regulation 1049/2001. However, the final decision on the request for access remains with the Commission, which needs to assess whether or not the Member State, undertaking or person concerned has given valid reasons for withholding consent. The Commission has made a commitment to seek to obtain the required consent under Article 44 of the Euratom Treaty even before a request for access has been made.³⁰

Categories of documents of the same nature

As a general rule, the institution has to make an individual and specific examination of each document to which access has been requested. However, in assessing whether releasing a document would undermine a protected interest, it is in principle open to the institution to base its decisions on general (albeit rebuttable) presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. In respect of the application of Article 4(2), third indent, on the basis of which the institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, the Court of Justice has expressly acknowledged the possibility of relying on general presumptions applying to certain categories of documents in certain specific circumstances, namely, procedures for reviewing State aid, merger control procedures, proceedings pending before the European Union Courts and the pre-litigation phase of infringement procedures under Article 258 TFEU.³¹

The Court has not yet had an opportunity to take a position on whether the possibility of relying on such general presumptions should also apply to an investigation conducted by OLAF and to subsequent national proceedings

²⁹ Case 2781/2008/FOR

³⁰ Case 2335/2008/CK

³¹ Case 2048/2011/OV



based on OLAF's findings. There are Regulations³² that contain provisions setting out strict rules limiting access to the information obtained by OLAF and transmitted to the Member States in the framework of an external investigation. These provisions are similar to the rules limiting access to the files in State aid or merger control procedures. The Ombudsman is of the view that, these provisions do give grounds for a general presumption that disclosure of documents in the file of an ongoing OLAF investigation, in principle, would undermine the purpose of that investigation. The general presumption set out above would apply while OLAF is investigating a matter and while related national proceedings are ongoing.³³

As noted above, the general presumption is rebuttable. It is thus up to the complainant to demonstrate that a given document to which he or she requested access is not covered by that presumption or that there is an overriding public interest justifying the disclosure of the document. It is obviously difficult for a person making a request for access to rebut such a general presumption with regard to a given document if that person is not given access to that document. However, the Ombudsman has the capacity to do so since she has the right to inspect the relevant documents.³⁴

Privacy and personal data - the interplay between Regulation 1049/2001 and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data

The importance of transparency has to be weighed against certain other interests, such as the right to protection of personal data.

A good way of ensuring such balance, for instance when citizens wish to know the names of experts or evaluators on boards or committees, is for the EU administration to consult the guidance provided by the European Data Protection Supervisor (EDPS) when wishing to act transparently while at the same time ensuring protection of an individual's right to privacy and protection of personal data. The EDPS urges the EU administration to adopt a proactive approach in respect of the processing of personal data, that is, to inform the data subjects in advance that their names could, under certain conditions, be disclosed.³⁵

If requesting access to documents containing personal data, the applicant has, in accordance with Article 8(b) of Regulation 45/2001, to demonstrate, by providing express and legitimate justifications, the necessity for the requested personal data to be transferred. The EU institution is then able to weigh the various interests of the parties concerned and to determine whether there is any

³² Regulation 1073/99 concerning investigations conducted by OLAF and Regulation 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

³³ Case 2048/2011/OV

³⁴ Case 2048/2011/OV

³⁵ Case 2111/2011/RA



reason to assume that the legitimate interests of the data subject might be prejudiced by the transfer of those data.³⁶ The person applying for access should be informed³⁷ that he or she has the right to put forward reasons why it would be justified to transfer the data to him or her, and he or she should be offered the possibility to do so. Regulation 1049/2001 establishes a two-level administrative procedure that gives applicants this possibility, whereby the applicant can demonstrate necessity in his or her confirmatory application.³⁸ Even where an applicant has not provided information explicitly constituting such justifications, the institution may have sufficiently clear information enabling it to consider that the transfer of data is justified.³⁹

It is not enough to blank out personal data such as names and contact details from documents, without stating whether an attempt has been made to verify whether the data subjects are prepared to give their consent to the disclosure.⁴⁰

The institutions should avoid being overly formalistic in dealing with requests for access. If an applicant submits a request for public access to a document under Regulation 1049/2001, where the applicant has already been granted privileged individual access under Article 13 of Regulation 45/2001, the institution must, in principle, still deal with that request. This will involve carrying out an examination of that document under Regulation 1049/2001. However, in such a case, the institution could consider explaining to the applicant that there is no practical benefit in carrying out the examination under Regulation 1049/2001.⁴¹

When disclosing information, under Regulation 45/2001, to an applicant about personal data relating to him or her, the institution is allowed to delete other information contained in the documents concerned. Access to personal data is not the same as access to documents as such.⁴²

Right of access to your own file

Article 41 of the Charter of Fundamental Rights of the EU (Right to good administration) states that every person has a right of access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Some of the exceptions which apply in relation to the right of *public* access to documents may also apply to the right of *individual* access. However, a person cannot be denied individual access to his/her own file on the grounds that granting such access might damage the privacy and personal data rights, or the commercial interests, *of the person making the request for access*.⁴³

³⁶ Cases 1403/2012/CK and 2510/2011CK

³⁷ Case 277/2012/RA

³⁸ Case 1403/2012/CK

³⁹ Case 2510/2011/CK

⁴⁰ Case 277/2012/RA

⁴¹ Case 1108/2012/RT

⁴² Case 1013/2012/MHZ

⁴³ Case 1560/2010/FOR



Institutional and policy matters

The Ombudsman takes the view that, neither the merits of EU legislation, nor the political work of the European Parliament, fall within the concept of maladministration.

The Commission and legislative proposals

In evaluating the actions of the Commission in formulating legislative proposals, it is not the role of the Ombudsman to substitute her judgment for that of the Commission. Rather, her role is to check that correct procedures were followed and that there was no manifest error of appraisal. The Commission should be able to provide a complete and easily understood account of the steps undertaken and the entities involved before submitting its legislative proposal to Parliament and Council scrutiny.⁴⁴

How to listen to citizens and civil society

Participatory democracy, based on the principles of equality and transparency, improves citizens' trust in the EU and its administration. Increased trust in the EU and its administration is a key element in increasing the effectiveness of the EU and its administration.⁴⁵

In respect of the Commission's development of legislative proposals, the Ombudsman focusses on procedural aspects. Article 11 TEU provides the contours of a deliberative space within which the EU institutions interact with citizens, representative associations and civil society. The EU institutions must determine "the appropriate means" by which citizens and representative associations are given the opportunity to make known and publicly exchange their views. The precise manner by which participatory democracy is made effective in any given circumstance will depend upon the specific nature of the Union action in question. In this regard, the EU institutions necessarily have a margin of discretion, especially in areas which are technically complex. However, they should always ensure that they can justify objectively how they exercise that margin of discretion, which must not be discriminatory, nor perceived to be discriminatory. In addition, the consultations carried out should be broad.⁴⁶

In order for citizens and representative associations to exercise the right of democratic participation in all areas of Union action, they must be given a genuine opportunity to express their views and be sure that these views will be taken into account by the EU institutions. To achieve this, the EU institutions must ensure that there is equality of opportunity in this regard, at a sufficiently early stage, for all parties involved, including the general public, NGOs and academics.⁴⁷

⁴⁴ Case 875/2011/JF

⁴⁵ Case 2558/2009/DK

⁴⁶ Cases 1151/2008/ANA and 2097/2011/RA

⁴⁷ Case 1151/2008/ANA



The obligation to engage in dialogue with civil society is not only a question of granting funding for certain actions. The fact that the Commission chooses not to sponsor a particular initiative cannot, in itself, lead to the conclusion that it has breached its obligation to enter into a dialogue with the relevant organisation.⁴⁸

The EU is to maintain an open, transparent and regular dialogue also with churches, religious associations or communities, philosophical organisations and non-confessional organisations (Article 17 TFEU). The principle of the separation of church and state, which translated into the EU context means the separation between the churches and the EU institutions, implies, however, that the churches and religious organisations should not have any inappropriate privileged position in relation to their dialogue with the EU institutions. The fact that the Commission chooses not to engage in a particular dialogue under Article 17 TFEU does not necessarily imply that civil society participation cannot be assured by other means, notably, under Article 11 TEU. The Commission enjoys a broad margin of discretion in terms of defining its priorities and determining the topics it chooses to discuss as part of the Article 17 TFEU dialogue. However, the Commission should always ensure that it exercises its discretion in a manner which is non-discriminatory. This is something which, in the normal course, can be determined only after examining the Commission's practice over a sufficiently long period.⁴⁹

Article 17 TFEU is not about discussing religion or philosophy in their own right. It is, however, not in principle problematic, that the views that will be put forward by the religious (and humanist) communities during their dialogue with the institutions will reflect their opinions as religious (and humanist) communities. As regards the term "regular" in Article 17 TFEU, there is nothing in Article 17 TFEU which implies that a precise balance must be struck between the different groups. Only if an analysis of the series of meetings were to indicate that the Commission's approach is manifestly disproportionate, could there be a cause for concern. As regards the term "transparent", the Commission has an obligation in certain areas, notably where it exercises investigative and regulatory powers, to take sufficiently detailed notes. In respect of the term "open", unless the Commission were to demonstrate that a particular dialogue would be contrary to the Union's core values, the Commission is free to engage in an open and frank discussion.⁵⁰

The Commission may host events and finance activities in order to foster debate about the issues surrounding those events or activities. This does not necessarily imply that the Commission endorses the specific message or content. On the contrary, the Commission may simply and legitimately wish to stimulate a debate. Freedom of expression is among the fundamental values of a democratic society.⁵¹

To give an example, a photographic exhibition relating to same-sex couples, which was held in a building of the Commission, created certain discontent. It

⁴⁸ Case 2097/2011/RA

⁴⁹ Case 2097/2011/RA

⁵⁰ Case 2097/2011/RA

⁵¹ Case 1640/2011/MMN



is true that the EU institutions can act only within the limits of the powers assigned to them expressly or implicitly in the Treaty and that the EU has no competence in respect of the recognition of marriages and registered partnerships. Nevertheless, discrimination on the grounds of sexual orientation is prohibited within the scope of application of EU law. It is clear that the EU has the power, and also the obligation, to fight discrimination on the grounds of sexual orientation within the scope of its competence. Thus, as a matter of principle, the Commission is empowered to pursue such a goal by direct as well as indirect means, such as through financing, hosting or placing under its patronage an exhibition seeking to promote non-discrimination on the grounds of sexual orientation. In particular, such action may fall within the EU competence when the alleged discrimination affects any of the freedoms guaranteed by the TFEU, such as the right to free movement within the EU.⁵²

However, even if a particular exhibition concerns an issue that falls within the EU's competence, and thus allows for the Commission hosting or co-financing such an event, it may be appropriate for the Commission to make a disclaimer, in order to clarify that statements reflect views that are not necessarily identical with its own views.⁵³

How to set up, and listen to, expert groups

The Ombudsman's mandate is limited to investigating the selection/composition, operation and transparency of Commission expert groups⁵⁴. The Ombudsman cannot assess the outcome of the work of expert groups.⁵⁵

It is not for the Ombudsman to reassess technical or scientific evaluations, some of which constitute an important element in the Commission's pre-legislative work. The work of, for instance, technical or scientific committees must be based on the principles of (i) technical excellence, (ii) independence and impartiality, and (iii) transparency. The Ombudsman's role is to ensure that good administrative procedures have been followed and that the rights guaranteed by the EU's legal order in administrative procedures have been respected, especially the duty to examine carefully and impartially all relevant aspects of the matter and to provide an adequately reasoned decision on the basis of the relevant legal framework. The Ombudsman can examine, for instance whether the EU body in question has had access to the elements necessary to undertake a comprehensive analysis of the particular issue, that unclear aspects are clarified and that the EU body has provided a consistent explanation of its application of the relevant rules. Different views as regards technical matters do not, in itself, render the EU body's assessment erroneous.⁵⁶

For instance, a choice in the field of research policy - however technical in nature or narrow in scope - cannot be dissociated from numerous other environmental, social and economic considerations. All relevant considerations

⁵² Case 1640/2011/MMN

⁵³ Case 1640/2011/MMN

⁵⁴ An "expert" group need not necessarily be a "representative" group.

⁵⁵ Case 1682/2010/BEH

⁵⁶ Cases 51/2011/AN and 2558/2009/DK



must be taken into account and for the Commission to argue that there is no “technological bias” is not sufficient. The Commission is not exonerated from the obligation to ensure objectivity by the fact that it is not bound to follow the recommendations made by a particular committee or group set up under its auspices.⁵⁷

When the Commission appoints experts to carry out technical or scientific evaluations, the methodology applied must comply with the applicable legal rules and principles of good administration, and there must not be any manifest errors of assessment. It should be remembered that the Commission enjoys a wide margin of discretion in determining how to choose external experts. The correct means of identifying the largest possible number of experts possessing the requisite expertise is normally to make public the Commission’s need for experts and to issue a call inviting experts to express their interest. The comparative assessment of experts should then be properly documented in order to show that the most suitable candidates have been chosen. That assessment should be publicly accessible, whilst paying due regard to the need to comply with data protection rules.⁵⁸

Good administrative procedures – a way to ensure that citizens understand what is going on and why

It is a general principle of EU law that an applicant seeking the annulment of an administrative decision on the grounds of a procedural irregularity must show at least a possibility that the outcome of the administrative procedure would have been different but for the procedural irregularity complained of. However, any procedural irregularity may constitute an instance of maladministration, even if that procedural irregularity would not, in a particular case, constitute grounds for the annulment by a court of a specific decision.⁵⁹

It is important to bear in mind that there is a fundamental right to be provided with reasons for the EU administration’s decisions and a fundamental right to be heard before the administration makes a decision adversely affecting one.⁶⁰

As regards the right to be heard, a citizen has to be able to usefully put forward his or her point of view regarding the material on which the decision is to be based. To give an example, in respect of a notice of termination of an employment contract with an EU military mission⁶¹, the Ombudsman did not find this to be acceptable while the employee was sick, and particularly not when on sick-leave because of a psychological disorder.⁶²

When the European Anti-Fraud Office, OLAF, requests information from or interviews a party under investigation, it should inform this party of the scope

⁵⁷ Case 1151/2008/ANA

⁵⁸ Case 2558/2009/DK

⁵⁹ Case 1560/2010/FOR

⁶⁰ Article 41 of the Charter of Fundamental Rights of the EU and further developed in Articles 16 and 18 of the *European Code of Good Administrative Behaviour*.

⁶¹ The employees of such missions are not subject to the Staff Regulations.

⁶² Case 1519/2011/AN



of the investigation. This information may be limited to the nature of the allegations made. When a decision adversely affecting a person is about to be taken, the formal right to be heard also requires that the person concerned be given the opportunity to comment on the evidence. In respect of the formal right to be heard, the Court of Justice has however established that a decision of OLAF to forward information to the national investigatory authorities does not constitute an act adversely affecting a person since the national authorities remain free to assess the content of that information. OLAF thus has no legal obligation to grant the party under investigation the formal right to be heard in such a case (it is rather for the national authorities to guarantee that the right to be heard is respected). The concept of good administration is, however, broader than the concept of legality. By subjecting its findings to scrutiny and challenge, OLAF can enhance their certainty and validity. OLAF will comply with the principle of good administration by providing the party under investigation with sufficient information relating to the allegations made against that party and the supporting evidence.⁶³

In respect of OLAF's procedures, if several persons are being investigated in relation to the same matter, it may well be that the facts of each investigation are not identical, and that the individual case-files contain different, distinct elements that have to be assessed separately. The fact that the length of the individual investigations carried out by OLAF varies does not, therefore, prove that there was discrimination. The reasonableness of the duration of an investigation must be assessed in light of the circumstances specific to the case. However, principles of good administration require that investigating authorities ensure that each procedural step is taken within a reasonable time following the previous step.⁶⁴

The Commission's Early Warning System (EWS) is a computerised system to identify threats to the EU's financial interests and reputation. The Ombudsman dealt with a complaint concerning a so-called W3b warning. A warning is registered when, according to the Decision setting up the EWS, "third parties, especially third parties benefiting or who have benefited from Community funds, ... are known to be the subject of judicial proceedings for serious administrative errors or fraud. Where OLAF investigations lead to judicial proceedings or OLAF offers assistance or follows up proceedings, OLAF ... requests the activation of the corresponding W3b warning". The relevant warning was registered by OLAF. The EWS Decision does not define the term "judicial proceedings", which in fact has a different meaning under different Member States' judicial systems. The interpretation of that term thus has to take into account the purpose and context of the EWS and, specifically, the purpose and context of the W3b warning within the EWS Decision. There is a clear difference between the commencement of a trial, in an inquisitorial or an adversarial judicial system, and the commencement of a judicial investigation phase in an inquisitorial system. Commencement of the investigation phase in an inquisitorial system does not necessarily imply that certain facts have already been established in relation to a person: all it means is that there are sufficient grounds to open a judicial investigation. Commencement of a trial, on

⁶³ Case 1560/2010/FOR

⁶⁴ Case 2515/2011/CK



the other hand, indicates that the allegation made against the person, combined with the *prima facie* evidence, is sufficiently serious and convincing to warrant a trial. Where a W3b warning is issued in the absence of the case having been sent for trial, there is the risk that like cases will not be treated in like manner. This is because the term “judicial proceedings” has different meanings depending on the State concerned. This suggests that a W3b warning should be issued only when a case is committed for trial.⁶⁵

Service-mindedness and courtesy – the right to be taken seriously

Everyone has the need to feel recognised and listened to. This is particularly the case of citizens in relation to the EU administration, which is often perceived as being very distant, not only geographically. The EU administration has to make an effort to make citizens feel that their concerns, questions and requests are taken seriously.

It is not unusual that a citizen does not agree with, for instance, the EU’s policy in a certain area. However, the mere fact that the views expressed by an EU institution differ from those of a complainant cannot as such constitute maladministration. Lack of courtesy is likely to constitute maladministration but any claim of lack of courtesy must be supported by evidence.⁶⁶

An example of a case where concerns expressed by a citizen were taken seriously by the EU administration is that of a citizen claiming compensation from an airline and then complaining to the relevant National Enforcement Body (NEB) following a delayed flight. The NEB informed him that it had no competence to deal with individual claims for compensation and the Commission confirmed the NEB’s position. Following the Ombudsman’s inquiry, the Commission however promised to change the unclear information in its *air passenger rights EU complaint form* and the Ombudsman found the Commission to have taken appropriate action to avoid any further confusion as regards what a NEB is able to do in reaction to a complaint.⁶⁷

Another way for the institutions to be service-minded and helpful is to avoid opening an unnecessary formal procedure if there is a less formal way of dealing with a matter to the citizen's satisfaction, such as when access to documents is being requested under different sets of rules and granted on the basis of one of them. There is then often no practical benefit from continuing the assessment of the request for access on the basis of the other rules.⁶⁸

The language issue, as already mentioned above, is also a matter of service-mindedness: The Commission should ensure that all European citizens are able to understand its public consultations, which should, as a matter of principle, be published in all the official languages.⁶⁹

⁶⁵ Case 637/2009/FOR

⁶⁶ Case 2441/2010/OV

⁶⁷ Case 606/2012/OV

⁶⁸ Case 1108/2012/RT

⁶⁹ Case 875/2011/JF



In addition, the EU administration should not underestimate the power of an apology.

Principles of good administration require that the EU administration acknowledges mistakes and considers how such mistakes can be rectified. A first step is to apologise. To merely express regret, without taking responsibility for the mistake, is not sufficient. The way to go is to provide an apology, which implies an admission of error.⁷⁰

A failure to live up to principles of good administration, such as a failure to reply to correspondence or to respond in the language used by the citizens approaching the EU administration, may be remedied by an apology and, where possible, an explanation.⁷¹

Delays in administration

A delay makes the citizen feel that he or she is not being taken seriously, particularly if the EU administration does not provide an explanation. The right of every person to have his or her affairs handled within a reasonable time by the EU institutions is a fundamental right provided for in Article 41(1) of the Charter of Fundamental Rights.

The Ombudsman found maladministration on the part of the Commission where it had not explained properly its decision to keep open an infringement complaint for a year and a half even though it had found that there was no infringement.⁷²

A recurring concern among complainants is alleged delay in handling requests for public access to documents under Regulation 1049/2001.

Where an institution fails to respond to the request for access within the stipulated deadline, this shall be considered as a negative reply, entitling the applicant to go to Court or the European Ombudsman. If an institution knows that it is going to be late with its response, it should inform the applicant of the delay and of how long that delay will be, as well as of the available remedies. This allows the applicant to make an informed decision as to whether to wait for the response or complain immediately to the Ombudsman.⁷³

Conflicts of interest - Can I trust that the EU administration acts for the good of the EU and, for the good of me as a citizen?

In order for the EU to function properly, and for the citizens to trust it, the EU administration has to act only for the good of the EU. Any official carrying out his or her duties with his or her own interest in mind is in breach of the Staff

⁷⁰ Case 312/2012/CK

⁷¹ Case 1708/2011/JF

⁷² Case 1786/2011/MHZ

⁷³ Case 1817/2010/RA



Regulations and should have no place in the EU administration. The EU administration has to make sure that such situations do not arise.

It is important that the procedure for the assessment of possible conflicts of interest is not reduced to a mere formality.⁷⁴

An actual conflict of interest exists when, as defined by the OECD, there is “a conflict between the public duties 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” (emphasis added). Whether a public official actually modifies his or her behaviour as a result of a conflict of interest is irrelevant as regards determining whether a conflict of interests exists, between the public official’s private interests and public interests, which *could* improperly influence the performance of that person’s official duties and responsibilities. It is the prospect, or even the likelihood, that behaviour of a public official could be influenced by private interests, which is central to determining whether a conflict of interests exists. While any concrete example of a conflict of interests actually altering the behaviour of a public official would be very serious indeed, the fact that no such example has been shown to exist is irrelevant as regards whether there is or whether there is not a situation of a conflict of interests. The concept of a conflict of interests seeks to ensure that no situation arises where a person *could* be influenced by private interests when carrying out a public function. It is the mere *possibility* of such influence occurring which the concept of a conflict of interest seeks to address.⁷⁵

The legitimacy of the EU in the eyes of the citizens depends not only on avoiding real, but also apparent conflicts of interest.⁷⁶

It is essential for the EU administration to keep a record of its analysis of alleged conflicts of interest and to be in a position to defend its views vis-à-vis EU citizens when asked to do so. The mere statement that there is no conflict of interest, without any indication of reasons, is not sufficient. Insufficient explanations could well be interpreted by citizens as an attempt to cover up what actually happened.⁷⁷

It is good administrative practice for the EU administration clearly to inform staff leaving its service about the obligations imposed by the Staff Regulations, such as conflicts of interest issues.⁷⁸

The fundamental right to protection of personal data does not constitute a systematic obstacle to public scrutiny of whether natural persons involved in lobbying activities (which are most frequently carried out vis-à-vis the Commission) may have conflicts of interest. It is in the interests of transparency, and in particular in the interests of promoting participatory democracy, for the Commission systematically to inform interest

⁷⁴ Case 1533/2010/MMN

⁷⁵ Case 297/2013/FOR

⁷⁶ Case 51/2011/AN

⁷⁷ Case 51/2011/AN

⁷⁸ Case OI/12/2011/JF



representatives, in advance of meetings with Commission staff members, and in the context of written communications between the Commission and interest representatives, that the Commission intends to release the names of interest representatives, if so requested in the context of applications for access to documents under Regulation 1049/2001.⁷⁹

In respect of activities taken up by former Commissioners, the fact that a former Commissioner expresses political support for a particular issue is not sufficient, in itself, to establish a conflict of interest with regard to that issue, as long as the issue is a legitimate goal of common interest of the EU.⁸⁰

One of the purposes of the rule that requires members of the decision-making bodies of the European Central Bank (ECB) to act independently⁸¹ is to ensure the legitimacy of the ECB in the eyes of EU citizens. In addition to their obligation to act independently, members of decision-making bodies of the ECB must also avoid conflict of interest. The legitimacy of the EU in the eyes of citizens depends not only on avoiding real conflicts of interest but also apparent conflicts of interest. It is legitimate for members of the decision-making bodies of the ECB to engage in appropriate public and private debate on issues of relevance to the work of the ECB. When the President of the ECB participates in a meeting, the purpose of the meeting, the identities of the other participants, and the topics discussed should normally be regarded as public information, unless there exists a legitimate reason for confidentiality, such as the need to protect the public interest as regards the financial, monetary or economic policy of the EU or a Member State. It would, for instance, be in accordance with the principle of transparency for the ECB to make public, on its own website, the fact that its President is a member of the Group of Thirty, even if the Group of Thirty is not a lobby or an interest group sharing a “common interest” which could compromise the independence of the ECB, but it is rather a discussion forum. An “interest group” is a group of natural and/or legal persons sharing a common interest as regards a substantive issue and seeking to promote that common interest through various means. A “lobby” can be understood to be an interest group that seeks to promote its common interest through directly influencing third parties, including public officials.⁸²

Whistleblowing

EU staff who, in the course of the performance of their duties, become aware of a presumed illegal activity, including fraud or corruption, detrimental to the interests of the EU, have to inform their hierarchy.⁸³ The importance of protecting the correct implementation of this “whistle blowing” provision in the Staff Regulations (Article 22a) cannot be stressed enough, particularly in light of the Council of Europe report⁸⁴ concluding that whistle blowers are

⁷⁹ Case 277/2012/RA

⁸⁰ Case 1533/2010/MMN

⁸¹ Article 130 TFEU and the Statute of the ECB

⁸² Case 1339/2012/FOR

⁸³ Article 22(a) of the Staff Regulations

⁸⁴ Available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN>



discouraged by the feeling that their warnings will not be followed up appropriately.

Information should clearly be regarded as a disclosure under Article 22a of the Staff Regulations if: (i) it is specified that the information is provided under Article 22a of the Staff Regulations; (ii) the content of the information corresponds to that intention; (iii) the information is objectively of a serious nature; and (iv) the information has been received in the course of performance of duties, whatever they may be. The timing of providing such information in relation to other procedures (such as auditing) is irrelevant.⁸⁵

There are whistleblowing situations other than those covered by the Staff Regulations. In these cases, it is not sufficient for the EU administration to inform the whistleblower that the file has been closed, and to provide only general results. One must bear in mind the sensitive position of the whistleblower when striking a balance between the possible confidentiality of the information possessed and the duty to report on something that the whistleblower considers to be serious, for instance, safety. Principles of good administration require that the substantive assessment of the information disclosed be carried out carefully, impartially and objectively, and that whatever the decision may be, the authority approached by the whistleblower should give reasons for its conclusions. This avoids the understandable suspicion on the part of the whistleblower that his or her case has not been properly dealt with, or has not been dealt with at all.⁸⁶

⁸⁵ Case 1697/2010/JN

⁸⁶ Case 51/2011/AN



The Commission as the Guardian of the Treaties – making sure that EU rules are respected by the Member States

The Commission is the “Guardian of the Treaties”, which means that it oversees whether Member States apply EU law correctly. If it considers that a Member State is not applying a particular aspect of EU law correctly, it can bring the issue before the EU courts, which can then rule on the issue. Citizens cannot use the EU Courts to control how the Commission exercises this role. However, they can complain to the Ombudsman. It is the Ombudsman’s view that, in carrying out its role as the Guardian of the Treaties, the Commission needs to be open and to avoid errors.

The Commission’s relations with citizens who make complaints to it about infringements of EU law by Member States are governed primarily by a Commission Communication setting out how it deals with persons who bring alleged infringements of EU law to its attention.⁸⁷ It is good administration for the Commission to follow the Communication when handling infringement complaints⁸⁸. For example, the Communication states that, as a general rule, the Commission will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. The Ombudsman has found that the Commission should explain in a clear and convincing manner why, in a particular case, it needed more time to deal with a complaint.⁸⁹

In carrying out its role as the Guardian of the Treaties, the Commission has a wide margin of discretion when deciding whether or not to pursue infringement proceedings against Member States for breaches of EU law. However, it is the Ombudsman’s belief that, in dealing with infringement complaints, the Commission has an obligation to be open and informative towards the complainant, first as to whether or not it considers that there is an infringement of EU law and why, and second as to how it chooses to exercise its discretion in that regard. Only in case of arbitrary choices in this regard would the Ombudsman consider the Commission to be acting outside its margin of discretion.

In dealing with an infringement complaint, the complainant is entitled to expect from the Commission a sufficient degree of diligence when deciding what action is the most appropriate to establish whether or not an infringement has taken place.⁹⁰

The Ombudsman may consider that a decision to close an infringement case involves maladministration if the Commission fails to explain its decision

⁸⁷ Communication from the Commission on updating the handling of relations with the complainant in respect of the application of Union law [COM(2012) 154 final].

⁸⁸ Case 1738/2012/RT

⁸⁹ Case 412/2012/MHZ

⁹⁰ Case 1786/2011/MHZ



adequately; makes a procedural error or a manifest error of assessment; clearly misinterprets the law⁹¹; or takes into account irrelevant matters.⁹²

In respect of its duty to explain its decision, the Commission should, expressly or implicitly, address the issues put forward by the complainant. If the Commission does not consider the EU law referred to by the complainant to be applicable, or if it considers that EU law has not been breached, it should adequately explain why.⁹³ In general, such explanations should, in order to be considered sufficient, coherent and reasonable: (i) address the complainant's relevant arguments⁹⁴; (ii) be reasonably coherent with the Commission's general practices, communications and policies in the area; and (iii) be such that the citizens concerned would be better able to decide whether it is appropriate to complain about similar matters in the future.⁹⁵

In a particular infringement case, the Ombudsman found that the Commission had not provided sufficient reasons for its decision and, accordingly, had not acted transparently. In the particular case, the Commission had changed its position from one of sending a letter of formal notice to the Member State concerned to one of simply closing the case. The Commission explained this change of position as resulting from "internal consultations". The Ombudsman took the view that this was not an adequate explanation of the basis for the Commission's final decision.⁹⁶

The Ombudsman has further recommended to the Commission that it adopt a more nuanced approach to openness in the field of infringement procedures. The Commission takes the view that public disclosure of documents exchanged with the Member States during infringement procedures will necessarily harm the purpose of that procedure, which is to ensure the correct application of EU law. This position is not self-evidently correct. One can imagine infringement procedures where public disclosure of the different opinions and arguments exchanged, exactly because of the robust involvement of public opinion and civil society, both national and European, could actually favour or facilitate an end to the infringement. One can even reasonably suppose that public disclosure of documents in infringement procedures where environmental issues are at stake would likely be one of those situations. Although the Court's case law in this area points in a particular direction, it must be remembered that a court reviews cases within a more stringent set of procedures and rules than does the Ombudsman. The Ombudsman, unlike the Court, may be able to identify systemic opportunities that could render the Commission's practices more open.⁹⁷

⁹¹ Cases 846/2010/PB and 1786/2011/MHZ

⁹² Case 1738/2012/RT

⁹³ Cases 846/2010/PB, 1708/2011/JF and 1786/2011/MHZ

⁹⁴ Cases 846/2010/PB and 1786/2011/MHZ

⁹⁵ Cases 846/2010/PB and 1708/2011/JF

⁹⁶ Case 412/2012/MHZ

⁹⁷ Cases 1947/2010/PB and 2207/2010/PB



Execution of contracts and grants

The EU administration enters into contracts in many areas not only for supplies and services, but also in the context of, for instance, EU-financed programmes. It is normally not for the EU administration to get involved in disputes between its contractors and subcontractors. Nevertheless, the EU administration should, depending on the particular situation and in the interest of the EU's reputation, be receptive and constructive faced with concerns brought to its attention.⁹⁸

It is reasonable for parties, such as the EU administration and its contract partners, to agree on the interpretation of issues not explicitly provided for in a written agreement. E-mail correspondence from the EU administration regarding such an issue should, as a rule, not be considered as "informal". In a culture of service, the authors of communications issued by the EU administration must take responsibility for the content.⁹⁹

In respect of choosing experts for EU projects, the EU administration has a broad margin of discretion and is free to decide that it prefers to work with one instead of another, in order, for instance, to ensure effective collaboration with its services. However, before replacing an expert, particularly because of alleged misconduct, the EU administration should always give the expert the opportunity to present his/her view of the matter (the right to be heard is also mentioned above under Transparency).¹⁰⁰

⁹⁸ Case OI/11/2010/AN

⁹⁹ Case 940/2011/JF

¹⁰⁰ Case 2441/2010/OV



Award of tenders and grants

Tenders and grants also imply contractual relations with the EU administration. The use of EU funds for these purposes clearly warrants transparency of the procedures and fair treatment of applicants. Award procedures should be clearly explained and tenderers should be provided with as much information as possible about the evaluation of their bids.¹⁰¹ Guidelines to grant agreements must provide precise and clear criteria for definitions and for the application of provisions.¹⁰²

A review of evaluations of scientific proposals raises complex scientific questions and the Ombudsman's substantive review is generally limited to assessing whether there is a manifest error in the reasoning of the contested decision. When the EU administration has an internal mechanism for re-evaluation, it is reasonable for such re-evaluation to come in question only in case of evidence of (i) procedural errors; (ii) factual errors; or (iii) a manifest error of assessment.¹⁰³

The primary task of the Commission in relation to the aid projects it finances is to ensure that all the EU funds allocated to a project are spent on the project in accordance with the agreed spending plan and that the project's aims are achieved. In addition to the need to ensure correct use of EU funds and the successful outcome of the project, it is in the interests of good administration for the Commission to ensure that recipients of EU funds act fairly and correctly towards partners in projects it funds. Despite its limited scope for intervention in a contractual relation to which it is not a party, the Commission should thus take appropriate measures to be informed as regards problems that might arise and to assist, where possible, in resolving disputes concerning those problems. This could be done by organising meetings, individually and between the disputing parties, and offering to act as a mediator.¹⁰⁴

¹⁰¹ Case 1653/2011/DK

¹⁰² Case 137/2013/RT

¹⁰³ Case 2111/2011/RA

¹⁰⁴ Case 2100/2011/OV



Staff matters - in the double sense

Staff of the EU administration should be treated correctly by their employer. Staff who are respected, and who feel included, are more likely to feel “ownership” of their tasks and thus to do a better job for EU citizens. The European Ombudsman should not be the primary agency for dealing with staff issues, as they are normally better settled closer to the source of the problem. However, the principles of good administration should apply also in this area of the EU administration and the Ombudsman may therefore assist, particularly in identifying and finding solutions to systemic problems.

In this area, the Ombudsman makes sure that, in taking its decisions, the EU administration properly applies the relevant rules, normally being (or stemming from) the Staff Regulations.¹⁰⁵ The EU administration’s commitment to solve problems¹⁰⁶ and to taking an approach that is not unduly formalistic¹⁰⁷ are important aspects of good administration in the area of staff issues. For instance, in respect of employment conditions for local staff in its Delegations, it is reasonable for the EU administration to look at the common practices in employment relationships in the relevant country when trying to find fair solutions.¹⁰⁸

¹⁰⁵ Case 1986/2011/JF

¹⁰⁶ Case 1286/2011/TN

¹⁰⁷ Case 2178/2011/KM

¹⁰⁸ Case 706/2010/RT



Competitions and selection procedures

The procedures for recruiting staff to the EU administration should be transparent.

Although the proceedings of selection boards acting in procedures for recruiting EU staff should be secret¹⁰⁹, this provision should not be interpreted incorrectly as covering anything related to a selection board (see also above under *The right of access to documents*). The need to keep individual views of selection board members secret, in order to protect the objectivity and impartiality of selection proceedings, does not give the right to keep the members' identities secret.¹¹⁰ Ideally, the names of selection board members should always be published, and such disclosure should not be limited to those candidates making an explicit request.¹¹¹

The threshold for being put on the reserve list of successful candidates eligible for recruitment should be disclosed to candidates in recruitment procedures, and so should the individual marks obtained in the written and oral tests.¹¹²

In 2008, the European Personnel Selection Office (EPSO) made a commitment to the Ombudsman to provide more detailed information to candidates in recruitment procedures in respect of their performance in tests. In addition to a global mark, EPSO agreed to provide the partial marks awarded for each evaluation criterion set out in the notice of competition. The Ombudsman has found that the new style competitions, providing candidates with a competency passport, is useful for giving structured and complete information regarding a candidate's performance. However, in cases where the competency passport does not provide partial marks in respect of a candidate's job-specific knowledge, that is, where it does not give the marks awarded for each evaluation criterion set out in the notice of competition, EPSO fails to comply with its earlier transparency commitment.¹¹³

¹⁰⁹ Article 6 of Annex III to the Staff Regulations

¹¹⁰ Case 2111/2011/RA

¹¹¹ Case OI/12/2011/JF

¹¹² Case 2044/2012/LP

¹¹³ Cases 2022/2011/RT and 2430/2011/RT



If you require a large print version of this publication, please contact the European Ombudsman's office. We shall also endeavour to provide an audio version upon request.

This publication is available on the Internet at:
www.ombudsman.europa.eu

© European Union, 2014
Reproduction for educational and non-commercial purposes is authorised,
provided the source is acknowledged.
Set in FrutigerNext and Palatino.