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AN EMPIRICAL STUDY INTO THE NORMS OF GOOD
ADMINISTRATION AS OPERATED BY THE EUROPEAN
OMBUDSMAN IN THE FIELD OF TENDERS

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*An empirical study into the norms of good administration as operated by the
European Ombudsman in the field of tenders*

MAGDALENA E. DE LEEUW

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Abstract

This Working Paper presents the results of the empirical research which I have conducted into the norms of good administration that are operated by the European Ombudsman in the field of tenders. The aim of the research was to discover whether the European Ombudsman is actively involved in creating norms of good administration in individual decisions, and in the end to make an inventory of the norms of good administration that have been operated by the Ombudsman to decide complaints about maladministration in this policy field. This empirical research is based upon a normative vision on the European Ombudsman as a developer of norms of good administration. The European Ombudsman has his own task and responsibility in respect of the review of administrative behaviour which is different from the task and responsibility of the Court. Administrative bodies do not only have to act lawfully, but also properly, i.e. in accordance with the principle of good administration. In my view the European Ombudsman has his own responsibility in autonomously developing the standard of good administration (and developing “Ombudsnorms”) and to review administrative behaviour for compliance with that ethical standard.

Keywords

European Ombudsman, the principle of good administration, tenders, public procurement, norm-creation, review basis, European code of good administrative behaviour, ethics, Dutch Ombudsman

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Part I Theoretical reflections on the European Ombudsman as a developer of norms of good administration*

Introduction of the empirical research

This Working Paper presents the empirical research which I have conducted into the norms of good administration that are operated by the European Ombudsman (EO) in the field of tenders. The aim of the research was to discover whether the European Ombudsman is actively involved in creating norms of good administration in individual decisions, and in the end to make an inventory of the norms of good administration that have been operated by the Ombudsman to decide complaints about maladministration in this policy field (Part II). This empirical research builds upon a tried and tested methodology used by Dutch researchers of Utrecht University in a similar research conducted in respect of the Dutch Ombudsman.

The empirical research demands a brief theoretical reflection on the role and function of the European Ombudsman, and in particular on the normative framework applied by him (Part I). My vision of the Ombudsman as a developer of his own norms of good administration, which underlies the empirical research, has been greatly inspired by the arguments that have been advanced by the same researchers. Their vision shall, therefore, be exposed in some detail.

The functions of an ombudsman institution: different models

It is not the purpose of this Working Paper to provide a historical overview of the emergence of ombudsman institutions in Europe: others have already done so.¹ What clearly follows from such overviews, however, is that ombudsman institutions in Europe have been created for different purposes, which implies different choices (by the legislator) about *who* can initiate the investigation, *what* the ombudsman investigates and *how* he does it.² What all these countries where an ombudsman was introduced, have in common, however, is that they were created because “something extra” was needed.³

K. Heede has elaborated five different theoretical ombudsman models. The main difference between the models are the primary function of an ombudsman: redress or control. “Control is when the supervisor seeks to influence policy for the benefit of the citizens as a whole, whereas redress is when the supervisor seeks to remedy an individual’s grievance.”⁴ Next, the models are distinguished on the basis of the ombudsman’s position in relation to other mechanisms of control and redress (overlapping mandates or not). The ombudsman can operate (as a mechanism of control or redress) in areas outside the competence of existing supervising mechanisms, the so-called Quango control ombudsman and Extra-judicial redress ombudsman. Alternatively, an ombudsman with overlapping

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¹ See for example, K. Heede, *European Ombudsman: redress and control at Union level*, The Hague, Kluwer Law International, 2000. N. Diamandouros, “The relationship between the principle of good administration and legal obligations,” in: *Liber Amicorum en l’honneur de Bo Vesterdorf*, Bruylant, 2007, p. 315-342.

² K. Heede, *ibid.*, p. 85. The *what* is about whom he can investigate and what he should review, whereas the *how* regards the review criteria, investigation powers, type of decision he can take, and his enforcing powers.

³ *Ibid.*, p. 79.

⁴ *Ibid.*, p. 96.

mandate can be created, such as a Discount alternative redress ombudsman (overlap with the courts) or Parliamentary control ombudsman (overlap with the parliament). Finally, there is the Citizens' control ombudsman whose primary task is the protection of fundamental rights. The starting point of those models is that existing ombudsman schemes are created for one purpose only. In reality, ombudsman institutions when established are assigned secondary functions. Consequently, none of the existing ombudsman schemes will fit one specific model entirely.

As my empirical research has been inspired by a similar research performed in respect of the Dutch Ombudsman a few words about this Office is necessary. The Dutch Ombudsman has been categorised as an Extra-judicial redress ombudsman, although he does not entirely fulfil this theoretical model. The Extra-judicial redress ombudsman ensures that non-legally enforceable rules are enforced, "that mediation is available and by his activities he creates and enforces non-legally binding principles of good administrative behaviour".⁵ The Dutch Office was created for the purpose of closing the gap which had been left open by the judiciary and was therefore created explicitly to conduct a non-legality review of the conduct of the administering authorities and the police force. The Ombudsman only investigates individual acts with the exception of administrative decisions that can be brought before the administrative courts and civil law suits.⁶ Therefore the Ombudsman serves not as an *alternative* to the court but as an *additional* redress mean. The Dutch Administrative Law Act ("AwB") obliges the Ombudsman to indicate explicitly in his report what principle of proper administration has been violated in a particular case (art. 9:36 AwB). It is insufficient to state that the public authority has acted improperly. These norms of proper administration are developed by the Ombudsman himself (see furthermore the par. on "Legal norms differ from Ombudsnorms").

The European Ombudsman

The European Ombudsman's function and legal mandate

Unlike the Dutch Ombudsman, the European Ombudsman has not been created according to the Extra-judicial redress model, but is said to come closer to a Discount alternative redress ombudsman, like the Danish Ombudsman, with a great emphasis on legality.⁷ The intention of the creation of an Ombudsman office was to establish an *alternative* supervisory mechanism for the courts for the administrative activities, which would be cheap, flexible and accessible. Later, when the ratification of the Maastricht Treaty proved difficult, the European Ombudsman was projected as a democratic cure for the legitimacy problem, i.e. by protecting the rights of individuals as a means of bringing the Union closer to its citizens. Although the European Ombudsman has been created to offer dispute settlement as his primary purpose, he was also given a control function in helping to make the Union more accountable by "providing an independent critical appraisal of the quality of administration by Community institutions and bodies and a stimulus towards improvement."⁸ The Office has been said to have been modelled according to the Danish Ombudsman plan. The Danish Ombudsman acts like a (discount) administrative court for those directly and individually concerned by administrative decisions: a small claims administrative court. This label can be explained by the fact that the largest category of complaints regards the merits of administrative decisions, which are, furthermore, assessed

⁵ *Ibid.*, p. 104-105.

⁶ *Ibid.*, p. 104. Ph.M. Langbroek and P. Rijpkema, "Demands of proper administrative conduct: a research project into the Ombudsprudence of the Dutch National Ombudsman," *Conference on Ethics and Integrity of Governance*, Leuven, Belgium, June 2-4, 2005, p. 1-19, at p. 2.

⁷ K. Heede, *op cit.* note 1, p. 106.

⁸ K. Heede, "Enhancing the Accountability of Community Institutions and Bodies: the Role of the European Ombudsman," *European Public Law*, Vol. 3, No. 4, 1997, p. 587-605, at p. 588.

through a legality review. This role is a consequence of the absence of a general administrative court in Denmark.⁹

Despite this basic imprint, when the first (Finnish) Ombudsman Jacob Söderman took up the Office, his legal mandate was largely undefined, which gave him much discretion and a unique opportunity to characterise the nature and functions of the Office.¹⁰ Article 195 TEC describes the Ombudsman's task as reviewing the activities of the institutions against the standard of "maladministration". The jurisdiction of the Ombudsman encompasses all the activities of Community organs, irrespective of their nature and context. Besides dealing with individual complaints about maladministration, the Ombudsman can also conduct own-initiative inquiries into more structural problems of maladministration.

The yardstick "maladministration" does not provide an answer to the concrete norms the Ombudsman applies when assessing alleged administrative wrongdoings. In his Annual Report 1995 the Ombudsman stressed that there was maladministration if a Community institution or body fails to act in accordance with the Treaties and the Community acts that are binding upon it, or if it fails to observe the rules and principles as established by the Court. The fundamental rights are explicitly mentioned.¹¹ He added a non-exhaustive list (open-ended) of other examples of maladministration, including: administrative irregularities, administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunctioning or incompetence, discrimination, avoidable delay, lack or refusal of information. In 1997 he defines the term as follows: "Maladministration occurs where a public authority fails to act in accordance with a rule or principle that is binding upon it". It is clear that "binding" does not refer to "legally binding", as the Ombudsman's review also comprises non-legal standards.¹² The binding nature of principles of good administration derives probably from their underlying ethical nature and social and cultural acceptance (see more ahead). However, the Ombudsman makes clear that when he investigates whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, "*his first and most essential task must be to establish whether it has acted lawfully*" (my italics). This means in accordance with the Treaties, legally binding provisions of Community legislation, and the whole corpus of judgments of the European Court of Justice (ECJ) and Court of First instance (CFI).¹³ The principles of good administration that the Ombudsman relies upon in his examination whether there is maladministration have been laid down in his Code of Good Administrative Behaviour, which was adopted by the European Parliament (EP) in September 2001 (see the next paragraph). It should be emphasised that in the end the conclusion on "maladministration" is never a legal verdict.

The non-legality review ("extra-legal" or "soft-law" review) constitutes a feature of almost all European ombudsman systems, although the nature and use of this kind of review differs.¹⁴ This non-legality review can coexist with hard legality reviews, even within the same decision, as is evidenced in the Danish and Swedish Ombudsmen's practice, but also in that of the European Ombudsman (see Part II). In Denmark and Sweden, non-legality reviews are not "simply a residual category which is applied to minor and banal wrongdoings where the law either fails to provide the answer or is seen as

⁹ K. Heede, 2000, *op cit.* note 1, Chapter 2, p. 45.

¹⁰ P. Leino, "The wind is in the North," *European Public Law*, Vol. 10, No. 2, 2004, p. 333-367, at p. 333.

¹¹ European Ombudsman (EO) Annual Report 1995, p. 6.

¹² See explicitly "The principles of good administration in the recommendations of the European Ombudsman", speech by the European Ombudsman at the EUNOMIA Project Capacity-Building Seminar on 'Ombudsman's Intervention: Between the Principles of Legality and Good Administration', Sofia, Bulgaria, 17 September 2007.

¹³ EO Annual Report 1995, p. 23.

¹⁴ See P. Bonnor, "Ombudsmen and the Development of Public Law," *European Public Law*, Vol. 9, No. 2, 2003, p. 237-267, at p. 247.

too drastic a means of reaction”.¹⁵ While such wrongdoings are certainly addressed through the non-legality review, more serious issues of *Rechtszekerheit* (individual and collective) are common targets as well.¹⁶ In fact, the Danish Ombudsman’s extensive use of the non-legality review was principally the consequence of the lack of general or well-developed principles of administrative law from the 1950s onwards.¹⁷ The soft-law review has had a great gap-filling function. But soft-law reviews are in those jurisdictions a secondary option, however, coming after the legality review.¹⁸

The European Code of Good Administrative Behaviour

A first indication of what is considered to be good administration is provided in the EO’s Code of Good Administrative Behaviour, which was adopted by the Ombudsman on 28 July 1999.¹⁹ As explained in it, the Code takes account of the principles of European administrative law contained in the case-law of the Court of Justice and also draws inspiration from national laws. This could be read as implying that the Code does not *per se* reflect what the Ombudsman conceives as good administration, but is very much inclined to show us what good administration means in legal terms. The Code has further to explain what the Charter’s right to good administration should mean in practice. When the EP approved the Code, it called on the EO to apply it in examining whether there is maladministration, so as to give effect to the citizens’ right to good administration in article 41 of the Charter.²⁰ Nonetheless, the Code includes a number of non-legal principles. The Code is not exhaustive, and in fact in the Ombudsman’s practice other principles of good administration have been created (see Part II).

The Code contains a mixture of principles which are merely listed, but lacks any kind of categorisation, for example in subjective rights v. duties imposed on the administration or formal v. substantive principles or legal v. extra-legal principles etc. When borrowing the categorisation of principles of good administration as operated by the Dutch Ombudsman,²¹ the principles of the EO Code can be categorised as follows. It contains first a number of traditional and new *human rights*, i.e. the principles of non-discrimination and equality (art. 5), the right to be heard (art. 16), privacy and data protection (art. 21) and requests for access to documents (art. 23).²² The latter two have not been formulated as fundamental rights; instead the provisions merely state that the official shall respect the legislation existing in those areas. The second category consists of *substantive principles*, which include: The absence of abuse of powers (art. 7), proportionality (art. 6), objectivity (art. 9), and legitimate expectations (art. 10). The third category of *formal principles* consists of the principles of impartiality and independence (art. 8) and the duty to state reasons (art. 18). Other principles of good

¹⁵ *Ibid.*, p. 250.

¹⁶ *Ibid.*

¹⁷ P. Bonnor, “The European Ombudsman: a novel source of soft law in the European Union,” *ELRev.*, Vol. 25, February 2000, p. 39-56, at p. 39.

¹⁸ P. Bonnor, 2003, *op cit.* note 14, p. 257.

¹⁹ EO Code of Good Administrative Behaviour, 2005 (latest version).

²⁰ *Ibid.*, p. 8.

²¹ The main division is between human rights, formal and substantive principles of good administration and the category of principles relating to behaving with care and consideration, which include a bundle of sub-principles, such as active and adequate provision of information, timeliness and courtesy etc. See Ph.M. Langbroek and P. Rijpkema (eds), *Ombudsprudentie. Over de behoorlijkheidsnorm en zijn toepassing*, Den Haag, Boom, 2004, p. 257-258.

²² The right of access to documents has been laid down in the Charter of Fundamental Rights (art. 42), but its fundamental nature has not yet been recognised by the Courts, although they are close to its recognition. See M.E. de Leeuw, “Zaak C-64/05 P, Koninkrijk Zweden t. Commissie” (case annotation), *SEW* juli/augustus 2008, p. 300-303. See furthermore, A. Prechal and M.E. de Leeuw, “Transparency: A General Principle of EU Law?,” in: U. Bernitz, J. Nergelius (eds), *General Principles of EC Law in a Process of Development?*, The Hague, Kluwer Law International, 2008, p. 199-242, at p. 208-212.

administration which aim at *behaving with care and consideration* in contacts with the public or regarding *organisational matters* have also been enshrined: A first cluster is formed by courtesy (art. 12) and fairness (art. 11).²³ A second cluster of provisions regards the active and adequate provision of information: The provisions concerning advising the public on how a matter which comes within his remit is to be pursued and how to proceed in dealing with the matter (art. 10), replying letters in the language of the citizen (art. 13),²⁴ acknowledgment of receipt and indication of competent official (art. 14), indication of possibilities of appeal (art. 19), (priority of) notification of decisions (art. 20) and dealing with requests for information (art. 22). A third cluster regards the adequate organisation of the administration, including transferring letters/complaints to the competent service (art. 15) and the keeping of adequate records (art. 24). Finally, there is the provision concerning timeliness of decisions (art. 17).

A large number of the above mentioned principles are typical legal standards, i.e. they are laid down in the Treaties or in the Court's case-law (often as general principles of law). But there are also a group of extra-legal standards, like many of those mentioned under the category of "care and consideration and organisational matters". To what extent the principles as formulated in the EO Code overlap in their scope with existing legal principles, in particular with the general principles of law, requires a more thorough research of the legislation and case-law which cannot be undertaken in this paper, however.

There might be some confusion about the use of the term "principle(s) of good administration". "Principles of good administration" can refer to all the requirements of good administration, including legal principles. Sometimes, however, this term is used "to denote requirements which are separate from the other principles and which are not necessarily legally binding".²⁵

The Ombudsman's request to other institutions and bodies to adopt his Code was not entirely successful.²⁶ The Commission adopted its own Code of Good Administrative Behaviour,²⁷ which has as the advantage over the one of the Ombudsman that it has been structured. Furthermore, the two Codes reflect different administrative law traditions. As has been explained by M. Soria, whereas the Commission's Code reflects the British-Roman tradition of good administration, which is characterised by imposing duties on the administration with the final objective of enhancing efficiency, the EO's Code follows more the Scandinavian/Dutch interpretation of good administration, which central aspect is the lawfulness of the administration's conduct and aims at protecting the subjective rights of the citizens.²⁸ As regards the content of the Commission's Code, it can easily be criticised for its elitist tone, and it also reflects its status as administrator, which is accountable to the European Parliament and not to the European citizen.²⁹ Many provisions are drafted more narrowly than those in the Ombudsman's Code, and its obligations are extending only so far as demanded by law. But also the Ombudsman's Code is not free of criticism; it lacks a coherent structure, a part of its provisions being exclusively directed at administrative decisions instead of covering all types of administrative behaviour, and important (elements) of principles of good administration are omitted (see Part II: Conclusion).

²³ This principle is defined as "the official shall act impartially, fairly and reasonably."

²⁴ This constitutes also a fundamental citizenship right, see art. 21 EC Treaty.

²⁵ N. Diamandouros, *Liber Amicorum*, *op cit.* note 1, p. 315-342, par. 4.2.

²⁶ The EP adopted the Ombudsman's Code on 6 September 2001; it was also adopted by numerous national, regional and local administrations in a number of Member States' Codes, see EO Annual Report 2005, p. 18.

²⁷ Commission Decision of 17 October 2000 amending its Rules of Procedure, Annex (2000/633/EC), OJ L267/63.

²⁸ Martínez Soria, "Die Kodizes für gute Verwaltungspraxis," *Europarecht*, No. 5, 2001, at p. 685-688.

²⁹ J. Wakefield, *The Right to Good Administration*, The Hague, Kluwer Law International, 2007, p. 47-49. She discusses the Code in more detail. See also M. Soria, *ibid.*, p. 682-705.

The Ombudsman, but also others, wishes to see his Code transformed into a European Act. According to the Ombudsman “this would help eliminate the confusion currently arising from the parallel existence of different codes for most EU institutions and bodies, it would ensure that the institutions and bodies apply the same basic principles in their relations with citizens and would underline, for both citizens and officials, the importance of such principles.”³⁰ Not denying the advantage of having one code of good administration, which applies throughout the administration, the legislative road cannot be reconciled with my vision of the Ombudsman’s responsibility in developing his own standards of proper administration (this vision will be explained ahead). Furthermore, it would compromise the flexibility that is inherent in non-legally binding instruments.

Finally, some brief observations must be made about the Court’s reliance on the principle of good, sound or proper administration in its case-law and the new right of good administration as laid down in article 41 Charter of Fundamental Rights. First of all, it should be observed that given the absence of a common administrative code, and the limited legislation containing administrative procedural rules,³¹ the main source on administrative procedure in general is the body of general principles of law (procedural and substantive) as developed by the Court.³² In the course of the European integration, a rather definite body of law on “administrative procedure in general, and regarding procedures that may be connected to the principle of good administration in particular”, has been developed by the Court of Justice.³³

The concept of good, sound or proper administration is used in the case-law, and it seems to have been recognised by the Court as a general principle of law.³⁴ The principle of good administration as developed by the Courts is understood “as containing administrative procedural tools for individuals to invoke in their interaction with EU institutions handling matters concerning them.”³⁵ It is difficult, however, to grasp the exact meaning of this concept.³⁶ Some authors have concluded that the concept has no independent meaning or is no independent ground of review,³⁷ whereas another describes it as an umbrella principle, containing distinct legal concepts, which overlap with procedural fundamental rights.³⁸ At times the Court has interpreted the principle of good administration as containing a standard of good practice for the institutions to apply, whereas in other cases it has been considered as an individual right.³⁹ For example, in *Tillack* the ECJ ruled that the principle of sound administration, does not, in itself, confer rights upon individuals, except where it constitutes the expression of specific

³⁰ See EO Code of Conduct, *op cit.* note 19, p. 9.

³¹ For example, article 253 EC concerning the duty to reason and article 251 on public access to documents, and secondary legislation in the field of public access to documents, data protection and various detailed procedural requirements in the field of competition law, state aid and public procurement.

³² P. Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2006, p. 848.

³³ J. Reichel, “Between Supremacy and Autonomy. Applying the Principle of Good Administration in the Member States,” in: U. Bernitz, J. Nergelius (eds), *General Principles of EC Law in a Process of Development?*, The Hague, Kluwer Law International, 2008, p. 243-271, at p. 245.

³⁴ See C-154/05 and C-155/04, *Alliance for Natural Health and Nutri-Link*, [2005] ECR I-6451, para. 72: and T-54/99, *Max.mobil Telekommunikation Service GmbH*, [2002] ECR II-313, para. 48. It should be stressed that general principles of law can have different functions. J. Wakefield denies that the Court has recognised the principle of good administration as a general principle of law, *op cit.* note 29, see p. 162. See for the opposite view, A. Peters, “The European Ombudsman and the European Constitution,” *Common Market Law Review*, Vol. 42, 2005, p. 697-74, at p. 737.

³⁵ J. Reichel, *op cit.* note 33, at p. 244.

³⁶ *Ibid.*, p. 245.

³⁷ T. Tridimas, *The General Principles of EU Law*, Oxford, Oxford University Press, 2006, p. 411. See for a similar opinion expressed a decade ago, H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Oxford, Hart Publishing, 1999, p. 37.

³⁸ J. Reichel, *op cit.* note 33, p. 246. She refers to Koen Lenaerts.

³⁹ *Ibid.*, p. 253-255.

rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of article 41 of the Charter of Fundamental Rights of the European Union.⁴⁰ The content of the right of good administration as laid down in article 41 Charter (see the extract of *Tillack* mentioned above) derived from the legislation and case-law, and no new obligations were imposed. However, the list of rights mentioned in this article is not exhaustive. Until the Lisbon Treaty, which incorporates the Charter, will come into force, the right to good administration as laid down in the Charter exists only insofar as it is guaranteed in the case-law of the Courts.

The legalistic approach of the former European Ombudsman

The first Ombudsman, Jacob Söderman, has been criticised for having been excessively legalistic, and for not meeting the challenges at European level.⁴¹ Criticisms regard the fact that he did not check the substance of decisions, but has been excessively occupied with the procedural site. According to Tomkins, “Söderman has adopted an overly narrow, legalistic and rule-based understanding of maladministration, which has significantly limited his usefulness, and which has also considerably lessened the extent to which the European Ombudsman can be readably distinguished from the Courts.”⁴² But Söderman’s efforts have also been defended in the literature, and it has been argued that this criticism is born out of an understanding of an atypical ombudsman office and neglects the Finnish roots of the Ombudsman.⁴³ It is true that the Ombudsman was modelled on the Danish Ombudsman scheme, and Söderman had been the former Finnish Ombudsman, a rather legalistic Office, which undoubtedly influenced the way in which he has conceived the Office. But also more time-related and strategic explanations for his sticking to legality can be indicated. At the beginning, the institutions denied the Ombudsman’s power to review the legality of decisions adopted by them.⁴⁴ The Ombudsman therefore had to struggle in order to establish his power firmly to conduct a legality review. Other reasons, which are still valid today, are the Ombudsman’s practice of “beefing up” his decision with legal arguments and case-law to convince the institutions to follow up his decision. This strategy finds its explanation in the fact that the institutions are of a very legalistic nature, and, therefore legal arguments are often indispensable to convince them. Furthermore, the decisions of the Ombudsman have no legal force, using legal arguments as much as possible might give them more strength which invites compliance. Finally, there is the fact that in certain areas complaints are in particular made by legal persons, who are only interested in obtaining a legality review.

The position of the Ombudsman depends not so much on the mandate in legal terms, but on how the individual occupying the Office sees his task.⁴⁵ The current Ombudsman, Diamandouros, who now places more emphasis on the consumer-watch role, whereas Söderman saw himself more as a redress-ombudsman. He emphasises the fact that the administration must also be service-minded and ensure that members of the public are properly treated and enjoy their rights fully. He tends to see his role as

⁴⁰ T-193/04 *Tillack v Commission* [2006] ECR II-03995.

⁴¹ See for a discussion of the standpoint of R. Rawlings and A. Tomkins, P. Leino, *op cit.* note 10, p. 334. See further R. Rawlings, “Engaged Elites- Citizen Action and Institutional Attitudes in Commission Enforcement,” *European Law Journal*, Vol. 7, March 2000, p. 4-28; A. Tomkins, “Transparency and the Emergence of a European Administrative Law,” *Yearbook of European Law*, Vol. 19 (1999-2000), p. 217-256.

⁴² Tomkins, *ibid.*, p. 236.

⁴³ See Leino, *op cit.* note 10, p. 364-366. P. Bonnor rejects the arguments of R. Rawlings expressed in the latter’s critical article about the European Ombudsman’s role in article 226 EC procedures, see Bonnor, “Institutional Attitudes in Context: A Comment on Rawlings’ ”Engaged Elites-Citizen Action and Institutional Attitudes in Commission Enforcement,” *European Law Journal*, Vol. 7, March 2001, p. 114-119.

⁴⁴ Complaint 579/99 against the Council, EO Annual Report 2001, p. 29-32. See J. Wakefield, *op cit.* note 29, p. 103.

⁴⁵ K. Heede, 2000, *op cit.* note 1, p. 271.

being different from that of the courts and to move away from the Nordic legalistic model (see more extensively beneath).

The European Ombudsman as a developer of “Ombudsnorms”

Legal norms differ from “Ombudsnorms”

In the following paragraphs, I would like to discuss briefly my normative vision of the European Ombudsman as a developer of norms of good administration. This vision can be summarised as follows: The Ombudsman has its own task and responsibility in respect of the review of administrative behaviour, which is different from the task and responsibility of the Court. Administrative bodies do not only have to act lawfully, but also properly, i.e. in accordance with the principle of good administration. In my view the European Ombudsman has his own responsibility in autonomously developing the *ethical* standard of good administration (and to develop “Ombudsnorms”) and to review administrative behaviour for compliance with that standard. This vision has been greatly inspired by the discussion in the Dutch academic literature about the relationship between law and ethics, and the practice of the Dutch (national) Ombudsman. I would like to turn first to this discussion and practice.

The yardstick for assessing complaints by the Dutch National Ombudsman of the Netherlands is “the general principle of proper conduct” (art. 9:36 AwB). Rijpkema and Langbroek, who emphasise the differences in function between the Ombudsman and the court, are of the opinion that the review by the Ombudsman on the basis of the principle of proper conduct does not necessarily coincide with that of the review of lawfulness by the court.⁴⁶ According to them acting lawfully cannot be equated with acting in accordance with “the general principle of proper conduct”. The content of the norms of proper conduct as operated by the Dutch Ombudsman on the one hand, and written and unwritten legal rules on the other, overlap to a large extent, which can be explained by the fact that those norms all give expression to one of the core values of a democratic state, i.e. that citizens are entitled to be treated with equal respect and concern by the public authority.⁴⁷ Fundamental rights, general (legal) principles of proper administrative behaviour and the requirement of proper administrative conduct as operated by the Ombudsman all derive from this same constitutional principle.⁴⁸ However, “the principle of proper conduct” constitutes an independent criteria to judge the behaviour of the administration. Consequently, administrative behaviour can be judged by the Ombudsman as “lawful and proper” and “unlawful and improper”, but also as “lawful but improper” and “unlawful but proper”. Lawful conduct and proper conduct are not each others synonyms. The latter situation is obviously an exception, but in the Dutch Ombudsman’s practice an example can be found.

Administrative lawyers have raised objections to this vision.⁴⁹ They argue that the review on the basis of “the principle of proper conduct” is in reality a “legality review-*plus*”, i.e. a review of the lawfulness of the administrative behaviour with an additional check for compliance with specific

⁴⁶ Ph.M. Langbroek and P. Rijpkema (eds), 2004, *op cit.* note 21. In their book “Ombudsprudentie” they explain in detail their normative vision. For an English summary version of their vision, consult the paper they presented at the *Conference on Ethics and Integrity of Governance* in Leuven, *op cit.* note 6.

⁴⁷ *Ibid.*, 2004, par. 2.2. and Chapter 3.

⁴⁸ *Ibid.*, 2004, p. 20.

⁴⁹ The main elements of this criticism is discussed and rebutted by P. Rijpkema and Ph. Langbroek in “Behoorlijk onrechtmatig. Over de aard van de behoorlijkheidstoetsing”, *Nederlands Tijdschrift Bestuursrecht* (NTB), 2008, 8, p. 253-259. Critics have been made by R.J.N. Schlössels, “Kroniek beginselen van behoorlijk bestuur,” in resp. *NTB* 2005, 33, *NTB* 2006, 50, and *NTB* 2007, 6 and L.J.A. Damen, “Behoorlijk, en ook rechtmatig, of juist eerlijk?”, *NTB* 2008, 2, p. 40-51.

norms of proper conduct.⁵⁰ This vision implies that administrative conduct, which is unlawful, is *per definitio* also improper. Idem, lawful conduct is *per definitio* proper conduct. On the opposite side, improper conduct is *per definitio* also unlawful, whereas proper conduct is lawful. The situation that lawful behaviour is improper is only possible in those situations where it regards factual behaviour (in contacts between citizen and administration), which is not regulated by law, and therefore is lawful. In this vision, lawfulness is *an element* of proper conduct.

The above-mentioned researchers have strong objections against this vision, and point out that not all unlawful behaviour violates “the general principle of proper conduct”, because not all unlawful behaviour has an effect upon the interests of the citizens. Furthermore, they give several reasons explaining why the law never coincides fully with “the principle of proper conduct”. Legal norms lay down elaborations of the standard of proper administrative action. Among other things they stress that “legal norms normally offer only a limited protection to citizens because they usually aim at guaranteeing a minimum level or proper action”.⁵¹ “The principles of proper administrative conduct developed by the judiciary also tend to formulate the lower limit of proper administrative conduct, since administrative courts are careful to leave a sufficiently wide margin of appreciation to administrative institutions.”⁵² Instead, the standard of proper administrative conduct as employed by the Ombudsman implies a higher standard: administrative institutions should act as we may reasonably expect them to behave.⁵³ The standard applied by the Ombudsman is an *ethical* standard. It is therefore possible that the Ombudsman concludes that the judgment regarding the lawfulness of conduct does not coincide with his own judgment regarding the properness of the same conduct.

For example, a certain type of conduct is lawful, but according to the Ombudsman it is nevertheless improper. In such a situation the Ombudsman should, according to the above-mentioned researchers, independently of the lawfulness of this conduct decide, whether it is proper or improper. In other words, in principle, it does not matter whether this conduct is lawful or not. They stress that the Ombudsman has his own responsibility in developing the moral standards for the evaluation of administrative conduct independent of, though not in isolation of existing legal standards.⁵⁴ The first reason has already been explained above, i.e. the fact that legal norms lay down elaborations of the standard of proper administrative conduct. Most of the time by acting unlawfully the administration will also act improperly, i.e. not in accordance with the norm of proper administrative conduct as employed by the Ombudsman. The second reason is that the administration should abide by legal norms for reasons of legal certainty. Citizens may expect that the administrative will obey the law.⁵⁵ Therefore, legal norms can serve as a guidance, but the Ombudsman should always ask himself whether the administrative behaviour is proper or improper in accordance with his own standards. This is possible because the Ombudsman is not a court and has its own constitutional foundation and tasks. As a result the Ombudsman can demand more of the administration than a judge.

This vision has been accepted by the Dutch Ombudsman.⁵⁶ He explains that the standards of proper conduct applied by him are clearly not legal norms. He underlines that proper conduct is an ethical category, and we are talking about ethics of good administration. Those ethics can be to a greater or

⁵⁰ P. Rijkema and Ph. Langbroek, 2008, *ibid.*

⁵¹ Ph.M. Langbroek and P. Rijkema, 2005, *op cit.* note 6, p. 9.

⁵² *Ibid.* See the analysis of the empirical research in respect of the review of discretionary decisions (Part II).

⁵³ Ph.M. Langbroek and P. Rijkema, 2005, *op cit.* note 6, p. 9 and Ph.M. Langbroek and P. Rijkema, 2004, *op cit.* note 21, p. 24-25.

⁵⁴ Ph. Langbroek and P. Rijkema (eds), 2005, *op cit.* note 6, p. 10.

⁵⁵ Ph.M. Langbroek and P. Rijkema (eds) provide a third reason which in the context of the EU is less relevant, however.

⁵⁶ A. Brenninkmeijer in his edited version of the Van Slingelandt lecture organised by the Dutch Association for Public Administration, *Fair governance: a question of lawfulness and proper conduct*, 21 November 2006, p. 3.

lesser extent translated into concrete legal norms, but that does not eliminate the ethical aspect. Instructive is his observation that:

Behind the codification of the general principles of proper administration in statute lurks the more shadowy category of proper conduct as an ethical standard. Thus when the Ombudsman applies a legal norm or a general principle of law, he is not applying the legal version but the ethical norm which is included in this legal and general principle of law (my italics).⁵⁷

It might well be that this ethical norm requires more than its legal counterpart, and this extra element may also become “hard” law through recognition by the court or by the legislator.

The European Ombudsman’s vision as regards the relationship between legality and good administration is different. He emphasises first of all that “it can never be good administration to act unlawfully. Or to say the same thing another way, an act that is unlawful is also, *ipso facto*, an act of maladministration.”⁵⁸ However, he accepts that there is “life beyond legality”, and that maladministration does not, therefore, always imply illegality.⁵⁹ He observes that the principles of good administration require not only the institutions and bodies to respect their legal obligations, but also to be service-minded and ensure that members of the public are properly treated and enjoy their rights fully. He explains that this principle of service refers to requirements which are separate from other principles of good administration, such as proportionality, and which are not necessarily legally binding.⁶⁰

The European Ombudsman as a developer of “Ombudsnorms”

I share the vision as defended by Rijkema/Langbroek and applied by the Dutch Ombudsman. I would like to apply their vision on the difference between lawful and proper behaviour, and the individual character of the normative framework of the Dutch Ombudsman to the European Ombudsman. Although there are differences between the functions and legal mandate of the Dutch Ombudsman and that of the European Ombudsman, this does not prevent the application of their vision. At most, it may justify a slightly different approach towards the legality review, in particular to take into account the differences in (legal) environment in which both Ombudsmen operate. In this paragraph, I shall explain why in my view the European Ombudsman has his own responsibility in autonomously developing the ethical standard of good administration and in reviewing administrative behaviour for compliance with that standard.

The main justification for my vision lies in the fact that, like the Dutch Ombudsman, the European Ombudsman is not a court. Although both institutions deal with grievances arising from administrative malfunctioning, they operate for the most part in different ways and although their roles overlap to some extent, they perform different functions and employ different working methodologies.⁶¹ Consequently, the Ombudsman should not act like a court and instead fulfil its own functions.⁶² The European Ombudsman plays a different role in the EU constitutional setting besides that of the Courts, but also other control bodies, like the European Parliament and the Committee of Petitions. As correctly observed by Tomkins: “Whereas the Court has the task to check the lawfulness, the Ombudsman should police in a less legalistic manner.” The CFI has also underlined their different

⁵⁷ *Ibid.*

⁵⁸ See the speech of the European Ombudsman, 2007, *op cit.* note 12, p. 5.

⁵⁹ *Ibid.*, p. 7-8. See *Liber Amicorum*, *op cit.* note 1, par. 4.2.

⁶⁰ *Ibid.*

⁶¹ G. Drewry, “Ombudsmen and Administrative Law- Shining Stars in a Parallel Universe”, paper presented at EGPA Conference, Rotterdam, September 2008: Study Group on Law and Public Administration, p. 11.

⁶² See differently Leino, who argues that if the Nordic model is taken as a standard variant, the European Ombudsman’s task is not so much “to do things that the courts do not do, but to do them in an accessible manner, thus enabling protection of the citizens at large”, *op cit.* note 10, p. 364.

roles and has refused to take into account the findings of the Ombudsman.⁶³ In the *Tillack*-case, the complainant referred to the EO's verdict of maladministration on the matter, but this was not of any interest to the Court.⁶⁴ The latter stressed that the Ombudsman, being an *alternative non-judicial remedy* to the Court, meets specific criteria and does not necessarily have the same objective as judicial proceedings (my italics). The Court even denies the competence of the Ombudsman to undertake a legality review.⁶⁵ These rulings suggest that the Court rejects the original model underlying the establishment of the European Ombudsman, i.e. the Discount alternative model.

How can my vision however be reconciled with the fact that the European Ombudsman has been created for the purpose of conducting an inexpensive alternative to court proceeding and that this type of review is arguably more important because of the different legal environment in which he operates in respect of his national counterparts? The EU environment is characterised by a limited direct administration, and consequently complaints are made in respect of only a limited number of fields. Moreover, complainants are often legal persons interested in obtaining a legality review (see empirical research). Without downplaying the importance of the task of reviewing the lawfulness of administrative behaviour, in my view it is now time for the Ombudsman to evolve further. The Ombudsman should use his potentials more to the full and should not be satisfied with the task of a discount "surrogate" court.⁶⁶ As said above, he *is not* a court! The European Ombudsman should develop his own vision of what good administration requires from the administration and review the behaviour of the administration against his own yardstick: of course, as has been said before in the context of the Dutch discussion, not in isolation of existing legal standards. The remarks made above about the relationship between legal rules, general principles of law and the principle of good administration as employed by the (Dutch) Ombudsman also apply in the EU context.

A second justification for the Ombudsman's independent role in developing the norms of good administration is related to his control and educative function. The European Ombudsman has also been given the task to enhance the quality of the administration. The EC institutions are very legalistic in nature and by some within the administration the idea that the principles of good administration requires more of institutions and civil servants than avoiding unlawful behaviour is not yet fully understood.⁶⁷ Here lies an important task for the European Ombudsman. The Ombudsman should make explicit to the administration what is expected from them. Similarly, citizens need to know what they can expect from the administration and what the latter has to do to respond to the high expectations of the citizens. The task of explaining can be seen as an intrinsic element of the standard of proper administration. The adoption of the Code of Good Administrative Behaviour, but also the review of administrative behaviour on the basis of principles of good administration can help to enhance the trust between the citizen and the administration and in the end will safeguard the legitimacy of the exercise of powers. This is only so if the Ombudsman in each decision *explicitly* indicates the relevant principle of good administration and what it requires in that particular context, i.e. formulate the norm in context. In this way the administration can avoid similar maladministration in the future (education).⁶⁸

⁶³ T-193/04 *Tillack v Commission* [2006] ECR II-03995, para. 128. See also *AFCon Management Consultants and Others v Commission* [2005] ECR II-00981. J. Wakefield, *op cit.* note 29, p. 116.

⁶⁴ *Ibid.*

⁶⁵ See for an explicit rejection T-294/03 *Gibault v. Commission* [2005] ECR IA-00141 and II-00635, para. 45.

⁶⁶ The legality review remains however the prerogative of the Court. The Ombudsman inserts always the usual caveat in his decisions that "the Court of Justice is the highest authority in questions of application and interpretation of Community law". He must also refrain from conducting an investigation when the alleged facts are or have been subject to legal proceedings (art. 195 EC) and he may not intervene in cases before the Courts or question the soundness of a Court's ruling (art. 1(3)) Statute).

⁶⁷ J. Wakefield, *op cit.* note 29, p. 127.

⁶⁸ See N. Diamandouros, *Liber Amicorum*, *op cit.* note 1, par. 5.

Objections against norm-creation by the European Ombudsman

It has been argued by Bonnor that, “Ombudsmen are often perceived as mere ‘protectors of the little man in the street’ in individual disputes, yet the rule-making and educative role is often a more dominant feature.”⁶⁹ Norm-creation is therefore not something exotic, and research shows that the Danish and Swedish Ombudsman, but also the Dutch and the British Ombudsman, are all involved in the creation of norms of good administration despite their different nature.⁷⁰ He also puts forward a number of contextual factors which indicate that the European Ombudsman’s rule-developing role was probably intended and arguably evident from the start. Some resistance against the wish to allocate the EO an independent norm-creating role has been expressed in the literature for a number of reasons. So is it questioned whether he has the mandate and if he enjoys sufficient democratic legitimacy to engage in more independent standard-setting activities.⁷¹ The Ombudsman never creates legally binding norms himself; he may instead formulate norms which may in the end be turned into hard law or remain soft. Besides that he can, of course, induce the administration to adopt certain norms themselves (indirect norm-creation). But given the fact that the norms created by the Ombudsman are “soft”, i.e. they are not legally binding, as well as the EO’s decisions themselves, in my view there is not much against the allocation of this role, in particular since norms developed by the Ombudsman are unlikely to have much impact if they do not originate in generally accepted behavioural norms (*ethical binding* norms).⁷² If they do, then it is the task of the Ombudsman to make them explicit.

Another counter-argument is that the Ombudsman does not yet have enough authority to engage in norm-creation.⁷³ He would not enjoy the same status as his national counterparts in the Nordic states, whose unofficial comments are generally treated with respect. This argument cannot be disposed of too easily; however, after thirteen years in office the EO has gained in respect as is evidenced by his recent study concerning the satisfactory follow-up given by the Institutions to “critical remarks” and “further remarks” in 2006.⁷⁴

Those authors that do not want to leave standard-setting to the Ombudsman would like to see the adoption of a proper Code or an Administrative Enforcement Act.⁷⁵ As explained by Leino, for that group the adoption of such a Code constitutes a precondition for the Ombudsman to play his role fully as a guardian of citizens’ rights.⁷⁶ The Ombudsman himself is also in favour of transforming his Code into a European Act.⁷⁷ As far as the adoption of a fully fledged European Administrative Law Act, like for example the one that exists in the Netherlands (“AwB”), is concerned, the following can be said: The scope of such an act would be wider than the issue of good administration alone, and, furthermore, this act would probably lay down certain minimum requirements of good administration, but as has been explained before the Ombudsman aims at protecting a higher standard of good administration. The adoption of such an act would therefore not compromise the Ombudsman’s own

⁶⁹ See P. Bonnor, 2000, *op cit.* note 17, p. 39.

⁷⁰ *Ibid.* See furthermore Ph.M. Langbroek and P. Rijkema, 2004, *op cit.* note 21, p. 47-64. The two Nordic Ombudsmen have been characterised as redress-Ombudsman, whereas the Dutch and the British Ombudsman place a greater emphasis on their mediation role.

⁷¹ P. Leino, *op cit.* note 10, p. 363.

⁷² Senior Legal Adviser Danish Ombudsman J. Olsen, *Good Administrative Practice*, p. 1 at <http://www.ioi-europe.org/goodadministration/danmark.pdf>.

⁷³ Leino, *op cit.* note 10, p. 363.

⁷⁴ *Ibid.* See also the study of the follow-up given by institutions to critical remarks and further remarks done by the EO in 2006, at: <http://ombudsman.europa.eu/followup/pdf/en/crfr2006.pdf>.

⁷⁵ Leino, *op cit.* note 10, p. 360.

⁷⁶ *Ibid.* He is amongst those that argue that the Ombudsman’s task must be limited to scrutinising the executive, and that responsibility for rule-making lies elsewhere, p. 364.

⁷⁷ See EO’s European Code of Good Administrative Behaviour, 2005, p. 9.

responsibility in developing the standards of good administration as is confirmed by the Dutch example.

The application of the new vision in practice

My normative vision regarding the European Ombudsman's role in developing norms of good administration, as explained above, requires that in each decision on maladministration he indicates the relevant principle of good administration, and what it requires in that particular context, i.e. he must formulate the norm in context. When he has explicitly been requested to check the legality of the administration's behaviour, he may do so, but at the same time he must also review the behaviour for compliance with his own principles of good administration. The question is why this lawful or unlawful behaviour is proper or improper according to his own (ethical) standard of good administration.

It is clear that this new approach requires changes to be made in the Ombudsman's mode of operation, which, as he observes himself, is difficult to capture. First of all, he stresses the fact that he might switch from the dispute-resolution mode, which focuses on problem-solving, conflict reduction, possibilities for compromise and win-win outcomes to the adjudicative mode in which he finds that there is either maladministration, or that there is no maladministration.⁷⁸ In both modes the Ombudsman applies legal rules and principles, as well as extra-legal standards. The EO starts basically with a legality review. It does not matter whether the issue can be brought before the Court or not; if it has legal aspects the Ombudsman will refer to them.

The Ombudsman might prefer to conduct a soft-law review for mainly two reasons: First, to simply avoid legalistic counter-arguments, and hence to have more freedom to formulate norms and enhance its chances of compliance,⁷⁹ for example in cases where it is not entirely clear what the law requires or if it is a case of the interpretation of the law. He may also attempt to trigger a soft-law process, "which aims to procure an impact through either a generalisation of the soft-norms formulated or even a "crystallisation" of the soft-norms into hard law."⁸⁰

Another reality, already referred to earlier, is that he refers as much as possible to legal sources, case-law included, "to beef up" the decision in order to persuade the institutions to take their responsibility.

Not infrequently, decisions of the Ombudsman are blurred, in the sense that it is not clear whether the Ombudsman decides the complaint on the basis of legal norms or principles of proper administration.⁸¹ This is the result of the fact that the Ombudsman may apply both standards, so there is no need to make this explicit (he can remain vague) or to choose between one standard of another (he may refer to both of them in the same decision). It has been pointed out in the literature that this "blurriness" is deliberate as it enables the Ombudsman to develop norms.⁸²

Another aspect of the Ombudsman's work is that he tries to reach solutions acceptable to both parties, which does not necessarily involve the Ombudsman in making a finding either that there is, or that there is not, maladministration.⁸³ Sometimes an apology is enough to settle the matter, or perhaps a telephone call will suffice. In those instances the Ombudsman does not have to make explicit what norm he relied upon to settle the matter, although he probably has a norm in mind. Here the

⁷⁸ *Ibid.*

⁷⁹ P. Bonnor, 2000, *op cit.* note 17, p. 45.

⁸⁰ *Ibid.*

⁸¹ In Denmark the distinction between a non-legality and legality review is also at times difficult to determine and has given rise to debate, P. Bonnor, 2003, *op cit.* note 14, p. 249.

⁸² P. Bonnor, 2000, *op cit.* note 17, p. 43.

⁸³ N. Diamandouros, *Liber Amicorum*, *op cit.* note 1, par. 5.

Ombudsman is more a mediator, who aims at an ad-hoc solution and is less occupied with norm development.

One of the aspects that should change is this “blurriness” of decisions. In order to guide the institutions in their future behaviour a clear exposition of the norms of good administrative behaviour is required. Another obstacle might be that the EO does not find it necessary to provide an additional check for compliance with its own principles of good administration in case the complainant has only asked for a review of the lawfulness of this behaviour. This seems contrary to sound time management – at the end of the year even Ombudsman officials need to have a certain amount of output. Nonetheless, the empirical research will show that despite the above-mentioned “realities”, it is possible to apply the suggested approach in respect of the European Ombudsman.

Part II Empirical research into the norms of good administration in the field of tenders: Results and recommendations

Structure of Part II

In this part the results of the empirical research shall be presented. First, the research method shall be explained. After having described in some detail the field of public procurement and the existing legal framework, the remaining part consists in a discussion of what the principle of good administration requires in the field of tenders according to the European Ombudsman. Those principles of good administration that are central to the area of tenders shall be analysed, as well as the norms in context. Next, the following three questions will be answered in separate paragraphs: What norms are missing in the EO Code of Good Administrative Behaviour and can the Code be refined? Is the Ombudsman active in creating norms of good administration and does he make a distinction between acting lawfully and properly?

The research method

I have analysed about 60 reports in the field of tenders, and in most cases I managed to identify the norm in context, i.e. the abstract principle of proper administration as applied in a concrete case. The method consists of summarising the situation described in a report of the European Ombudsman, including his judgement. Next, the concrete norm in the context of the case is formulated. In those instances in which the Ombudsman has not explicated the norm in its report, I have tried to deduce the norm from the factual material of the case. Subsequently the norm identified is linked to the abstract principle of good administration involved. Where the Ombudsman only refers to a legal rule, I have tried to find the ethical norm of good administration behind this legal norm. I have categorised the norms identified on the basis of the principles of good administration as laid down in the Ombudsman’s Code of Good Administrative Behaviour. The actual operation of the above mentioned research method is demonstrated in the appendix to this Working Paper. This appendix also contains the inventory of norms.

A few caveats must be made. The analysis covers the reports that have been published by the European Ombudsman on his website till January 2008 (the last one being complaint 2633/2006/WP to be found in “decisions concerning contracts”). Although the analysis covers almost all complaints in the field of tender, not all have been included in the inventory. The reasons for this are diverse; certain complaints were not interesting, too many complaints of the same type, not electronically available (1995/1996) or too complicated. Furthermore, complaints often contain more than one allegation which might relate to different principles of good administration. Since it is difficult to divide the case summary in separate parts, the summary is placed under one of the abstract principles of good administration involved. The other principles of good administration that are relevant, and the norms in context that can be deduced, are mentioned under the heading “Other principles of good

administration". In the situation that the case summary and relevant principles of good administration can be easily separated, this method will be followed. Therefore, to obtain a complete overview of the norms in context relating to one specific abstract principle of good administration, the reader has to look further than the norms categorised explicitly under that specific principle of good administration. To make this exercise easier a reference shall be included at the end of each abstract principle of good administration indicating those complaints which also concern that principle. In order to distinguish the norms that have been explicitly formulated by the European Ombudsman from those deduced by myself, the first have been placed in italics. Finally, critical and further remarks are not always mentioned at the end of a case summary.

EU public procurement

Introduction

The types of complaints that are dealt with by the European Ombudsman office are of a different nature than the complaints made to his national counterpart. This is due to the fact that direct administration, and therefore the direct contact between the Brussels administration and the European citizen, is limited. Traditionally the Community administration has been shared, with the Commission working directly with national bureaucracies to implement policy in areas such as the Common Agriculture Policy and Structural Funds.⁸⁴ Complaints about illegal or improper implementation of European policies by national administrations are a matter for the national Ombudsman. Typical complaints to a national Ombudsman regarding the exercise of force by the police or the granting of subsidies and all kind of permissions are absent in the European context. The European Ombudsman receives in particular complaints in respect of the following areas: recruitment procedures, the infringement procedure (art. 226 EC), transparency and openness, and tenders and contracts. The empirical research which I have conducted regards the area of tenders and contracts; however, this Working Paper presents only the results in regard of tenders.

The key actor in the field of tenders and contracts is the Commission, which is the executive power in the Union. Through public contracts awarded after a tender procedure the Commission buys services, goods and works in order to ensure its operation including the administration of European Union projects or activities. The area covered by the public contracts awarded by the Commission includes for instance carrying out studies, commissioning consultancy work or technical assistance, conducting information and communication campaigns, accessing databases useful for Commission activities, organising conferences, setting up training courses, purchasing publications or IT equipment as well as obtaining and fitting out offices for Commission departments.

In respect of the direct administration of EU projects, the Commission takes initiatives in relation to tourism, co-operation with non-member countries of the southern Mediterranean (the MED programmes), emergency aid, vocational training (the Leonardo da Vinci programme), nuclear safety policy, as well as the Tacis and Phare programmes.⁸⁵ The Commission will implement a programme without formal, systematic co-operation with national bureaucracies, but this does not mean that it carries out the entirety of the activity itself "in-house". It is common to contract out part of the work through tenders. Other institutions also issue public contracts, but to a lesser extent.

EU Public procurement is subject to an extensive detailed legal framework. Tenders placed by the EU institutions are subject to articles 12, 28, 43 EC and 49 EC of the EU Treaty, the Financial

⁸⁴ P. Craig, *op cit.* note 32, p. 32.

⁸⁵ *Ibid.*

Regulation⁸⁶ and the Tenders Directives (see preamble recital 24 Financial Regulation),⁸⁷ as well as the case-law of the European Court of Justice. In the Financial Regulation (“FR”), which has been implemented through Commission Regulation 2342/2002 (“IR”),⁸⁸ the rules on the award of tenders are laid down in detail. The Financial Regulation and the implementing Regulation incorporate the rules laid down in Directive 2004/18.⁸⁹ In the next paragraph, the main aspects of this Regulation and its implementing rules shall be discussed.

The public procurement rules

Contracts shall be awarded by a “call for tender” using the open, restricted or negotiated procedure (Ch. 1, sec. 3 IR). Calls for tenders are open where all interested economic operators may submit a tender. In the restricted procedure, economic operators may ask to take part, but only candidates satisfying the selection criteria may submit a tender by invitation from the contracting authority. In a negotiated procedure, the contracting authorities shall consult the candidates of their choice who satisfy the selection criteria and negotiate the terms of the contract with one or more of them. There is also the call for expression which is, however, not a complete procurement procedure but regards a pre-selection of candidates in the light of future restricted invitations to tender.

The public procurement procedure(s) can be divided in three phases, each of which shall be briefly described.

(1) The first phase regards the preparation of the tender documents, its announcement and the dispatch of tender documents and the receipt of the tenders. All contracts are subject to publication duties, either through publication in the O.J. with/without a contract notice and through advertisement by other means. The contract notice is to inform all potentially interested operators that a tender procedure has been launched and it describes the characteristics of the contract. However, it are the documents relating to the call for tenders that must give a full, clear and precise description of the subject of the contract and specify the exclusion, selection and award criteria applicable to the contract (art. 92 FR). The contract notice must be consistent with the tender documents. The tender documents constitute the cornerstone of the competitive tendering, which is the rule for public procurement.⁹⁰ Tenders must be received and opened and evaluated and the contract must be awarded in accordance with the arrangements set out in those documents.

Tenderers must be eligible to participate in tendering procedures. Furthermore, tenderers are excluded from participation when they are involved in certain illegal activities, and a contract will not be awarded to those candidates or tenderers who, during the procedure, are subject to a conflict of interest, are guilty of misrepresentation of the information required by the authority as a condition for participation or fail to supply this information, or find themselves in certain illegal situations. The selection criteria are intended to check whether an operator is capable of performing the contract. They

⁸⁶ Council Regulation (EC, Euratom) No 1605/2002 of 25/06/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248/1.

⁸⁷ I.e. the four procurement directives are Directive 93/36 (supplies), OJ 1993, L 199/1, Directive 93/37 (works), OJ 1993, L 199/54, Directive 92/50 (services), OJ 1992, L 209/1 and Directive 93/38 (utility sectors), OJ 1993, L 199/84. These have been recently replaced by Directive 2004/18 (procedures for the award of public works contracts, public supply contracts and public service contracts), OJ 2004, L 134/114 and Directive 2004/17 (procurement procedures of entities operating in the water, energy, transport and postal services sectors), OJ 2004, L 134/1.

⁸⁸ Commission Regulation (EC, EURATOM) No 2342/2002 of 23/12/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 (hereinafter: IR) on the Financial Regulation applicable to the general budget of the European Communities.

⁸⁹ It should be observed that given the period of the research 1995-2008, the Financial Regulation (hereinafter: FR) has been applied in three different versions. Beneath the FR is described which applied from 2002 (amended in 2006).

⁹⁰ Vade-mecum on public procurement in the Commission, March 2008, par. 5.2.1.1.

must be drafted in a clear and non-discriminatory manner, and regard the financial, economic, technical and professional capacity of the tenderer (art. 135 IR). In respect of the *eligibility, exclusion and selection* criteria, the tenderer must or may be asked to submit proof.

The purpose of the *award* criteria is to choose the best offer out of those submitted by the tenderers which are not excluded and meet the selection criteria. The award criteria are intended to assess the *quality* of the tender and not the ability of the tenderer. Contracts shall be awarded by the automatic award procedure, i.e. the contract is awarded to the tender which quotes the lowest price, or by the best-value for money procedure, which is the one offering the best price-quality ratio, taking into account criteria justified by the subject of the contract, such as technical merit, functional characteristics, environmental characteristics, running costs, delivery time etc. In the contract notice or in the specification/descriptive document the contracting authority must specify the weighting it will apply for each of the criteria for determining best value for money (or if not possible the decreasing order of importance in which the criteria are to be applied). This is the method most frequently used by the Commission and it entails defining detailed award criteria to determine quality. The method used must not only make it possible to select a quality tender but also place an obligation on tenderers to compete on price. Unlike the technical criteria, which are usually evaluated by means of a mark, the price given by the tenderer is an objective element and cannot be marked.⁹¹

The set of tender documents are made available through electronic means or sent to the operators in written form. Before the closing date for the submission of tenders, contact with the tenderers is only allowed by way of exception (see art. 148(2) IR).

The submission of the tender documents is subject to specific (minimum) time-limits and methods of submission. The time-limits for the receipt of tenders and requests for participation shall be long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders (...) (art. 140 IR). The arrangements for submitting tenders must be such as to ensure that there is genuine competition and that the contents of the tenders remain confidential until they are opened simultaneously (art. 98(1)FR). It is the contracting authority that determines the method of submission. Tenders and requests for participation may be submitted by letter or by electronic means, and requests to participate by fax. When tenders are sent by letter, the envelope is subject to specific requirements in respect of its sealing. The contracting authority must make arrangements in advance to receive tenders, including all the items for verifying the date of submission and they must make sure that the tender remains sealed until the opening session.

(2) The second phase regards the opening of the tender procedure and the evaluation phase. All requests that satisfy the submission requirements, i.e. submitted by the deadline and in a sealed envelope, are opened. Above a certain threshold this is done by a committee composed of at least three persons from the institution. Next, an evaluation committee is set up to evaluate the tenders for compliance with the exclusion, selection criteria and the award criteria. The evaluation committee consists of at least three persons representing at least two (non-hierarchical) organisational entities of the institution concerned (...). Outside experts may assist the committee. The evaluation must be done in an identical and non-discriminatory manner. The members of the evaluation committee and outside experts are subject to the obligations laid down in article 52 FR concerning the prevention of conflicts of interests. After the tenders have been opened, contacts with tenderers is only allowed in the following exceptional circumstances on the initiative of the contracting authority: if obvious clerical errors in the drafting of the tender need to be corrected; to request additional material or clarification on the exclusion and selection criteria. Such contacts may not alter the terms of the tender (art. 148 IR), however.

There are certain situations in which the contract specifications are not met and which result in the rejection of the tender, for example, when the tender differs on a point of substance from the

⁹¹ Vade-mecum, par. 5.2.2.7.3.

description of the subject of the contract contained in the specification or proposes a solution different from the one imposed.⁹² In case of abnormally low tenders, the evaluation committee shall request any relevant information concerning the composition of the tender. Tenders can also be judged unacceptable either because their technical quality is inadequate or the price is too high. Tenders that are not excluded (see above) and satisfy the selection criteria are admissible. Next, the evaluation committee evaluate and rank the tenders on the basis of the award criteria. During this phase anything to do with experience, expertise, references, work already done, and resources available can be ignored: All these are covered by the selection criteria.⁹³ In the end a written record containing the results of the evaluation and ranking shall be drawn up. This public report must be carefully drawn up and provides minimum information similar to that contained in the reasoned award decision which is taken by the authorising officer on the basis of the advisory opinion of the committee (art. 147 IR). This decision must give minimum information which is specified in art. 147 IR and includes the names of the tenderers/candidates rejected and the reasons for this, the names of those to be examined and the reasons for their selection, the names of the candidates/contractors selected and the reasons for that choice by reference to the selection and award criteria.

(3) The third phase concerns the awarding of the contract and informing the tenders of the decision. Successful and unsuccessful tenderers have a right to obtain information after notification of exclusion, selection or award decisions (art. 100(2)FR and 149 IR). This right is part of the rights of defence and the administration's obligation to give reasons for its decisions adversely affecting an individual. According to the rules the tenderers have to be informed as quickly as possible of the award decision (art. 149 IR). The contracting authority has to notify simultaneously and individually as soon as possible after the award decision and within one week at the latest all unsuccessful tenderers of the grounds on which the rejection decision was taken.⁹⁴ They will also be informed that the contract will not be signed until two weeks have elapsed from the day after the dispatch of the notification message, in order to allow unsuccessful tenderers to ask additional information and, if appropriate, to start legal actions. Unsuccessful tenderers and candidates may request additional information about the reasons for their rejection in writing, and all tenderers who have put in an admissible tender (those that satisfy the exclusion and selection criteria) may obtain additional information about the characteristics and relative advantages of the successful tender and the name of the successful tenderer (within no more than fifteen days from receipt of the request).⁹⁵

Before signing the contract the contracting authority is allowed to cancel the award procedure without the tenderers being entitled to claim for damages (art. 101 FR). Finally, the Financial Regulation lays down the measures that the institution must or may take when it appears that the award procedure or the performance of the contract have been subject of substantial errors, irregularities or fraud (art. 103).

The objectives and guiding principles of the EU public procurement procedure

As has been explained by the Commission "public procurement policy aims at contributing to the realisation of the Single market by the creation of competition necessary for the non-discriminatory award of public contracts and the rational allocation of public money through the choice of the best offer presented. Implementing these principles enables public purchasers to obtain the best value for money, following certain rules on how to define the subject matter of the contract, for the selection of

⁹² Vade-mecum, par. 5.5.3.3.

⁹³ Vade-mecum, par. 7.2.

⁹⁴ See own-initiative inquiry of OI/2/2002/IJH. The Ombudsman has made a further remark since the Communication does not expressly provide that unsuccessful tenderers and candidates shall be informed of the possibility to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed.

⁹⁵ Communication from the Commission, COM(2003)395 final (03.07.03).

the candidates according to objective requirements and the award of the contract solely on the basis of the price or alternatively on the basis of a set of objective criteria.”⁹⁶ It has been observed in the literature that the Tender Directives aim foremost at creating equal opportunities for firms and to ensure a minimum level of transparency so that member states cannot easily conceal discriminatory award decisions instead of the rational allocation of public money.⁹⁷ The Financial Regulation has as its first objective to make sure that the budget is well spent, i.e. sound financial management. In fact in the public procurement rules provisions can be found on the suspension of the contract and pay back money (art. 103 FR). Furthermore, art. 89 requires that all public procurement contracts financed in whole or in part by the budget need to comply with the principles of transparency, proportionality, equal treatment and non-discrimination and they shall be put out to tender on the broadest possible base.

The principles of equal treatment and transparency are central to the public procurement procedure in the EU and therefore a few remarks about these principles and their relationship is required.⁹⁸ In Case C-87/94 *Commission v. Belgium*, the Court held, on the basis of the text of Directive 90/531, that the procedure for comparing tenderers had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency. The relationship between equality of treatment and transparency was elaborated in more detail in a number of public procurement cases at national level, and EU level.⁹⁹ In a number of cases the principle of equal treatment and non-discrimination is said to imply an obligation of transparency.¹⁰⁰ There are also cases which seem to suggest that transparency and equal treatment are to be considered as two separate principles which exist along each other.¹⁰¹ Transparency has, in certain respects, also a more specific meaning of its own.¹⁰² It requires, inter alia, the clear and unambiguous drafting of the conditions for and the rules on the award procedure. The selection and the award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. The adjudicating authority must interpret the selection and award criteria in the same way throughout the entire procedure and must apply them objectively and uniformly to all tenderers. The substantive and procedural conditions concerning participation in a contract, including criteria for selecting candidates and those awarding the contract must be clearly defined in advance and make known to the persons concerned. In principle, no new criteria or specifications may subsequently be taken into account. There should at least be a certain degree of publicity or advertising in order to enable the market in question to be opened up to competition.

The principle of equal treatment is said to imply an obligation of transparency for mainly two reasons. The first is the creation of equality of opportunity, thus to place all potential bidders on an equal footing. According to the ECJ transparency affords all interested parties equality of opportunity

⁹⁶ COM (2001) 274 final.

⁹⁷ S. Arrowsmith, “The Past and Future Evolution of EC Public Procurement Law: from Framework to Common Code?” *Public Contract Law Journal*, No. 3, 2006, p. 337-384, at p. 340.

⁹⁸ The following paragraphs are extracts from A. Prechal, M. de Leeuw, “Dimension of Transparency”, *Review of European Administrative Law*, 2007/1 (zero issue), p. 57-59. See also A. Prechal and M.E. de Leeuw, *op cit.* note 22, at p. 229-233.

⁹⁹ Cf. Joined Cases T-191/96 and T-106/97 *Succhi di frutta* [1999] ECR II-3181 and Case T-183/00 *Strabag Benelux NV* [2003] ECR II-135. The cases concerning national public procurement procedures, insofar they clarify the relationship between the principle of transparency and equality, are also relevant for EU tenders. These two principles must be respected at both levels.

¹⁰⁰ Cf. for instance Case C-19/00 *SIAC* [2001] ECR I-7725 and Case C-410/04 *ANAV* [2006] ECR I-3303. See further Case C-231/03 *Coname* [2005] ECR I-7287 and Case C-496/99 P *Succhi di frutta* [2004] ECR I-3801.

¹⁰¹ For instance Case C-458/03 *Parken Brixen* [2005] ECR I-8612, para. 50 or Case C-448/01 *Wienstrom* [2003] ECR I-14527, para. 58.

¹⁰² The meanings of transparency which are provided derive from different cases. It is not relevant to mention those cases, but references can be found in A. Prechal, M. de Leeuw, *op cit.* note 98 (“Dimension of Transparency”), p. 57-59.

in formulating the terms of the applications for and participation in the tenders.¹⁰³ The second reason is to facilitate control of compliance with the principle of equal treatment.¹⁰⁴ Such control must be possible during the award procedure and ex post, and control must be made possible for the contracting authority, but also for the tenderer.

The fact that transparency must make it possible to review whether the principle of non-discrimination has been observed, illustrates that transparency precedes non-discrimination and in that sense it can be separated from equal treatment. Transparency is also “intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority.”¹⁰⁵ This constitutes another indication to consider transparency as a principle independent from equality and non-discrimination. Also in the two tender Directives from 2004, transparency has been codified alongside the requirement of equal treatment and non-discrimination.¹⁰⁶

Conclusion

The EU tender procedure is regulated in detail and the public administration in each phase of the decision-making process is subject to a number of duties to ensure genuine competition and fair procedure. To resume, “hard law” good administration means in respect of the different decision-making phases the following: during the preparation phase, the administration must be extremely careful that it drafts the tender documents in a clear, precise and non-discriminatory manner, in order to allow all those interested to draft a well-targeted tender and as a result to obtain the best possible offer. On the other hand the tenderer has an own responsibility in carefully drafting its tender and make sure that it fulfils all the criteria mentioned in the tender documents and submit all required proof. It must in particular give insight in its ability to perform the subject of the contract as well as show the quality/price relationship.

The second phase regards the evaluation by the evaluation committee of the fulfilment of the exclusion, selection and award criteria. This phase gives a wide discretionary power to the administration to decide whether or not those criteria have been fulfilled. In particular, it is important that no conflict of interest exists between a member of the evaluation committee and tenderers.

The third decision-making phase concerns the award decision and ex-post information duties of the administration. Of particular importance is that unsuccessful tenders obtain sufficient information to understand why their tender has been refused and why it was granted to the successful tenderer. It should be clear whether there were irregularities in the procedure or whether the tender has been evaluated wrongly or unfairly, in order to start Court proceedings or go to the Ombudsman. Finally, transparency requirements exist in all three phases for the reasons mentioned in the preceding paragraphs.

The presentation of the results of the empirical research

Good administration in the field of tenders

In this section an answer shall be given to the question what the principle of good administration means in the field of tenders according to the EO? Complaints are usually submitted by tenderers (i.e. company) which bids have been rejected. The unsuccessful tenderer complains in particular about the

¹⁰³ Case C-231/03 *Coname* [2005] ECR I-7287, para. 17 and 18.

¹⁰⁴ Case C-458/03 *Parken Brixen*[2005] ECR I-8612, para. 49 and Case C-324/98 *Telaustria* [2000] ECR I-10745, para. 62.

¹⁰⁵ Case C-496/99 P *Succhi di frutta* [2004] ECR I-3801, para. 111 and Case C-6/05 *Medipack* [2007] ECR-I-04557, para. 53.

¹⁰⁶ See art. 2 of Directive 2004/18, *op cit.* note 87, and art. 10 Directive 2004/17, *op cit.* note 87.

fact that the institution has not drafted the tender documents clearly and in a non-discriminatory manner and that the latter failed to contact it about unclear aspects of the bid before rejecting it; the evaluation has not been done in an impartial and independent manner because of an existing conflict of interest; its bid was wrongly rejected because the tenderer fulfilled the eligibility and selection criteria; the institution failed to provide information about the grounds of rejection of a bid and about the bid of the successful tender. Furthermore, there are a number of complaints about the fact that letters have not been answered or were answered belated, lack of referral of complaint to the competent authority or that staff had not treated the complainant with courtesy. The complaints regard different phases in the decision-making process and different principles of good administration are involved. Next follows an analysis of those principles of good administration which are central to the field of tenders as emerges from the empirical research. To have a complete overview of the principles and norms in context that are applied by the EO in this area, the empirical research which is annexed to this Working Paper needs to be consulted. The type of review conducted by the Ombudsman shall also be discussed.

Review of discretionary decisions in tender complaints

As regards discretionary administrative decisions, the EO has observed in his Annual Report that the substantive content of a measure would not be open to scrutiny, provided that the institution or body concerned has acted within the limits of its legal authority. “General limits on such authority are established by the jurisprudence of the Court of Justice which requires, for example that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principle of proportionality, equality and legitimate expectations and respect for human rights and fundamental freedoms.”¹⁰⁷ This approach is in fact followed by the Ombudsman in the field of tenders.

The unsuccessful tenderer complains about the fact that the institution has wrongly rejected his bid on the basis of the exclusion or selection criteria or the successful tenderer has not fulfilled those conditions. There are hardly any complaints of the nature that it has been *unfair* that a tenderer did not obtain the tender, because it should have obtained a higher score in respect of a certain award criteria or the successful tenderer obtained a too high score. Although unsuccessful tenderers may obtain additional information about the rejection of their own bid and about the successful bid, this might not be sufficient to prove this type of allegation and for the Ombudsman to review.¹⁰⁸ It would require a comparison between the two (or more) bids, which demands considerable technical knowledge in the matter. Furthermore, it can be argued that the administration should retain some (discretionary) space to prefer a certain bid over another, simply because it fits better the administrations overall plans or policy.

The EO’s review is similar to that of the Courts in tender cases.¹⁰⁹ The EO’s standard line is that “the administration enjoys a wide discretion when evaluating tenders on the basis of the criteria laid

¹⁰⁷ EO Annual Report, 1997, p. 26.

¹⁰⁸ In response to a written request from unsuccessful tenderers, which tenders are admissible, have the possibility to obtain additional information from the Commission about their own bid and that of the successful tenderer. The Commission has to inform about the characteristics and relative advantages of the tender accepted and the name of the successful tenderer. More precisely, the total price relating to the offer of the successful tenderer, the breakdown of points for each of the quality award criteria as well as comments and observations of the evaluation committee which justify the points attributed have to be furnished to the applicants. However, in particular information cannot be provided if this would harm the legitimate business interests of public or private undertakings or could distort fair competition, or would be contrary to the provisions applicable to the protection of personal data. Article 100(2) FR, and article 149(2) and (3), third subpar. IR.

¹⁰⁹ Community Courts have held that in relation to the procedure to be followed to award a contract following an invitation to tender the Commission has a broad discretion with regard to the factors to be taken into account. Review of the actions pertaining to a tender procedure is therefore limited to checking that the rules governing the procedure and the statement

down in the call for tenders. His review in this context is thus limited to whether the assessment made by the administration is vitiated by a manifest error of appraisal.”¹¹⁰ At times the EO examines whether the institution has provided an adequate statement of reasons for its decision to reject a tenderer’s bid (see complaint 1193/2001/JMA). However, both are checks whether the Commission acted within the limits of its legal authority.

The manifest error test is a standard of review and is not a review for compliance with a principle of good administration. The principle of good administration that is involved is whether the administration has balanced the interests involved and whether the outcome is reasonable. This principle has been placed in the EO Code partly under “the principle of objectivity”. Article 9 stipulates that “when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration”.

Most complaints are about the correct evaluation of the facts (can on the basis of the evidence be concluded that the tenderer fulfils the tender criteria) or correct interpretation of legal terms in the light of the balancing of interests. The interest that is balanced regards which tenderer provides the best performance within the prescribed budget. The Ombudsman does not redo the balancing test nor does he investigate the complaints thoroughly, but he checks whether the explanation given by the Commission is *reasonable* or not *unreasonable*. “Reasonable” does not refer to any substantive legal principle, but whether the institution has been able to provide a convincing explanation about why it chooses a particular option. If it can explain this to the Ombudsman, the latter does not investigate the matter further. The complainant should, however, provide some evidence to support its allegations; otherwise the EO concludes that the allegation has not been substantiated. This is not always easy because a tender does not have access to the competitor’s tender. The tenderer might feel that there is something wrong or unfair, but has difficulty to substantiate it. Most of the times the EO concludes that the administration’s explanation is *reasonable*, but he may detect flagrant errors, like in complaint 1043/2000/GG, in which the Commission had rejected a tender because the tenderer did not fulfil the requirement of “hands on experience” of the design of water treatment facilities. The EO concluded that the Commission had made a manifest error of assessment given that this conclusion was not born out of the evidence on which the Commission relied.

The question that emerges is whether the EO can conduct a more intensive review than detecting only blatant errors? According to Ombudsman officials, he lacks the technical expertise to evaluate the bids and compare them.¹¹¹ He has also no access to the bids of the other tenderers because of reasons of confidentiality. Perhaps if the Ombudsman and the complainant would have access to a non-confidential version of the successful tender bids, excluding all sensitive business information, the complainant would be able to indicate the EO more precisely what aspect constitutes in his view maladministration and the latter could conduct a more thorough review. Given this limitation, the Ombudsman tries to concentrate his review on procedural fairness, for example, checking whether the evaluation panel is qualified and impartial (see par. on the duty of impartiality and prevention of bias).

The duty to gather information and the no- contact rule

It is the responsibility of the tenderer to proof that it fulfils the tender criteria, i.e. the onus is on the tenderers. The required proof in respect of specific tender criteria is often explicitly mentioned in the

(Contd.) _____

of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers, see complaint 1193/2001/JMA.

¹¹⁰ Complaint 1167/2004/PB. See also complaint 1043/2000/GG in which the EO observed “it is of course in the first place for the administration organising a call for tenders to assess whether the applicants fulfil the conditions laid down in this call. The Ombudsman must not submit this assessment by his own but only check whether the administration’s assessment is manifestly unreasonable.”

¹¹¹ Comment made in interview with Ombudsman staff.

call for tender and at times it is also specified that failure to submit the right documents leads to the exclusion from the award procedure.¹¹² Hence, the administration shall in most situations reject the tender without asking for the submission of additional information. In complaint 1167/2004/PB the professional certificates of the tenderer did not represent a sufficient explanation of the working methods of the network or of the workflow between the freelance translators, core members of the network and the co-ordinator of the network. The Commission had, however, not requested any additional information from the tenderer. The Ombudsman pointed out that neither the Notice of Competition in this case, nor *general principles of good administration*, required the evaluation committee to contact the complainant in order to obtain additional information or clarification relating to these points.

The administration's own responsibility to prepare its decisions with care, and in that light to gather information, is limited. This can be explained by the fact that in the field of tenders there exists the important rule of "no contact" between the administration and the tenderers during the tender procedure, which is applied by the Commission, but also by other institutions.¹¹³ In the Commission's implementing rules of the Financial Regulation the provision is laid down that "...every invitation to tender shall in particular: ...(h) Prohibit any contact between the institution and tenderers during a procurement procedure save in the following exceptional circumstances: ...[(second paragraph)] after the opening of tenders: if some clarification is required in connection with a tender or if obvious clerical errors in the tender need to be corrected, the institution may contact the tenderer provided that the terms of the tender are not modified as a result" (art. 148 IR). As explained by the CFI in its case-law, which is followed by the Ombudsman in this area, this rule should protect the equality of the tenderers when their tenders are evaluated, as they are all under an equal duty to take care in drawing up their tenders.¹¹⁴

Both the Commission and the EP seem(ed) to share the erroneous opinion that they can decide themselves whether or not to exercise the power to seek or not to seek clarification. This vision has been rejected by the CFI and the Ombudsman, however.¹¹⁵ As has been ruled by the CFI in its case-law the power to ask for clarifications must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarifications of a tender is clearly both practically possible and necessary.¹¹⁶ The evaluation committee has a duty to exercise a certain degree of care when considering the content of each tender. Thus, in cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then in principle it is contrary to the requirements of *good administration* (concerning the exercise of discretionary powers) for an evaluation committee to reject the tender without exercising its power to seek clarification.¹¹⁷ The Ombudsman follows the CFI's ruling in complaints that it receives concerning this aspect.¹¹⁸

The institutions are hesitant to ask for additional information or clarifications, and prefer to remain on the safe side in order to prevent being accused of unequal treatment. An extreme example is the recent complaint about the Commission's rejection of a tender bid because the overall price of the

¹¹² See complaint 1315/2005/BB.

¹¹³ See complaint 1315/2005/BB concerning the EP. This identical rule is specified in the General Specifications of the Call for tender.

¹¹⁴ See complaints 142/2005/BB and 1315/2005/BB.

¹¹⁵ See in respect of the Commission, T-211/02 *Tideland Signal Limited v. Commission* [2002] ECR II-03781 and in respect of the EP, complaint 1315/2005/BB.

¹¹⁶ See T-211/02, [2002] ECR II-03781.

¹¹⁷ See T-211/02, [2002] ECR II-03781.

¹¹⁸ See complaints 142/2005/BB and 1315/2005/BB.

tender was EUR 21 above the maximum price specified in the Call for tender.¹¹⁹ This was the consequence of a recalculation carried out by the evaluation committee as a result of anomalies which it understood to be present in the paper version of the bid. The Ombudsman ruled that the mere fact that the tenderer's bid exceeded the maximum budget of EUR 4 million by only EUR 21 should, on its own, have led to the evaluation committee to consider the need to clarify this bid with the tenderer. Although the evaluation committee is of course not obliged to ask for clarification as regards each and every point which may be unclear in a bid, it would certainly be an abuse of its discretion, and therefore constitute an instance of maladministration, if the Evaluation committee failed to seek clarifications as regards an issue which was unclear and which would prove decisive for the acceptance or rejection of the bid. It is good to realise that preparing a tender is a very elaborative exercise and that rejection because of some minor error or flaw is very frustrating and would prevent tenderers from applying in the future. Furthermore, from a viewpoint of the interests of the administration it is not wise of the administration to undo itself too quickly of valid tender bids. This can create serious risks of compromising the interests of the institutions and community funds.

Given the fact that the institutions tend to eschew any contact with the tenderers, the Ombudsman can play an important role here. It should vigorously supervise the compliance of the institutions with their own responsibility to prepare with care its decisions, and request clarifications, if necessary, within the limits set by the principle of equality. It must be observed that this element of the principle of care/due diligence (i.e. gathering information), which is also recognised as a legal principle, is missing in the EO's Code of Conduct. Article 9 EO Code seems only to refer to the actual correct performance of the balancing test on the basis of all relevant factors and not at the preparation phase of collecting the information by the administration (see further the suggestions made in par. on norms that are not fully enshrined in the EO Code).

The principles of active and adequate provision of information and transparency

The Ombudsman has received a number of complaints about the lack of provision of information in relation to the preparation phase of tenders. This concerns, for example, complaints about the lack of clear information about the tender conditions, the documents that must be submitted and the method of submission, the omission to keep tenderers informed of the stage of the procedure as well as about the lack of publishing questions on the FAQ website.

In complaint 866/2001/GG the Ombudsman has explicitly recognised that "it is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil". In another complaint he refers implicitly to the principle of good administration, when he observes that "information concerning documents that have to be submitted with a tender should be clear and unambiguous" (complaint 949/2003/IJH). In a number of complaints the norm in context has not been made explicit, but can be constructed; admissible tenderers questions and their answers must be published on the FAQ website in order to give all tenderers access to the same information about tender procedures (complaint 745/2003/IJH); information about the method of submission of tenders must be explicitly provided (complaint 534/2004/ELB); and participants of a tender procedure must be properly informed of the proceedings (complaint 415/98/VK). The above mentioned norms I have categorised under the (invented) principle of good administration of active and adequate provision of information. Whereas the principle of requests for information, with the corresponding duties of replying to letters and sending acknowledgements of receipt etc. has been listed in the EO Code (see articles 22, 13 and 14), the requirement of the supply of adequate information on the side of the administration about its activities has been omitted. The principle as phrased refers to the actual provision of information, its clarity and consistency.

¹¹⁹ The complaint procedure has not yet been completed.

The above norms in context could also have been categorised under the (umbrella) principle of transparency, which is neither mentioned in the EO Code. To recall, the Court has held that the principle of equality implies a duty of transparency in tender procedures, which leads to a number of specific transparency requirements. The objective of transparency is firstly the creation of equality of opportunities, and secondly, to facilitate control of compliance with the principle of equal treatment and impartiality of public procurement procedures. In some complaints about the lack of publicity or clarity of the tender criteria, the EO referred to transparency. In complaint 1858/2005/BB, the EO followed the Court's case-law and observed that the obligation of transparency requires that the administration establishes and applies *transparent* award criteria, which means that the weighting of the award criteria must be made public well in advance. This regards the obligation to publish tender requirements. One of the complaints regarded not only access to information, but the transparency of the procedure itself. The complainant argued that under the Tacis tender procedures the selection process should be public, and the names and qualifications of the evaluators known in advance.¹²⁰ The EO concluded that information about these issues can be obtained afterwards, and that the Commission's measures of confidentiality do not appear to infringe the *general principle of transparency*. The part of the complaint that refers to the publicity of the selection procedure (evaluation process) does not regard the aspect of information, but the accessibility of the procedure in physical terms. This is another aspect of transparency and would support the inclusion of transparency as a separate principle of good administration (see below).

The above mentioned norms in context could also be categorised under the principle of equality, but this would neglect the fact that transparency is to a certain extent independent from equality in tender cases.¹²¹

The question remains whether the principle of transparency or the principle of active and adequate provision of information, or both, should be inserted in the EO Code? In my view the principle of active and adequate provision of information should be added because it constitutes a clear and unequivocal duty of good administration. It can be argued that this principle also constitutes an element of the principle of transparency. Transparency can in fact be categorised as an umbrella principle, comprising elements of other legal principles. Transparency includes a number of core elements, among which can be mentioned clarity, publicity and predictability of the law and its application, access to information, and clarity of procedures. Their content changes according to the context. It is not clear whether transparency is yet an autonomous self-standing principle with its own meaning or whether it is merely an umbrella principle. Case-law and legislation give a nuanced picture of the use of the concept of transparency.¹²² Nonetheless, the careful conclusion can be drawn that in the near future transparency might develop in a self-standing general principle of law. Only in that case it would seem to make sense to insert transparency as a separate principle of good administration in the EO Code (which also has been characterised as an umbrella principle).

The empirical research in tender fields does not provide an answer to the question whether the Ombudsman operates transparency as a self-standing principle and about its classification as a principle of good administration. Further empirical research in other complaint areas, like transparency and openness, is indispensable to come to a well-substantiated conclusion as regards its use by the European Ombudsman.

¹²⁰ Complaint 649/99/ADB. This decision is from the early years. Given that it is rather short, it is difficult to fully understand its implications.

¹²¹ See before section 3.2.3.

¹²² *Ibid.* See A. Prechal and M.E. de Leeuw, "Transparency: A General Principle of EU Law?", *op cit.* note 22. In this article a number of areas are discussed where the term/concept of transparency pops up.

The duty of impartiality and prevention of bias

Given the difficulty in conducting a thorough review of the actual evaluation of the tender, it is important that the EO checks the procedural fairness side of the tender procedure by guaranteeing that the tender procedure has been conducted in accordance with the procedural rules and in particular in an impartial and objective manner. The Ombudsman has more than once investigated complaints about conflicts of interests. Different types of conflict of interests exist: for example, a member of the evaluation committee has links with a tenderer (complaint 3296/2005/ID(SAB)), particular links exist between individual tenderers (complaint 232/2001/GG) or tenderers that have been involved in the preparation phase of the drafting of a tender call and later participate in that same call (see complaint 3732/2004/GG).

The Ombudsman has been active in creating norms of good administration in respect of the principle of impartiality, some of which are or were initially not covered by legal rules or principles.

The principle of good administration of impartiality requires from the administration two things: First that the staff of the Community institutions and bodies not only performs their duties impartially but also demonstrate their impartiality by avoiding any action which could lead to their impartiality being reasonably called into question. Furthermore, it requires that the relevant Community institution or body take appropriate action to ensure both the reality and the appearance of impartiality in the performance of the administrative functions entrusted to its staff members. Only the aspect of the reality of impartiality is explicitly laid down in article 8 EO Code. The above mentioned principles of good administration were created by the Ombudsman in complaint 3296/2005/ID (SAB). The Ombudsman had to decide on the allegation that a member of the evaluation committee had a conflict of interest (due to links with the successful tenderer) and should have declared this potential conflict and withdrawn from the tender procedure. According to the Ombudsman, the Commission had not acted in accordance with those principles, since the evaluation committee's considerations on the potential conflict could not be taken with the participation of the member in question (norm in context). This seems a sound ruling; being a judge in your own case is of course unacceptable. Moreover, the Commission's replies to the complainant's letters did not show that appropriate action had been taken with a view to ensuring both the reality and the appearance of impartiality and did not address the complainant's relevant legitimate concerns. The Commission should provide the complainant with sufficient information about its compliance with its duties (norm in context). Also this duty makes sense, good information about the actions which were taken could, as the Ombudsman stressed himself, have prevented the complaint from being lodged in the first place.

This first aspect of the principle of good administration of impartiality seems not yet covered by legal rules or principles (at least the EO makes no reference at all to legislation or case-law in this respect). In an earlier complaint, 3732/2004/GG, the Ombudsman formulated a similar principle of good administration but phrased it in more general terms: *Principles of good administration do not only need to be respected but must also be seen to be applied*. Next, he concluded that the administration must do the utmost to avoid giving the impression (unfounded though it may be) that Community institutions or bodies or their staff behave in an untoward way (in this complaint "untoward" referred to biased). In this case the impartiality of a member of the evaluation committee was questioned.

Secondly, the administration has the duty to ensure that the tender procedure is performed in an impartial and objective manner, which comprises a duty to investigate potential cases of conflict of interest. The aspect of the prevention of bias is not mentioned in the EO Code. In complaint 232/2001/GG, the complainant had submitted serious arguments and substantial evidence to support its claim that there were 'particular links' between the successful bidder and other companies or persons involved in the tender and that the successful bidder therefore ought to have been excluded from the tender. According to the Ombudsman, the Commission had not investigated the matter sufficiently and violated *the principle of good administration that the administration must carry out a*

comprehensive examination where it is confronted with serious maladministration regarding a call for tenders. Given its general phrasing, i.e. the norm refers to “maladministration” and not only to instances of bias, it can be seen as either an emanation of “the principle of care” (“objectivity”) or “active and adequate information gathering”.¹²³ Four years later the Ombudsman had to decide on a complaint that the Commission Delegation to Russia had failed to investigate the potential conflict of interest that the complainant had pointed out (i.e. that one member of the evaluation committee had links with the successful tenderer). This time the Ombudsman does not refer to its earlier formulated principle of good administration anymore, but instead points to the recently adopted case-law of the Court in this respect. The case-law is precise as regards the duties that the principle of equality imposes upon the Commission. The principle of equality of tenderers implies that the institution has a duty to ensure that the tender procedure is carried out in an impartial and objective manner (prevention of bias). This implies that the Community institutions or body concerned should investigate with due diligence not only complaints about potential cases of conflict of interest but also any such potential cases arising in the context of the evaluation of the tenders.¹²⁴

Finally, a remark must be made about the delicate problem where future tenderers are participating in the preparatory stages of a public contract (through conducting research, studies or development in connection with a public contract).¹²⁵ Should those tenderers be automatically excluded from participation in tender calls? According to the Ombudsman this is not the case. Exclusion is only possible when it has been proven that the tenderer through its participation in the preparatory stage of the contract has gained an unjustified advantage (and thus distorts competition) over other tenderers. The onus of proof lies with the undertaking that makes the allegation of conflict of interest. In complaint 3732/2004/GG, the Ombudsman ruled that the complainant had not submitted proof that the tender documents drafted were based on the report containing guidelines for a remote interpretation experiment, which had been prepared by the successful tender. This approach, which is similar to that of the ECJ,¹²⁶ is sound, since the administration relies at times on the expertise of tenderers to draft suitable tender specifications. If this participation would lead to an automatic exclusion of those tenderers that provide such assistance, the latter will not be willing anymore to provide their crucial expertise.

The principles of non-discrimination and equality

As has been observed before, the principle of non-discrimination and equality are central principles in the field of public procurement. In the end, a number of principles and norms found in this area have the underlying aim of protecting equality of tenderers and to prevent discrimination, which serves the ultimate goal of the promotion of effective competition in public markets (see for example transparency/adequate provision of information, but also the principle of impartiality). The application of the principle of equal treatment regards the stage of the drafting of the tenders as well as the stage of evaluation of the tenders.¹²⁷

¹²³ See for example complaint 140/2002/GG under the heading of “fairness”. The Commission had taken adequate steps to investigate whether there had been an irregularity in the tender procedure as alleged by the complainant. The categorisation of this complaint under “fairness” is because its core was about fairness.

¹²⁴ See complaint 3296/2005/ID (SAB). This duty to investigate is laid down in the case-law to which the Ombudsman refers.

¹²⁵ See also complaint 2688/2005/PB. However, the complainant did not complain about the grounds of refusal of its tender by the Commission (the tender had been rejected on the grounds that a member of its technical staff who had participated in the feasibility study for the same project also featured on the list of persons presented in its proposal).

¹²⁶ See C.H. Bovis, “Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making,” *CML Rev.*, Vol. 43, April, 2006, p. 461-495, at p. 464.

¹²⁷ Complaint 142/2005/BB in which is referred to the case-law.

The principle of non-discrimination implies that identical situations cannot be treated differently and that different situations cannot be treated identically. According to the Ombudsman, the distinguishing element among the applications in a tender procedure may regard the quality of the applicant's work (complaint 564/97/PD). In complaint 1043/2001/GG the Ombudsman observed that *good administration requires that tenderers are treated equally*. In this complaint the principle of equality required that the administration must assess whether each tenderer fulfils the technical selection criteria to be admissible. The Commission had wrongly concluded that two unsuccessful tenderers had fulfilled the technical tender criteria, and therefore it had treated tenderers unequally.

In most complaints the Ombudsman refers not to the principle of good administration of equality or non-discrimination, but to its legal counterpart as applied and interpreted by the Court. There have been diverse problems of equal treatment. First, is it fair that NGO's which receive state aid are competing against ordinary firms in a public tender procedure? According to the Ombudsman, relying on existing case-law in this respect, the principle of equal treatment forbids the automatic exclusion of organisations benefiting from a Community grant in a call for tenders, provided that this organisation does not put forward an abnormally low offer as a result of an inappropriate use of the Community assistance granted to it, thereby breaching the rules applicable as regards that assistance (norm in context).¹²⁸

Another norm that emanates from the principle of equality is that the Commission should apply the same rules on breakdown of prices to all tenderers in order for bids to remain comparable (norm in context). The Ombudsman made a finding of maladministration since the Commission had failed to reject the tender on the grounds that the bid did not comply with the rules on the breakdown of prices and it was therefore impossible to compare the bids (complaint 834/2001/GG). However, this case must be treated with care now the Ombudsman has been criticised by the Court for having been too legalistic.¹²⁹ The Court allowed the Commission to accept the different way of presenting the prices by the tenderer (complainant), because the emerging difference between the technical proposal and the financial proposal could be simply explained and in the end there was thus no difficulty to compare the bids. In the light of this ruling, the Ombudsman will probably reconsider its vision in the future, as the Commission did not act unlawfully. He will probably also conclude that the principle of good administration of equality does not require this rigid application of the rules on breakdown of prices. In this complaint the Ombudsman did not rely on the principle of equality, but on the principle of lawfulness (see par. on legality and properness review for a critical discussion of the application of the principle of lawfulness).

Finally, the principle of equality entitles the administration to reject a tender that is enclosed in a container, the confidentiality of which cannot be guaranteed because it can easily be opened and which has not been properly sealed and signed (complaint 287/2005/JMA).

Other principles of good administration

Complaints about *unfair* behaviour of the administration in reality regard often another more specific principle of good administration. Fairness seems therefore to be a rest-category, for example for complaints about unfairness in the evaluation of a tender (substance), i.e. about the unjust assignment of scores to a bid. These complaints are rare since it is very hard to prove that your bid should have received a higher score and in the end the administration has a certain amount of discretion to prefer one bid over another. In complaint 2633/2006/WP, the Commission had rejected the complainant's bid in reply to a call for tenders for translation services, because its linguistic quality had not attained the required minimum mark of 5/10. After reconsideration by the Commission of the complainant's text, it appeared that two alleged spelling errors were correct and that the tender could be admitted to the next

¹²⁸ Complaint 3571/2005(MF)JMA.

¹²⁹ *AFCon Management Consultants and Others v Commission* [2005] ECR II-00981.

stage in the tender procedure. This type of complaint could also have been categorised under the heading of “administrative precision” or “acting with care” (principles which are not mentioned in the EO Code) or “objectivity”.

It is good to realise that identical or similar behaviour of the administration can at times be evaluated by the EO for compliance with different principles of good administration. In the end the choice of one principle over the other is a decision of the official that handles the complaint. Instances of discrepancy can be found in the empirical research, but overall the review is rather homogenous which might be explained by the fact that tender complaints have been handled by the same group of EO officials.

In complaint 140/2002/GG the complainant alleged that one of the evaluators had made a mistake by not giving the complainant’s consortium the scores it deserved (“administrative imprecision”). This allegation was based on a supposed remark made by a member of the selection committee. In the complainant’s view the Commission had failed to assess its offer *fairly*. The Commission investigated the matter thoroughly, and even heard the persons involved, and could not discover any irregularities in this respect. The assessment seemed therefore regular or fair. The EO’s decision was extremely short and it merely observed that the Commission appeared to have taken adequate steps to deal with the matter raised.

The Ombudsman has been very active in laying down principles of good administration and explicating norms in respect of various types of factual behaviour or organisational matters, like behaving in a courteous manner (article 12 EO), replying to letters (article 13 EO)¹³⁰ and transferring requests and complaints to the competent service (article 15 EO Code). There is also a separate principle concerning requests for information (article 22 EO Code) and requests for access to documents (article 23 EO Code). In respect of requests for information the Ombudsman has added some elements to those that are mentioned in the Code. According to the Ombudsman, *principles of good administration require that the Community administration provide members of the public with the information they have requested, unless it invokes valid and adequate grounds for not doing so* (this exception is not mentioned in the Code). In tender procedures this means that the administration provides additional information upon request about the rejection of a tender’s bid (complaint 1858/2005/BB). Another complaint regarding a request for additional information about the rejection of a tender’s bid was reviewed by the Ombudsman under the principle of courtesy. The Commission, by not acknowledging or answering the complainant’s arguments, but merely giving additional reasons for rejecting the complainant’s bid had failed to reply as completely and accurately as possible to the complainant’s letter. The requirement of answering completely and accurately is mentioned as an aspect of the principle of courtesy (answering correspondence). In my view, this complaint should have been reviewed under the principle of good administration of “requests for information” which includes the requirement that information which is communicated is clear and understandable (article 22(1) EO Code). From complaint 882/98/OV the duty can furthermore be deduced that information communicated must also be “correct”. It appears that the principle of good administration of “requests for information”, as formulated in art. 22(1) EO Code, and of “courtesy” overlap to a certain extent.

Instead questions asked about the tender procedure when the procedure is ongoing must be answered as far as this does not give candidates (tenders) an unfair advantage over others (complaint 278/2000/GG). This norm is closely related to the principle of equality and the no contact rule (see par. 3.3.1.2).

As regards the element of re-directing requests for information, *principles of good administration require that an official receiving requests for information on matters for which he is not responsible*

¹³⁰ Article 13 EO Code, which lays down the duty to reply to letters in the language of the citizen, imposes in the first place a duty to reply (complaint 466/2000/(OV)SM)).

should either (i) direct that person to the official responsible (...) or ii) forward the request directly to the person responsible for such matters. The latter aspect (ii) is not mentioned in art. 22 EO Code.

Article 17 EO Code lays down *the principle of good administration of taking decisions on requests or complaint and answering letters/notes within a reasonable time-limit*. This principle regards the time-aspect of taking decisions, but combines it with a duty to inform the persons involved of eventual delays. This latter aspect should in my view be categorised as an aspect of the principle of good administration of “active and adequate provision of information” (not existing in the EO Code).¹³¹ Furthermore, it is strange that the duty of reasonable time-limits as phrased in this article refers only to decisions on requests/complaints and answering letters. Why does it not refer to decisions in general?

It follows from the empirical research that the duty to state the grounds of decisions requires that tender decisions are adequately reasoned and that those reasons are communicated to the persons affected by it. In an early tender decision, the Ombudsman referred to *the principle of good administration of communicating the reasons for a decision to the person affected by it* (complaint 415/98/VK). But in more recent decisions there is no reference anymore to the principle of good administration of the duty to state reasons, but there is neither an explicit reference to the Financial Regulation, article 253 EC or case-law in respect of the legal principle of statement of reasons. However, a change from soft law to hard law is discernible in those decisions now the Ombudsman refers to the Court’s observations about its limited powers to review actions taken by the institutions in tender procedures given the administration’s broad discretion in this field. Next the usual lines follow about this review.¹³² Article 18 EO Code which lays down the duty to state the grounds of decisions seems to limit the principle of good administration to state reasons to decisions which have legal effects, meaning that there exists no such duty of good administration in respect of decisions which are without legal effects.

Furthermore, decisions which may adversely affect the rights or interests of a private person shall contain an indication of the possibilities of the appeal possibilities available for challenging the decision (article 19 EO Code). In complaint 287/2005/JMA the complainant, an unsuccessful tenderer, alleged that the Parliament had not informed him of the possibilities of appeal against its rejection of the bid. The Ombudsman observed that this duty was not enshrined in the Financial Regulation, but *that general principles, including information about appeals, are of general application*, and there is no indication that the legislator wanted to exclude the *general principle of good administration concerning the provision of information about possibilities of appeal*.¹³³ This is a good example where principles of good administration require more of the administration than the relevant legal provisions, and where lawful behaviour is not a synonym for proper behaviour (see further par. on legality v. properness review).

Norms that are not (fully) enshrined in the EO Code: Suggestions

From the empirical research it follows that there are a number of principles of good administration which have been formulated by the European Ombudsman or could be deduced from its decisions, but which are not enshrined anywhere in the EO Code or only partially. Beneath, some remarks and suggestions are made:

¹³¹ See complaints 78/99/ADB and 415/98/VK under the heading of the principle of active and adequate provision of information.

¹³² “Review of the actions taken by the Commission in connection to tender procedures, is therefore limited to checking that the rules governing the procedure and the statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers”, complaint 1193/2001/JMA.

¹³³ See similar IO/2/2002/IJH in respect of the Commission and the duty of good administration to provide information to unsuccessful tenderers concerning the possibility to start judicial proceedings in accordance with art. 230 EC.

1. First, insert the principle of good administration of *active and adequate gathering of information*. This principle requires that the administration before it takes decisions on possible actions has gathered the necessary information on its own initiative. This principle reflects an aspect of “the principle of care or due diligence” as recognised by the Court in its case-law, which central feature is that it establishes a duty on the administration to impartially and carefully examine the relevant factual and legal aspects of the individual case.¹³⁴ It includes the duty of prior collection of the necessary information. The principle of care is reflected in article 9 EO Code titled the principle of “objectivity”. This latter principle comprises a formal element, i.e. taking into consideration all relevant factors, as well as a substantive element, that each of these factors should be given their proper weight. The outcome of this balancing exercise should lead to a reasonable outcome. The element of the prior gathering of information is not made explicit in this article, however. In the empirical research examples of this principle are provided under the heading of “active and adequate gathering of information” (complaints 2539/2005/MF and 1167/2004/PB). The principle of “active and adequate gathering of information” could be seen as an element of the principle of “objectivity”, but in my view the inclusion of a separate principle should be preferred, since this former principle is not limited to administrative decisions but applies to all behaviour and actions.

In complaint 232/2001/GG the Ombudsman has formulated the principle of good administration that the administration has to carry out a comprehensive examination where it is confronted with serious allegations of maladministration regarding a call for tenders. This regards a norm in context which could be generalised in the sense that in each case the Ombudsman is confronted with serious allegations of maladministration, he has to carry out a comprehensive examination. This latter norm can be considered as a concrete application of the principle of “active and adequate gathering of information.”

2. Insert the principle of good administration of *active and adequate provision of information*. On the one hand, this principle imposes on the institutions the duty to provide information upon request and, on the other, the duty to provide information on their own initiative about procedures or activities which are undertaken to the general public or those persons involved. The first element is enshrined in article 22 EO Code, whereas the second is missing. This new principle of good administration could also be interpreted as including the aspect that the information which is supplied, in either way, is clear, understandable and correct. Article 22 enshrines this aspect for information supplied upon request. However, this aspect could also be categorised under another (non-existing) principle like “administrative care or precision” or under “transparency”.
3. Insert the principle of good administration of “transparency”. As already explained, this principle of good administration can comprise elements of other principles, but it can also have a meaning of its own which still has to crystallise out more in the future. Certainly, additional empirical research is required to further delineate the substantive meaning of this principle.
4. Delete the principle of “lawfulness” for the reasons which will be explained in the next paragraph.
5. Evaluate the inclusion of a new principle of good administration of “exercise of discretionary powers” or broaden the heading of “abuse of powers”, for example into “exercise of powers”, which includes abuse of powers, failure to exercise powers and other norms related to the exercise of powers.
6. In this analysis a number of elements of principles of good administration which are missing in the EO Code have been identified and could be added to the abstract description of the relevant principles of good administration in this Code.

¹³⁴ See C- 269/90 *TU München v Hauptzollamt München-Mitte* [1991] ECR I-5469, para. 14.

7. The Ombudsman has also formulated a number of characteristics that all principles of good administration seem to share. General principles of good administration do not only need to be respected, but must also be seen to be applied (complaint 3732/2004/GG); and principles of good administration are of a general application (complaint 287/2005/JMA). These common aspects of principles of good administration could be listed in an annex to the EO Code.

The above suggestions do not undo a complete revision of the structure and content of the EO Code. This Code can easily be criticised for its lack of structure and coherence. The EO Code is also too much oriented towards administrative decisions; principles of good administration should therefore be drafted broader to capture all types of behaviour. Finally, thorough theoretical reflections as regards the meaning of good administration in addition to further empirical research will certainly lead to rethinking the EO Code.

The discussion of this empirical research is rounded off with an analysis of the type of review that has been conducted by the Ombudsman in this field, with emphasis on the legality v. properness review.

Legality v. properness review

The Ombudsman's type of review in tender complaints

It appears from the tender research that the Ombudsman in this area seems first to search for the existence of legal norms laid down in legislation or created by the judiciary (including general principles of Community law). If the complaint can be decided on the basis of legal rules or general principles of Community law then he mostly conducts a legality review. The general principles of administrative law, procedural as well as substantive, have foremost a legal connotation for the Ombudsman. In most decisions, the fact that the institution acted lawfully leads to the conclusion that there was no maladministration, in other words, the institution acted properly, whereas the verdict that the institution acted unlawfully, leads to the conclusion that it committed maladministration.¹³⁵ There are complaints, however, in which the Ombudsman undertakes a "comprehensive" review, i.e. a legality review as well as a review on the basis principles of proper administration. In some of these cases the Ombudsman concludes that although having acted *lawfully* the institution did not act *properly* (see beneath). It should be observed however, that it does not always follow clearly from the Ombudsman's decisions whether he is applying legal or non-legal rules. As already observed before, there is "blurriness" in applying legal and non-legal principles, since the Ombudsman may apply both (see part I).

The field of tenders is a highly legalised policy area and detailed procedural rules exist, which has been laid down in a number of legislative instruments. This fact limits considerably the Ombudsman's space to create new procedural rules in this area. Furthermore, it regards an area in which the main complainants, in particular unsuccessful tenderers, can choose between lodging a complaint to the Court against the decision to reject a tender or to the Ombudsman. Complaints are often limited to questions about legality, and are not infrequently drafted by lawyers. The complaint therefore sets the boundaries of the Ombudsman's review. These circumstances explain partly why the Ombudsman conducts primarily a legality review in this area.

Recourse to principles of good administration is often reserved for the situation in which no legal rules or principles are applicable or exist, but as said before, at times it is also a deliberate choice to prevent legalistic counter-arguments. Principles of good administration concern mostly factual behaviour and organisational matters. In this type of complaints the Ombudsman is actively involved in creating norms of good administration. In his decisions he indicates explicitly when he applies a

¹³⁵ This is in conformity with the Ombudsman's vision expressed in his above mentioned speech of 2007, *op cit.* note 12.

principle of good administration, and in most cases he also explicates what this principle requires in that particular context; in other words, he formulates the norm in context. At times he also expresses more general norms of good administration, not limited to the specific particularities of the case. These principles often regard the general duty of acting with diligence, like answering letters, being polite and helpful, transferring complaints to responsible body/person etc. The Ombudsman does not indicate the abstract principle of good administration that is involved, however. His standard line is that “principles of good administration require that...” The method in which the EO indicates explicitly the abstract principle, has a number of advantages, however. First of all, it makes it easier for complainants to understand the roots of the specific norm in context, i.e. is it an application of the principle of equality or impartiality? Secondly, an inventory of the principles and their norms in context can be easily compiled electronically. When the Ombudsman would also earmark in each decision the area involved, inventories of the application of principles of good administration in a specific area can easily be compiled (like my own inventory in the field of tenders). Such inventories give insight into the meaning of a specific principle of good administration in practice, which might improve consistency in review. Moreover, equally important is that the administration understands better what is expected from it under a specific principle or in a specific field.

As has been explained in the theoretical part, by merely stating that the institutions acted legally or illegally, the Ombudsman denies the autonomous character of the review based on standards of proper administration. To recall, it is good administration to adhere to act lawfully, but that does not mean that therefore the administration acted properly. Acting lawfully is usually *the minimum* level of acting properly, but might not be sufficient in accordance with the standard of good administration, which aspires to an ideal behaviour. This has been recognised by the European Ombudsman. What he denies is the fact that unlawful behaviour can be proper in exceptional circumstances.¹³⁶ The verdict that the behaviour is lawful or not, will most of the times lead to the conclusion that the behaviour is proper or not. Furthermore, when he formulates a norm of proper administration, which has the same content as the legal rule, he is not applying the legal rule, but the concrete expression of the principle of proper administration which has the same content as the legal norm.¹³⁷ Therefore, the Ombudsman himself, besides pointing out that the behaviour has been legal, should review why this lawful behaviour is also in accordance with his own standards of proper administration. The same applies when he concludes that the behaviour is unlawful; why does this mean that it is also improper? Some examples can serve to clarify the above mentioned points.

Lawfulness cannot be used as an “Ombudsnorm”

In complaint 834/2001 the Commission allowed a tenderer, the company GFA, to deviate from the instructions of the tender as regards the rule that the breakdown of prices and the summary of staff input has to be consistent. The Ombudsman observed that “*it is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures*”. He concluded that by allowing tenderers to include experts’ fees under reimbursable items in this case, the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. The Ombudsman seems (implicitly) to refer to the principle of good administration of “lawfulness”. It has, however, been sustained by the Dutch researchers that “lawfulness” as a norm of proper administration has no power to discriminate between different contexts.¹³⁸ The norm can only be operated as: Has any legal provision been violated by the institution or not. However, in these cases usually another more specific “Ombudsnorm” is violated. As observed by the Ombudsman, the aim of

¹³⁶ *Ibid.*

¹³⁷ P.M. Langbroek and P. Rijpkema, 2004, *op cit.* note 21, p. 21-22.

¹³⁸ *Ibid.*, p. 236-237.

the relevant rules is to make bids comparable. By allowing derogation from these rules the Commission favoured tenderers who adopted an approach such as GFA's. By deviating from those rules as it did, the Commission acted in violation of the principle of equal treatment. He could have formulated the following norm in context: *The principle of equal treatment* requires that the Commission applies the same rules on breakdown of prices to all tenders in order for bids to remain comparable.

In most cases where the Ombudsman (implicitly) concludes that the institution has acted unlawfully, and therefore committed maladministration, no reference is made to the principle of lawfulness. But this is probably implied (given the speech of the Ombudsman). In those decisions, the Ombudsman should have equally indicated why the unlawful behaviour is in violation of a more specific principle of good administration. For example, in decision 1858/2005/BB the complainant argued that the EUMC failed to establish and apply transparent award criteria in this tender. The Ombudsman concludes that the EUMC failed to make the quality/price ratio public at the time the Open Call for this tender was submitted. He refers to the case-law of the ECJ, in which the latter ruled that the principle of equal treatment of tenderers is a general principle of Community law, and implies an obligation of transparency (...). The Ombudsman notes that the EUMC failed to show that the establishment of a simple quality/price ratio, on which basis it identified the economically most advantageous offer in this case, was consonant with the Community law requirements concerning transparency in the context of tender procedures. The Ombudsman examines whether the EUMC fulfilled the (legal) requirements laid down in the case-law. The fact that the Commission seemingly does not, makes him conclude there might be an instance of maladministration. The Ombudsman fails to examine why this unlawful behaviour is not in accordance with the principles of good administration. This *unlawful* behaviour is probably in violation of "the principle of good administration of transparency" or "active and adequate provision of information" which equally requires that the quality/price ratio is made public (minimum requirement of proper behaviour). In this case the content of the norm of proper administration and the legal norm are identical. The Ombudsman should make this explicit, however.

Unlawful behaviour which is proper

Given the Ombudsman's vision that it can never be good administration to act unlawfully, there are no examples of decisions in which unlawful behaviour was judged *proper* on the basis of the principles of good administration.

Lawful behaviour which is proper

In the following example the Ombudsman concluded that the institution acted lawfully and therefore found no maladministration. In complaint 1193/2001/JMA, the complainant alleged that the reasons provided by the Commission for the rejection of its application for funding were spurious. The EO recalled the case-law about the limited review conducted by the Court in cases where the Commission decides on the awarding of a contract following an invitation to tenders. The EO concluded that the explanations provided by the Commission constituted an adequate statement for the position taken by the Commission, and therefore it had acted within the limits of its legal authority. Lawful behaviour is often also proper behaviour, but the Ombudsman should indicate this. Here the legal duty coincides with the principle of good administration of the duty to state reasons.

Lawful behaviour which is not proper

There are examples of decisions in which the Ombudsman, in respect of an allegation, conducts both a legality review as well as a review on the basis of principles of proper administration. In some of them, the Ombudsman concluded that the institution acted legally, but not properly. In decision 287/2005/JMA, the Parliament had not provided the complainant with information about possibilities of appeal against its rejection of its bid. The Ombudsman observed that under the Financial

Regulation, the contracting authority has only to notify the candidates or bidders, whose applications or tenders are rejected, of the grounds on which the decision was taken. Nevertheless, the EO observed that *principles of good administration, including information about appeals, are of general application*, and there is no indication that the Community legislator intended that the relevant provisions of the Financial Regulation concerning information to tenderers should exclude the *general principle of good administration concerning the provision of information about possibilities of appeal*. By not providing those details on the available means to appeal its decisions, the Parliament failed to abide by its *own Code of Conduct*. This constituted an instance of maladministration and the EO made a critical remark. In this complaint, the Parliament did not act unlawful, but failed to abide by the principle of proper administration which required additional information. Another highly interesting example regards the thorny complaint 3296/2005/ID(SAB) concerning the principle of impartiality (see par. on the duty of impartiality and prevention of bias).

Conclusion

From the empirical research it emerges that the Ombudsman is active in the creation of norms of good administration in his decisions on complaints. Nonetheless, he could be more active than he currently is. There are a number of factors which might explain why the EO *at this moment* in time has not as his main priority creating his own norms of good administration. The EO is a rather young institution and is still in the process of establishment, which might explain that it is more inclined to stick with the legal rules and is less interested yet in proper administration rules or autonomous review on the basis of its own standards. What's more, the EO's review is limited to a number of fields, so it has probably less possibilities to go further with its review in the sense of creating principles of proper administration which are not already covered in the legal rule and principles. This is, of course, easier when you have cases in which there has been more human contact, like in the area of social security and police activities etc. The staff that is working in the office are, furthermore, black letter lawyers. It is furthermore a heterogeneous group of people with different cultural and legal backgrounds and each with different approaches. By contrast, however, a national Ombudsman is a rather homogenous institution. But a general administrative code is lacking in the EU, which means more scope for the European Ombudsman to create norms of good administration, which might one day crystallise into legal norms - or not.

To conclude, it cannot be emphasised enough that this research and its conclusion are based on empirical research done in one specific policy area, and that only additional research will provide the complete picture of the EO's role in norm-creation.

Annex : Empirical Research

NORMS OF GOOD ADMINISTRATIVE BEHAVIOUR IN THE FIELD OF TENDERS*

Article 4 ***Lawfulness***

The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their context complies with the law.

Norms in context

1. Presentation of breakdown of prices

It is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures (general norm).

Replaced by:

The principle of equal treatment (art. 5 EO Code) requires that the Commission applies the same rules on breakdown of prices to all tenders in order for bids to remain comparable (norm in context- first allegation)

Other principles of good administration

The principle of prevention of bias (no reference in EO Code): The principle that the Commission must treat tenders equally implies that bias and appearances of bias are to be prevented. Striving for the prevention of bias implies that a tender evaluation procedure must be done all over again if one of the evaluators has a connection to one of the bidders, while excluding the first evaluator from the renewed evaluation (norm in context- second allegation).

The principle of objectivity (art. 9 EO Code) implies that a contract signed with the successful tenderer has not to be ended, in case the tender evaluation procedure has been done all over again after the Commission's discovery that one of the evaluators had a connection to the successful tenderer, while excluding that evaluator from the renewed evaluation (norm in context-third allegation).

Context

The complainant, the Irish firm AFCon which failed to obtain a tender, claims that the German company GFA, the tenderer to whom a contract was awarded, failed to comply with the rules applicable to the tender, namely the rule that the breakdown of prices and the summary of staff input had to be consistent.

The Ombudsman analysed the instruction for tenderers and concluded that GFA did not comply with these instructions. The Commission submits that the approach used by GFA was nevertheless acceptable, since there were no rules expressly excluding it. This argument cannot be accepted in the present case for at least three reasons. The second reason is that it has to be borne in mind that the relevant rules appear to have the aim of making the bids submitted comparable. Thirdly, the Commission's approach was thus clearly likely to favour tenderers who adopted an approach such as GFA's. *It is good administrative practice in tender procedures for the administration to adhere to the*

* The norms are categorised under the relevant principle of good administration as enshrined in the EO Code of Good Administrative Behaviour, 2005.

rules established for these procedures. In view of the foregoing, the Ombudsman considers that by allowing tenderers to include experts' fees under reimbursable items the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. It makes a critical remark in this respect [first allegation].

The complainant also alleged that one of the original evaluators, Mr Fowler, had links with one of GFA's partner firms. He takes the view that both Mr Fowler and GFA should therefore have been removed from the tender process. When the Commission discovered that there was a conflict of interest due to the presence of a member of the evaluation committee who had links to one of the tenderers, it took steps to rectify the situation by cancelling the first evaluation and arranging for a re-evaluation by new evaluators. The Commission furthermore gave instructions to ensure that the relevant person should not be entrusted with the task of an evaluator again. The Commission considers it acted in accordance with article 12.4 of the General Regulations for Tacis.¹ The Ombudsman considers that the steps taken by the Commission appear to be appropriate in the circumstances of the case. The complainant has not established that in the case of such a conflict of interest the Commission would, under the rules governing the tender, have been obliged to exclude both the relevant evaluator and the tenderer concerned [second allegation].

Article 12.5 of the General Regulations for Tacis tenders provides that where a contract is signed between a tenderer who is in violation of Article 12.4, the Contracting Party "may terminate the contract with immediate effect." The termination of the contract is thus not obligatory but within the discretion of the Commission. The Ombudsman considers that the complainant has not shown that the Commission exceeded the margins of its discretion in the present case by acting as it did. No maladministration [third allegation].
[Complaint 834/2001/GG]

Critical remark: It is good administrative practice in tender procedures for the administration to adhere to the rules established for these procedures. The Ombudsman considers that by allowing tenderers to include experts' fees under reimbursable items in the present case, the Commission failed to comply with the rules applicable to the tender and the aim pursued by these rules. This constitutes an instance of maladministration.

Article 5 ***Absence of discrimination***

1. In dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner.
2. If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case.
3. The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.

Norms in context

1. Community subsidised NGO's

The principle of equal treatment forbids the automatic exclusion of organisations benefiting from a Community grant in a call for tenders, provided that this organisation does not put forward an abnormally low offer as a result of an inappropriate use of the Community assistance granted to it, thereby breaching the rules applicable as regards that assistance (norm in context- first allegation).

¹ "No Tenderer, member of his staff or any other person anyhow associated to the Tenderer for the purpose of the Tender shall take part in the evaluation of the Tender in question".

Other principles of good administration

The principle of objectivity (art. 9 EO Code) requires that when the Commission has to evaluate whether a tender constitutes an abnormally low offer as a result of an inappropriate use of the State aid granted it must take into account the information provided by the tender when balancing the interests (norm in context- second allegation).

Context

The complainant, firm Y, which failed to obtain a tender from the Commission alleged that the Commission failed to provide him with all the information requested in his letter concerning the identity of the successful tenderer, the amount of the bid and the evaluation criteria. The Ombudsman concludes that the Commission's reply appears to meet the criteria laid down in Article 100 of the Financial Regulation, Article 149 of its Implementing Rules, as well as the Commission's Communication. The latter therefore provided adequate information in relation to the complainant's requests [first allegation].

The complainant also alleged that the Commission's decision to award the contract was unfair. In his view, it was anti-competitive for an organisation largely funded with public money, mostly from the EU (namely 51%), to compete against ordinary commercial firms in a public tender procedure organised by the Commission [second allegation]. The EO points out that Article 89 establishes that all public contracts financed in whole or in part by the Community budget shall comply, *inter alia*, with the principles of equal treatment and non-discrimination (see C-94/99).² The Ombudsman also notes that the participation of bidders benefiting from State aid can only be restricted in the exceptional circumstances laid down in Article 139(2) of the Implementing Rules.³ In view of the above provisions, the Ombudsman considers that there appears to be no legal rule according to which a successful bidder must be excluded from participating in the call for tenders simply because it benefited from a Community grant. On the contrary, an automatic exclusion, based solely on the fact that the tenderer benefited from a Community grant, would constitute a breach of the principle of equal treatment.

It has to be assessed, however, whether the successful bidder put forward an abnormally low offer as a result of an inappropriate use of the Community assistance granted to it, thereby breaching the rules applicable as regards that assistance, including the "no profit rule" laid down in Article 109(2) of the Financial Regulation and the "principle of digression for operating grants" laid down in Article 113(2) of the same Regulation. On the basis of the information it had, the Ombudsman concluded that the Commission did not act *improperly* when, in light of the assurances given by the successful bidder, it decided that the latter's bid did not constitute an abnormally low offer which should be annulled pursuant to Article 139(2) of the Implementing Rules. The EO did not find any maladministration. [complaint 3571/2005(MF) JMA]

2. Fulfilment method of submission

The principle of equality and non-discrimination entitles the administration to reject a tender that is enclosed in a container, the confidentiality of which cannot be guaranteed because it can easily be opened, which has not been properly sealed and signed (norm in context).

Context

Parliament rejected the tender on the grounds that the complainant's tenders did not comply with the requirements set out in Article 143 (3) of the implementing Regulation, which imposes on bidders who use self-adhesive envelopes the obligations both to seal the envelope with adhesive tape and to sign

² Case C-94/99 ARGE [2000] ECR I-11037, paragraph 32. As the Community Courts have established, the mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other (unsubsidised) tenderers, to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment.

³ "Where the contracting authority establishes that a tender is abnormally low as a result of State aid provided, it may reject the tender on that ground alone only if the tenderer is unable to prove, within a reasonable time determined by the contracting authority, that the aid in question has been awarded definitively and in accordance with the procedures and decisions specified in the Community rules on State aid."

across the seal. The complainant had submitted its bid in boxes which were sealed with adhesive paper, but were not signed.

The EO observes that it appears that the aim of measure is to ensure that the general obligation of confidentiality set out in both Article 98 (1) of the EU Financial Regulation and in Article 143 (3) of the implementing Regulation, is strictly applied to situations, such as the sending of a tender in a self-adhesive envelope, which, by their nature, do not guarantee that the contents of a tender will remain confidential until all tenders are all opened simultaneously. In order to ensure a consistent application of the above principles, the Ombudsman finds it reasonable that similar requirements may be applied to situations other than the use of self-adhesive envelopes, in which, due to their nature, the contents of a tender can be tampered with. The Ombudsman considers that Parliament correctly interpreted the above rules and that it was therefore entitled to apply them so as to exclude the complainant's tenders (although highest authority on interpretation of Community law is ECJ).
[287/2005/JMA]

*Second part of the 287/2005/JMA under Art. 19 EO Code.

3. Fulfilment of selection criteria

The principle of equality requires that tenderers are treated equally. This implies that the administration must assess whether each tenderer fulfils the technical selection criteria to be admissible (norm in context- third aspect allegation 2).

Other principles of good administration

The principle of transparency (not in the Code) requires that tender procedures are transparent. *The administration is therefore required to set out the conditions that applicants have to fulfil as clearly as possible* (norm in context-first allegation).

The principle of objectivity (art. 9 EO Code) implies that the administration in tender procedures must take the proof submitted by the tenderer in respect of its technical capacity into account when taking a decision on an action (norm in context- second and third aspect allegation 2).

Context:

The complainant, a Dutch company active in the environmental field, had not been awarded the tender contract for the performance of consultancy services in the field of drinking water, because according to the Commission it lacked the necessary experience in the water research field.

The complainant claims that the selection procedure was not transparent, given that the selection criteria had required the applicant firms to have "the necessary experience and record in the water research field" whereas the bid lodged by the complainant's firm had been rejected by the Commission on the grounds that it did not have "hands on experience of the design of water treatment facilities". The EO observes that tender procedures need to be transparent. *It is therefore good administrative practice in such procedures for the administration to set out the conditions that applicants have to fulfil as clearly as possible.* In the present case, the decisive criterion was that applicants had to have "hands on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants (allegation 1).

Secondly, the complainant claims that the Commission treated tenderers unequally. In this context, he puts forward three arguments: (1) The relevant expert at the firm to which the contract was awarded had a good personal relationship with at least one of the Commission officials responsible for the contract; (2) the complainant's firm did have the necessary experience to fulfil the Commission's requirement that applicants needed to have "hands on experience of the design of water treatment facilities" and (3) neither EDC nor Eunice fulfilled the said requirement.

It is good administrative practice for the administration to treat tenderers equally. The European Ombudsman agreed with the Commission that the complainant has not submitted any evidence to support its allegation that there was a conflict of interest (first aspect allegation 2). As regards the second aspect of allegation 2, the Commission denies that the relevant passage (as indicated by complainant) shows that the complainant's firm fulfilled the requirement that firms had to have "hands on experience of the design of water treatment facilities". The Ombudsman considers that the

Commission's interpretation of the tender submitted by the complainant's firm does not appear to be unreasonable (second aspect allegation 2).

In so far as EDC and Eunice are concerned, it is true that the contract was not awarded to either of them. However, the offers of both firms were considered by the Commission as having fulfilled the relevant criterion. If this should not have been the case, the Commission would thus have treated tenderers unequally as the complainant claims. It is of course in the first place for the administration organising a call for tenders to assess whether the applicants fulfil the conditions laid down in this call. The Ombudsman must not substitute this assessment by his own but only check whether the administration's assessment is manifestly unreasonable. However, the Ombudsman considers that this is indeed the case here. In the Ombudsman's view, none of the excerpts from the tenders submitted by EDC and Eunice shows that these firms had "hands on experience of the design of water treatment facilities". The Ombudsman notes that the design of water treatment facilities is not even referred to in these excerpts. In these circumstances, the Ombudsman considers that the evidence on which the Commission relied manifestly does not warrant the conclusion that these two firms fulfilled the relevant condition. The Ombudsman thus concludes that the Commission appears to have treated tenderers unequally. This constitutes an instance of maladministration, and the Ombudsman considers it necessary to make a critical remark in this regard (third aspect allegation 2).

[complaint 1043/2000/GG; other aspects under the principles of objectivity and transparency]

4. Selection criteria: quality of applicant's work

The principle of non-discrimination implies that identical situations cannot be treated differently and that different situations cannot be treated identically. This implies that the distinguishing element among the applications in a tender procedure may regard the quality of the applicant's work (norm in context).

Context

The translation services of the European Commission published a restricted call for tender for translation into French. The complainant, a translation company, was not invited to bid, and alleged that the Commission had discriminated your company.

The principle of non-discrimination implies that identical situations cannot be treated differently and that different situations cannot be treated identically. There is no element at hand indicating that the Commission should have engaged in discrimination in this matter. The distinguishing element among the applications which were in conformity with the tender notice was the quality of the applicants' work, which in your case was seen as a weak point by the selection committee of the Commission. It appears from the Commission's opinion that the Commission has complied properly with the provisions governing the procedure.

[complaint 564/97/PD]

* [See complaint 834/2001/GG under art. 4 EO Code]

Article 6 **Proportionality**

1. When taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.
2. When taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest.

Norms in context

1. Method of submission tender

The *principle of proportionality* implies that the Commission is entitled to reject a tender when it has not been submitted in a double sealed envelope in order to guarantee equal treatment of tenderers (norm in context).

Context

The complainant complains about the decision of EUROFOUND to reject the tender of the European Industrial Relations Observatory due to failure to comply with a formal requirement. The formal requirement concerned a tender instruction according to which the tender must be submitted in a double sealed envelope. The complainant confirmed that he had not fulfilled the condition of using two sealed envelopes, which had led to the rejection of his tender. However, he questioned whether the rule was reasonable and whether it should be applied strictly. This was rephrased by the EO in the allegation that the complainant alleges that EUROFOUND was not entitled to reject the tender on this ground.

The Ombudsman considers that since the requirement in question was explicitly set out in the notice of tender, EUROFOUND was entitled to reject the complainant's tender bid on grounds that it failed to comply with the above requirement. Therefore, there appears to be no maladministration.

[complainant 1605/2002(IJH) BB]

Article 7

Absence of abuse of power

Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest.

Norms in context

1. Follow procurement rules

The principle of prohibition of abuse of power implies that powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest. This implies that the Commission must follow the procurement procedures as laid down in the Financial Regulation and implementing provisions (norm in context).

Context

The complainants alleged that it is an abuse of power to reject their tender for failure to comply with the formal requirement concerning the sealing of the envelope containing the tender.

The Ombudsman recalls that, according to Article 7 of the European Code of Good Administrative Behaviour which relates to abuse of power, "*powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest.*" The Ombudsman also recalls that the legal basis for procurement procedures organised by the Commission is constituted by the corresponding articles of the Financial Regulation⁴ and the implementing rules laid down in Commission Regulation No 2342/2002.⁵ The Ombudsman notes that the methods of submitting tenders are provided for by Article 143 of Regulation 2342/2002 and that these methods were included in the General Specifications of the tender (section 6.1). He further notes that the aim of the requirement in question is to maintain secrecy. Having reviewed the documents included in the file, the Ombudsman is of the view that the Commission appears to have correctly applied the rules laid down in Articles 143 and 145 of Commission Regulation No 2342/2002 and that there is no evidence of an abuse of power by the Commission in this regard.

[complaint 534/2004/ELB]

⁴ Council Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248 of 16.9.2002.

⁵ Commission Regulation No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357 of 31.12.2002.

2. Exceeding powers: EDF funding

The principle of prohibition of abuse of power implies that powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest. In respect of EDF funding, the Commission has not only the right but also the duty, as part of the responsibilities conferred upon it for the proper management of the resources of the EDF fund (supervisory powers) to ensure that the appropriate procedural rules are complied with (norm in context).

Context

The German company Beller Consult participated in and won a tender procedure for the supervision of the second section of a road construction project in Mali, financed by the European Development Fund (EDF). A selected engineer could not carry out anymore the project and Beller Consult therefore contacted the complainant for the post. The Delegation of the European Commission in Mali rejected the complainant's participation in the project because his diploma was not a university degree. This degree was required in the terms of reference of the Malian authorities.

Two allegations concerning alleged discrimination by the Commission and alleged inconsistency with the Commission's previous practice were rejected by the Ombudsman.

The complainant also alleged that the Commission exceeded its powers in rejecting the complainant's participation in the project. This choice was to be made by the contracting authority. The Ombudsman notes that according to the case law of the Court of Justice, "It would (.) be incompatible with the sovereignty of the ACP States and the responsibilities reserved to them by the Convention, for the Commission's agents to deal directly, in place of the ACP States, with undertakings submitting tenders for or awarding contracts financed by the Fund; indeed, such action would constitute interference in a sphere reserved solely to the authorities of those states". However, the Ombudsman also notes that "the Commission has not only the right but also the duty, as part of the responsibilities conferred upon it for the proper management of the resources of the fund, to ensure that the appropriate procedural rules are complied with".⁶ The Commission informed Beller Consult that the complainant's participation in the project would not meet the requirements set out in the terms of reference and that this could jeopardise the funding of the project. The Commission thereby appears to have acted in its capacity as supervisor of the procedure. It did therefore not exceed its powers.

[complaint 54/2001/ABB]

3. Responsibility: external aid

The principle of prohibition of abuse of power implies that powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest. The Commission has the duty to monitor the implementation of the tender procedure and award of contracts in case of projects covered under external aid contracts, while the contracting authority is in charge of the actual implementation of the project, which includes decisions on alleged irregularities during the award process (norm in context).

Context

The complainant alleged that the specifications of the tender had basically been copied from the catalogue of a competitor, thus precluding the complainant from applying. In his opinion this fact constituted an irregularity for which the European Commission was to be held responsible.

The Commission explained that whilst the financing had come from the general budget of the EU, the Maltese authorities had been in charge of implementing the project. The Commission had monitored the implementation through ex-ante control of the tender procedure and award of contract. While executing its ex-ante control, the Commission had approved the procurement notice and the tender dossier, including the technical specifications. According to the Commission, there had been no reason to believe that the specifications would not give equal access to all eligible operators on the specific market being able to fulfil the needs of the Maltese authorities. The Commission further noted

⁶ Case 267/82, *Développement SA et Clemessy v. Commission* [1986] ECR I-1907, paragraph 25 to 27.

that in accordance with the Commission's standard procedures for external aid contracts, tenderers believing themselves to be the victims of an error or irregularity during the award process could complain to the Contracting Authority directly. The Commission took the view that the complaint concerned the substance-matter of the tender procedure and that it had therefore to be directed towards the Contracting Authority, i.e. the Maltese authorities.

Upon examination of the evidence submitted to him, the Ombudsman considers that the explanations provided by the Commission concerning its responsibilities in the tender procedure appear to be reasonable. He found no maladministration.

[complaint 1583/2003/GG]

Article 8

Impartiality and independence

1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever.
2. The conduct of the official shall never be guided by personal, family or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest.

Norms in context

1. Staff must appear and be impartial; and prevent bias/duty to investigate

The principle that tenders must be treated equally with regard to each stage of a tender procedure implies that the institution has a duty to ensure that the tender procedure is carried out in an impartial and objective manner (*prevention of bias*). This implies that the Community institution or body concerned should investigate with due diligence not only complaints about potential cases of conflict of interest but also any such potential cases arising in the context of the evaluation of the tenders (norm in context- developed in case law).

The principle of impartiality requires that the staff of the Community institutions and bodies not only perform their duties impartially but also demonstrate their impartiality by avoiding any action_which could lead to their impartiality being reasonably called into question (general norm).

The principle of impartiality requires that the relevant Community institution or body take appropriate action to ensure both the reality and the appearance of impartiality in the performance of the administrative functions entrusted to its staff members (general norm).

The principle of impartiality implies that the decision on the impartiality of one of the members of an Evaluation committee cannot be taken with the participation of the member in question (norm in context).

The principle of impartiality implies that the institution in complaint letters about the conflict of interests show that appropriate action has been taken with a view to ensuring both the reality and appearance of impartiality in the tender procedure and does adequately address the complainant's relevant legitimate concern (norm in context).

Context

The European Commission, acting for and on behalf of the government of the Russian Federation, launched a restricted tender procedure under the Tacis Action Programme 2003 for award of a 28-month service contract for the "Regional Media Support Programme, Russian Federation". According to the tender notice, the project partners were the National Association of Television and Radio Broadcasters ("NAT") and the Alliance of Editors of Russian Regional Media ("ARS Press"). Both organisations were represented on the Evaluation Committee for the tender procedure through an evaluator. The contract was assigned to the consortium Internews Europe. BBC World Service Trust,

tenderer, complained about the fact that the tender procedure was vitiated by a potential conflict of interest due to an alleged affiliation between Internews Russia (tenderer and partner of consortium Internews Europe) and one of the project partners (NAT). One of the problems regarded the impartiality of one of the members representing NAT on the Evaluation committee. The complainant alleged, firstly, that the Commission Delegation to Russia had failed fully to investigate the potential conflict of interest that the complainant had pointed out.

The Ombudsman notes that, under Article 89 of the Council Regulation No 1605/2002, "[a]ll public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination."⁷ Indeed, the principle of equal treatment of tenderers is a general principle of Community law⁸, and its respect has to be ensured by the Community institution or body concerned with regard to each stage of a tender procedure⁹ for the award of a contract financed by the Community budget. In cases like the one in the present case, this duty is intertwined with the need to ensure that the tender procedure is carried out in an objective and impartial manner. This implies that the Community institution or body concerned should investigate with due diligence not only complaints about potential cases of conflict of interest but also any such potential cases arising in the context of the evaluation of the tenders.¹⁰ The European Ombudsman concludes that the Evaluation Committee and the Commission Delegation had duly investigated the matter and found no maladministration.

Secondly, the complainant alleged that, since the member representing NAT on the Evaluation Committee had failed to report the conflict of interest and withdraw from the Committee, the evaluation process represented a clear infringement of contract procedures. The member had made no declaration because in his view he had no reason to do so. The Ombudsman notes, in this respect, that Section 2.8.2 (Impartiality and confidentiality) of the Practical Guide provides that: "(...) Any Evaluation Committee member or observer who has a potential conflict of interest due to a link with any tenderer must declare it and immediately withdraw from the Evaluation Committee". This provision is closely related to *the principle of good administration which requires that the staff of the Community institutions and bodies not only perform their duties impartially but also demonstrate their impartiality by avoiding any action which could lead to their impartiality being reasonably called into question*.¹¹ Furthermore *principles of good administration require that the relevant Community institution or body take appropriate action to ensure both the reality and the appearance of impartiality in the performance of the administrative functions entrusted to its staff members*.¹² The Ombudsman notes that the decision of the member not to declare and withdraw cannot be attributed to the Commission nor is part of its activities, however, the Commission has the duty to ensure the reality and appearance of impartiality. In this context, he observes that the Evaluation Committee's consideration of and decision on the matter could not, in accordance with *principles of good administration, be taken with the participation of the member in question*. The EO did not find maladministration now the Commission offered sufficient explanations to exclude any reasonable doubts as to existence of a conflict of interest regarding the NAT's representative in the Evaluation Committee.

In light of the foregoing, the Ombudsman notes that the Commission's replies to the complainant's letters did not show that appropriate action had been taken with a view to ensuring both the reality and the appearance of impartiality in the tender procedure at issue and did not adequately address the complainant's relevant legitimate concerns. He makes a further remark in this respect.

[complaint 3296/2005/ID(SAB)]

⁷ OJ 2002 L 248/1.

⁸ Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091, paragraph 69.

⁹ Case T-160/03 *AFCon v. Commission* [2005] ECR II-981, paragraph 75.

¹⁰ Cf. Case T-160/03 *AFCon v. Commission* [2005] ECR II-981, paragraphs 75-78 in conjunction with Case C-269/90 *Technische Universität München v. Hauptzollamt München-Mitte* [1991] ECR I-5469, paragraph 14; and Case T-54/99 *Max.mobil v Commission* [2002] ECR II-313 paragraph 48.

¹¹ See point 2.6 of Ombudsman's decision on complaint 1027/2005/ELB which is available on the Ombudsman's website (<http://www.ombudsman.europa.eu/decision/en/default.htm>). In this case EO referred to article 8 EO Code.

¹² See point 2.6 of Ombudsman's decision on complaint 1027/2005/ELB, *ibid*. This principle derives from an earlier complaint, see complaint 751/2000(BB)IJH.

Further remarks: In the case at hand, the Evaluation Committee dealt with a potential conflict of interest concerning one of its members. The Ombudsman would like to draw the Commission's attention to the fact that the Evaluation Committee's consideration of and decision on the matter could not, in accordance with principles of good administration, be taken with the participation of the member in question. Although the complainant has not specifically raised this issue and the Commission has not provided relevant factual information in this regard, the Ombudsman encourages the Commission to ensure compliance with the above requirement in similar future cases. In its replies to complaints such as the one submitted to the Commission by the complainant on 8 August 2005, regarding a potential conflict of interest, the Commission is encouraged to provide the complainants with sufficient information about its compliance with its duties mentioned in points 1.4 and 2.4 above.

2. Staff must appear and be impartial and prevent bias

The principle that tenders must be treated equally with regard to each stage of a tender procedure implies that the institution has a duty to ensure that the tender procedure is carried out in an impartial and objective manner (*prevention of bias*). This implies that it may not award a contract to tenderers that are involved in a conflict of interest. There is a conflict of interest if a tenderer that prepared a study on the same topic of the tender subject, and which has been used as a basis by the institution that drafted the tender specifications, gained an unjustified advantage over other tenderers (norm in context).

The principle of impartiality requires that the utmost is done by the Community staff to avoid giving the impression that they act in an untoward manner, i.e. are not impartial or objective (general norm).

Other principles of good administration

Principles of good administrative practice do not only need to be respected but must also be seen to be applied (not in the EO Code).

Context

The complainant, an Austrian company, participated in a call for tender for a study concerning the constraints arising from remote interpreting. Its bid was not successful and the contract had been awarded to the company Mertens-Hoffman. The complainant appears to allege that Mertens-Hoffman ought to have been excluded from the call for tenders because there was a conflict of interest (1) on the part of the company itself and (2) as regards members of the Evaluation Committee.

As regards the first allegation, the complainant submitted that Parliament's working group had decided to ask "AIIC", the International Association of Conference Interpreters, to commission a study for the development of specifications to be used as a basis for the development of the tender specifications. Mertens-Hoffman carried out this study and submitted, in April 2003, a report entitled "Guidelines for Remote Interpretation Experiment". Mertens-Hoffman had thus been enabled to liaise with the members of the working group and thus had had significant influence on the tender specifications. In the complainant's view, Mertens-Hoffman had therefore been given a tremendous advantage compared to other bidders. Article 94 Financial Regulation provides that contracts may not be awarded to tenderers who (a) are subject to a conflict of interest or (b) (...). The Ombudsman concludes, after having asked further information from the EP, that the complainant has not submitted any evidence to prove this allegation. In view of the evidence submitted to the Ombudsman, it appears clear that the Guidelines were commissioned by the AIIC and not by Parliament or any body or committee set up by the latter. Parliament has further explained that the committee in charge of preparing the tender documents had been composed of representatives of the interpreters (AIIC) and of representatives of the administration, and that the latter did not know about the guidelines. The Ombudsman notes that it is furthermore undisputed that at least one of the interpreters who was part of the committee preparing the tender documents had read the Guidelines. However, the fact that one of more members of the said committee knew of the Guidelines and were possibly influenced by their contents does not yet mean that the tender documents were based on these Guidelines. However, regard should be had to the fact that it is not for Parliament to prove that the tender documents were not based on the Guidelines, but that the complainant has to establish that the Guidelines formed the basis of the tender documents. In the Ombudsman's view, the complainant has not discharged the burden of proof that rests with him in this regard. In the light of preceding considerations, the Ombudsman considers that the complainant has not been able to refute Parliament's view that it has not been proven that Mertens-Hoffman had gained

an unjustified advantage over other tenderers. In these circumstances, the Ombudsman considers that the complainant has not established his allegation that there was a conflict of interest on the part of Mertens-Hoffmann.¹³

As regards the Evaluation Committee, the complainant considers that at least some members of this committee found themselves in a position of conflict of interest. Mr. L was on this committee, and was also a member of the AIIC, and had had knowledge of the Guidelines and had had contacts with Mertens-Hoffman. "There is a conflict of interests where the impartial and objective exercise of the functions of a player in the implementation of the budget or a internal auditor is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary" (art. 52(2) Financial Regulation). The complainant has pointed out that Article 34(1) of the Implementing Provisions stipulates that acts likely to be vitiated by a conflict of interest within the meaning of Article 52(2) may take the form of "granting oneself or others unjustified direct or indirect advantages". Even taking into account the fact that Mr L. was a member of AIIC's Board when it commissioned Mertens-Hoffman to prepare the Guidelines, the Ombudsman considers that the complainant has not established that Mr L. had a "shared interest" with that company or that through the award of the contract Mertens-Hoffman had gained an undue advantage. The Ombudsman considers that Parliament's view according to which it could not be concluded, on the basis of the available evidence, that the circumstances had been such as to give rise to a conflict of interest on the part of Mr L. is reasonable.

However, the Ombudsman considers it useful to add that *the principles of good administrative practice do not only need to be respected but must also be seen to be applied*. Parliament stated that in order to avoid suspicion or ambiguity, the responsible authorising officer would (if he had become aware of the facts in time) have asked the members referred to by the complainant to withdraw from any position on the committee drawing up the tender documents and *a fortiori* on the Evaluation Committee. *In the Ombudsman's view, it is indeed appropriate to do the utmost to avoid giving the impression (unfounded though it may be) that Community institutions or bodies or their staff behave in an untoward way*. He will therefore make a further remark with a view to preventing the recurrence of problems such as the ones raised by the complainant.
[complaint 3732/2004/GG]

Further remark: The Ombudsman would consider it most useful if Parliament could contemplate adopting measures that could prevent problems such as the ones referred to by the complainant from arising in future cases. One possibility would be to require all persons who deal with tenders not only to declare any potential conflict of interest but also to provide information on any previous dealings with, or activities involving tenderers, which might be relevant to the outcome of the tender.

3. Prevention of bias: duty to investigate

The principle that tenders must be treated equally with regard to each stage of a tender procedure implies that the institution has a duty to ensure that the tender procedure is carried out in an impartial and objective manner (*prevention of bias*). This implies that the Community institution or body concerned should investigate with due diligence not only complaints about potential cases of conflict of interest but also any such potential cases arising in the context of the evaluation of the tenders (norm in context- developed in case law). The Commission must examine the existence of a conflict of interest in the field of a tender for a service contract funded under the EDF, even if the technical proposal has already been considered admissible (satisfying exclusion and selection criteria) by the contracting authority (norm in context).

Context

¹³ The Ombudsman notes that Parliament has argued that, even if Mertens-Hoffman had found itself in a conflict of interest, it could only have been excluded from the tender if it had been clarified from the very beginning that an involvement in preparing the tender documents would render a company ineligible for the tender. In view of the conclusion reached as regards a potential conflict of interest, the Ombudsman considers that there is no need further to examine this argument. Parliament's view would in any event appear to be in conformity with the case-law of the Community courts. Case C-234/89 *Commission v. Denmark* [1993] ECR I-3353; Conclusions of Advocate-General Léger in Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR, p. I-01559, paragraphs 37 et seq. concerning the principles of equal treatment and transparency.

The complaint concerned a restricted invitation to tender for a service contract funded under the 8th European Development Fund, which was decentralised to the National Authorising Officer of Cape Verde ("NAO"). The NAO proposed to awarding the contract to the complainant, a consultancy firm. The Commission rejected, however, the complainant's tender on the grounds that a member of its technical staff who had participated in the feasibility study for the same project also featured on the list of persons presented in its proposal.

The Ombudsman, first, notes that the complainant alleges, that, in light of Articles 33.9 and 34.6 of Annex I of Decision 3/90, the Commission was precluded *ratione temporis* from examining the issue of conflict of interest and from rejecting the complainant's tender, since its technical proposal had already been considered eligible. According to the EO these provisions do not state or imply that the Commission lacks the power to reject a tender that has been considered as technically admissible by the contracting authority (NAO). Under Articles 33 to 36 of Annex I of Decision 3/90, the evaluation of the tenders is conducted by the contracting authority and its assessment is submitted to the Commission's delegate for review and approval only after the completion of this evaluation. Furthermore, this evaluation includes the examination of whether the tenders conform to all the terms of the tender dossier and whether the principle of fair competition has been respected. Moreover, in the context of its decisions concerning the award of tenders, the Commission is bound by the principle of equal treatment of tenderers, which is a general principle of Community law.¹⁴ This principle is relevant to the issue of conflict of interest invoked by the Commission in support of its challenged decision not to accept the contracting authority's proposal and to reject the complainant's tender. The Ombudsman considers that the complainant's allegation has not been substantiated.
[complaint: 2688/2005/PB]

4. Duty to investigate maladministration

Other principles of good administration/impartiality

The principle of objectivity/the active and adequate gathering of information (latter is not enshrined in the EO Code) requires the administration to carry out a comprehensive examination where it is confronted with serious allegations of maladministration regarding a call for tenders.

Context

The complainant alleged that two companies, TDI NDR and LM, should have been excluded from the tender procedure because of a conflict of interest and unfair competition. TDI NDR and LM are subsidiaries, as well as TMS, of the investment holding company called DCI. The Commission rejected the allegations and awarded the contract to the consortium to which TDI NRD belonged. In its complaint to the Ombudsman, the complainant argued that (1) the Commission had wrongly failed to exclude TDI NRD and LM from the tender and that (2) the award of the contract to TDI NRD had constituted an abuse of power. These allegations were based on an alleged infringement of the above-mentioned rules.

As regards the first allegation, the complainant claims that the bids submitted by TDI NRD and LM should be regarded as two applications submitted by the same person, within the meaning of Point 9 of the Contract Notice.¹⁵ The Ombudsman considers that the Commission's conclusion that Point 9 of the Contract Notice had not been infringed in the present case appears to be *reasonable*.

The complainant's main argument is based on the assumption that there existed a "particular link" between TDI and LM on the one hand and between TDI and "other tenderers or parties involved in the project" on the other hand.¹⁶ The exclusion clauses contained in the relevant contracts and

¹⁴ C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, paragraph 69.

¹⁵ It provides that candidates should submit only one application for the current contract "whatever the form of participation (as an individual candidate, or as leader or partner of a consortium candidate)" and that where a person submits more than one application, "all applications in which that person has participated will automatically be excluded".

¹⁶ This would contravene Article 2 (3) of the SCR Manual of Instructions which provides that natural or legal persons "are not entitled to participate in competitive tendering or be awarded contracts where (...) they are in one of the situations allowing exclusion referred to in the Ethics Clauses (section 7) in connection with the tender or contract". Article 7 (3) of the SCR Manual of Instructions obliges a candidate or tenderer to declare "that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project".

provisions serve the purpose of ensuring that the competition between bidders taking part in a call for tenders is not jeopardised by a conflict of interest or by the existence of "particular" links between the participants in such a tender. The Commission argues that these clauses and rules do not need to be interpreted more widely than this purpose requires. This approach appears to be *reasonable*. It would also appear to be correct to assume, as the Commission argues, that such a "particular link" exists where there is a parent-subsidiary relationship between the companies concerned or where these companies have entered into an anti-competitive agreement with the aim of restricting competition. On the basis of the available evidence, neither of these conditions is fulfilled in the present case. The Ombudsman considers, however, that the question as to whether a "particular link" within the above-mentioned meaning exists has to be assessed on the basis of all the facts of a given case. On the basis of the evidence that has been submitted, there are serious grounds that would seem to support the complainant's claim that there were "particular links" between TDI and other companies or persons involved in the tender and that TDI and LM consequently ought to have been excluded from the tender (EO summarises which ones). *In such circumstances, principles of good administration would have required the Commission to carry out a comprehensive examination of the issues that had been raised.* The Commission has failed to do so in the present case.¹⁷ In these circumstances, the Ombudsman concludes that the Commission's failure to carry out a comprehensive examination of the issues raised constituted an instance of maladministration. The Ombudsman addressed a draft recommendation.¹⁸ Further, the Commission did not satisfactorily reply to his recommendation and therefore the EO issued a critical remark:

Principles of good administration require the administration to carry out a comprehensive examination where it is confronted with serious allegations of maladministration regarding a call for tenders. In the present case, the complainant submitted serious arguments and substantial evidence to support its claim that there were "particular links" between the successful bidder and other companies or persons involved in the tender and that the successful bidder therefore ought to have been excluded from the tender. The Commission failed to carry out a comprehensive examination of the issues raised by the complainant. This is an instance of maladministration. Under the circumstances of this case the EO did not send a special report to the EP (as it should have under art. 3(7) statute. [complaint 232/2001/GG].

* [See complaint 834/2001/GG under art. 4 EO Code]

Article 9 ***Objectivity (balancing of interest)***

When taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.

Norms in context

1. Language of call for tender

¹⁷ As discussed above, several facts that appear to be relevant do not seem to have been considered at all by the Commission. With regard to others, the Commission appears simply to have relied on statements made by the incriminated company without using the means at its disposal to verify the correctness of these statements. He considers, in this context, that regard should be had to the fact that the Commission itself points out that it already received a similar complaint regarding the participation of TDI in the call for tender, well before the one submitted by the complainant in the present case. The Commission would thus appear to have had sufficient time to clarify the situation by obtaining all the necessary information.

¹⁸ Which states that the European Commission should carry out a comprehensive examination of all the relevant issues in the present case. This examination should also cover the additional allegations and claims made by the complainant in its observations. The Commission should further reconsider its decision not to exclude TDI and LM from the tender and its subsequent decision not to cancel the contract with TDI in the light of the results of this examination.

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The *principle of objectivity* and *equal treatment* allows that calls for tenders concerning work at the Parliament's buildings, and which are of a small value and could have been awarded by way of negotiated procedure, are drafted in one of the languages used in the relevant location, provided that the rights of persons who are potentially interested in carrying out the relevant work but who do not understand the language chosen are safeguarded in an appropriate way (norm in context).

Context

The complainant, a German interior decorator, complaint about the Parliament's *failure to provide a translation into German* of the call for tenders concerning the replacement of three carpets in a Parliament building in Luxembourg. The Parliament explained that the tender was only of a small value, and which could, on the basis of the rules in force, have been awarded by way of a negotiated procedure with at least three bidders. In such cases, Parliament's Buildings Service used a simplified procedure in order to obtain quotes which was normally conducted in one of the languages used in the relevant location. Translation was only prepared upon request. If translations had to be prepared for all the languages that could possibly be requested, administrative costs might be driven to levels that would not be proportionate to the value of the contract.

The Ombudsman found this a valid consideration, provided that the rights of persons who are potentially interested in carrying out the relevant work but who do not understand French are safeguarded in an appropriate way. This was guaranteed through the possibility of requesting a translation. The complainant had not done this, furthermore, parliament had by now send the complainant a translation. No maladministration.

[complaint 928/2004/GG]

2. Fulfilment eligibility criteria: proof (ZAAKNUMMER IS FOUT)

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The administration in tender procedures must take the proof submitted by the tenderer in respect of the eligibility criteria into account when taking a decision on an action (norm in context second aspect).*

Other principles of good administration

The principle of gathering of information implies that the Commission is in principle not obliged to ask for additional information or clarification if the proof submitted by the tenderer is not sufficient to demonstrate the fulfilment of the tender criteria (norm in context second aspect).

Context

In his complaint to the Ombudsman, the complainant alleged that the Commission had *unfairly* decided to exclude GTZ from the tender procedure on the grounds that he (expert for the tender procedure) did not fulfil the condition of eligibility related to nationality.

The Ombudsman examined whether the Commission committed a mistake when it considered that the documents submitted by GTZ were not sufficient to establish that the complainant had Polish nationality. The Ombudsman notes that, pursuant to point 2.3.1 of the Practical Guide, the Evaluation Committee had to assess the tenderers' and experts' nationality on the basis of "the documents usual under the relevant country law", that is, Polish law in the present case. This suggests that it was sufficient for tenderers and experts to submit these documents and that it was then up to the Commission to ascertain whether these documents were sufficient. The Ombudsman therefore considers that the Evaluation Committee should have examined whether the documents submitted to it by GTZ were documents that were "usual under [Polish] law" in order to prove the complainant's Polish nationality [first aspect].

However, regard needs to be had to the documents that were actually submitted to the Commission, e.g. copy of his birth certificate and the copy of his father's passport. The Evaluation Committee considered that these documents were not sufficient. According to the EO this decision was not *unreasonable* in the circumstances. Therefore, the Commission's decision to exclude GTZ from the

tender procedure on the grounds that the documents it had submitted were not sufficient to establish that the complainant had Polish nationality appears to be reasonable [second aspect].
[complaint 2539/2005/MF]

*See similar complaint 1081/2001/SM.

3. Fulfilment selection criteria- information gathering

Other principles of good administration

The principle of gathering of information implies that the Evaluation committee is in principle not obliged to ask for additional information or clarification if the proof submitted by the tenderer is not sufficient to demonstrate the fulfilment of the tender criteria (norm in context).

Context

The complainant's translation firm participated in tender procedure for Translation services into Dutch. Its bid was rejected because it had not obtained the minimum mark 12/20. The complainant alleged that the Commission had wrongly evaluated its bid, because first, the Commission had accepted other proposals from her firm that were almost identical to the proposal here concerned; and secondly, the Commission had failed to take into account the quality certificates submitted with the proposal.

The Ombudsman notes that, in general, the Administration enjoys a wide discretion when evaluating tenders on the basis of the criteria laid down in the call for tenders. His review in this context is thus limited to whether the assessment made by the Administration is vitiated by a manifest error of appraisal. As regards the first argument, he found the Commission's explanation reasonable. The latter explained that evaluation committees set up to evaluate proposals work independently, only on the basis of the concrete call for tenders concerned, and that they use a comparative method to evaluate the proposals submitted. It has stated that this may well lead to different points being obtained for similar proposals submitted in response to separate calls.

As regards the professional certificates, the Commission argued that her firm's certificates did not represent a sufficient explanation of the working methods of the network or of the workflow between the freelance translators, core members of the network and the coordinator of the network. The Ombudsman furthermore points out that neither the Notice of Competition in this case, nor *general principles of good administration*, required the evaluation committee to contact the complainant in order to obtain additional information or clarification relating to these points. He also found the Commission's view that it cannot rely exclusively on quality criteria set out by such organisations, but has to apply its own internal quality criteria, reasonable. The Ombudsman cannot find that the assessment by the evaluation committee in this case was vitiated by any manifest errors of appraisal.
[complaint 1167/2004/PB]

4. Fulfilment information requirements by tenderer

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The Commission may reject a tender when the tenderer does not comply with the information requirements laid down explicitly in the call for tender (norm in context).

Context

The complainant participated, through his company, Redgate, in the tender procedure for translation into Swedish. The complainant alleged that the Commission has lost the covering letter submitted with his tender, in which he explained, that he works alone and therefore cannot provide the information required under point 2.3.3.2. of the tender specifications concerning details of the organisation chart, the description of procedures for selecting translation staff and the subcontracting procedures.

The Ombudsman has considered the Commission's account of how bids are opened and kept. He considers that the Commission has provided a convincing explanation of the procedures that should prevent loss of any part of a bid and of the checks that it has carried out in this case. Furthermore, the Ombudsman has not found any concrete evidence to support the allegation that the Commission lost the

complainant's covering letter. The complainant also argued that the Commission wrongly excluded his tender on the basis of point 2.3.3.2. of the tender specifications, which requires the tenderer to submit information on qualifications and organisation, if relevant. The Commission pointed out that the complainant's letter contained statements that suggested that he had translation staff. *On the basis of the available evidence and taking into account the fact that the covering letter did not seem lost, the Ombudsman considers reasonable* the Commission's conclusion that the tender was from a company which should provide the above mentioned information, as indicated in the tender specifications.
[complaint 2327/2003/TN]

5. Fulfilment selection criteria

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The Commission when evaluating bids on the basis of their proposed project management and co-ordination as well as when assessing the capacity of the bidder to adapt to a variable workload must analyse the budgetary resources devoted to each of these areas (norm in context).

Context:

By letter the complainant, a consulting firm, was informed that its bid in a tender procedure concerning a contract for technical assistance in the evaluation of projects in the field of the Life Environment programme 2004 was rejected. One of the allegations regards the fact that the Commission has failed to respect the published award criteria by applying a "value for money" argument in the first phase, which should only have come into play in the second phase of the award procedure. The Ombudsman observed that it is for the Commission and not for the Ombudsman to carry out the actual evaluation of bids. The Ombudsman's inquiry therefore investigates whether the Commission, *in exercising its power of evaluation, has acted outside the scope of its legal authority*. For the purposes of the present inquiry, the relevant questions for the Ombudsman are whether the Commission has respected the published award criteria and whether it has acted reasonably. The Ombudsman notes the Commission's explanation that, when assessing bids on the basis of their proposed project management and co-ordination as well as when assessing the capacity of the bidder to adapt to a variable workload, it is necessary to analyse the budgetary resources devoted to each of these areas. The Ombudsman considers this explanation provided by the Commission to be *reasonable* and he does not find any evidence to show that the Commission, by using this method when assessing the bids failed to respect the published award criteria.

As regards the complaint that the Commission has incorrectly evaluated its bid, the Ombudsman notes that none of the complainant's arguments leads to the conclusion that the Commission's evaluation was unreasonable.

[538/2004/TN]

* [See part of 538/2004/TN under active and adequate provision of information]

6. Tender requirements concerning experts

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The administration in tender procedures may reject a tender when the expert appears to be unavailable on the information that was available to it (norm in context).

Context

The Italian company Cotecno participated in a call for tender for a project to be carried out in Guatemala. The complainant's proposal was not successful because it appeared that the expert designated by the company was unavailable. Another company F, beneficiary of a different project x, had designated the same expert. After the Commission's decision, the expert wrote a letter to Cotecno in which he did not consider himself committed anymore to this other company. The complainant alleged that the Commission's decision not to retain the proposal of Cotecno on this basis was unfair and claimed that the Commission should reconsider its decision.

The Ombudsman makes the following findings. The Commission informed the company F that it had been successful in the tender procedure for project x. On 6 November 2000, F confirmed the availability of the expert to the Commission. On the basis of this information, when the Commission evaluated the project presented by Cotecno on 20 November 2001, it was aware of the unavailability of Mr. Ostwald and therefore excluded the project presented by the complainant's company. The Ombudsman also notes that the Commission does not have direct contacts with the experts but only with the companies which participate in the call for tenders. The Ombudsman therefore considers that the Commission acted reasonably in excluding the complainant's project on the basis of the information that was available to it and that the complainant has not provided evidence to show that the Commission acted unfairly.

[complaint 1694/2000/JP]

7. Arbitrary tender evaluation

The principle of objectivity requires that when taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. It requires that the Commission's assessment of tenders is based on objective criteria (norm in context).

Context

The complainant alleges that his tender offer was the lowest one exclusive of the reimbursable costs. According to him this criteria was specified in the tender contract as award criteria. Instead, the Commission claimed that there is no provision in the tender document indicating that only the fixed cost components would be taken into account in the selection. The Ombudsman notes that the price breakdown in (Section D) the tender contract includes reimbursable costs, but Article 36 (Section C) of the tender contract foresees that the Administration shall bear the travelling expenses of each team. It also imposes limits for the refund of travelling expenses. This might confuse the tenderers. The Ombudsman notes that the Commission has now modified the tender dossier for service contracts which include a standard provision that the prices will be compared on fixed costs only. As regards the selection of the lowest tender, the Ombudsman observes that the Commission based its assessment on an objective criteria, namely, the total costs of the tenders, which was reflected both in Article 5 (h) and Section B of the Instructions to Tenders and of Annex D of the draft contract. Therefore, there is no evidence to the effect that the Commission would have acted in an arbitrary or discriminatory way.

The complainant claims that the Commission, as the Chief Authorising Officer, overturned the decision of the National Authorising Officer (NAO) to award the tender contract to the company he represented. In its opinion the Commission states that there was no decision which was overturned. Ombudsman's inquiries indicate that the Commission acted in accordance with the provisions of the Lomé IV Convention, the EDF General Regulations and the tender dossier when it chose the lowest tender defined according to the principles applied at the time of the call for tender. No evidence has been put forward to the effect that the Commission would have *acted unlawfully* or was engaged in *improper conduct* when it decided not to give its approval to the proposal made by the NAO.

[complaint 653/97/HMA/XD/BB]

* [See complaint 834/2001/GG under art. 4 EO Code; complaint 3571/2005/(MF)JMA and complaint 1043/02001/GG under art. 5 EO Code; and complaint 232/2001/GG under art. 8 EO Code]

Article 10

Legitimate expectations, consistency and advice

1. The official shall be consistent in his own administrative behaviour as well as with the administrative action of the Institution. The official shall follow the Institution's normal administrative practices, unless there are legitimate grounds for departing from those practices in an individual case; these grounds shall be recorded in writing.
2. The official shall respect the legitimate and reasonable expectations that members of the public have in the light of how the Institution has acted in the past.

3. The official shall, where necessary, advise the public on how a matter which comes within his or her remit is to be pursued and how to proceed in dealing with the matter.

Norms in context

1. publish answers as FAQ

The principle of legitimate expectations requires that the institution acts in accordance with the reasonable expectations created by the institutions conduct.

The principle of legitimate expectations requires that the Commission acts in accordance with his own adopted rules concerning any contact between the tenderers and the awarding authority, and in particular concerning the provision of additional information regarding the tender specifications upon a tenderer's request and the publishing of those answers on the FAQ website (norm in context).

Context

The complainant, a translation bureau, alleged that the Commission did not answer his questions regarding the tender specifications of a call for tenders for translation services.

The EO observed that the language of section 1.12 of the tender specifications regarding contacting the Commission concerning the tender and FAQ could reasonably lead tenderers to expect that the Commission would answer all questions meeting the criteria specified therein and that a level playing field would be safeguarded by publication of answers on the FAQ website. This section that any contact is prohibited, except under exceptional circumstances, before the closing date for submission and the Commission may only communicate additional information for the purpose of clarifying the nature of the contract.¹⁹ In respect of two of the questions asked the EO did not find the Commission's reply justified. The Ombudsman considers that, on the basis of section 1.12 of the tender specifications, the complainant could reasonably have expected the Commission to publish answers to two of his questions on the FAQ website. *It is good administration to act in accordance with reasonable expectations created by the Institution's conduct.* The Commission's failure to provide and publish such answers was therefore an instance of maladministration and the Ombudsman will make a critical remark in this regard.

[complaint 949/2003/IJH]

Article 11

Fairness

The official shall act impartially, fairly and reasonably.

Norms in context

1. Error in evaluation of bid

The principle of fairness requires that a decision to reject a bid must be reviewed when it appears that errors have occurred in the evaluation of the bid (norm in context).

Context

The Commission informed mr. X that his bid in reply for the Call for tenders for translation services into Bulgarian was rejected, because its linguistic quality had not attained the required minimum mark of 5/10. The Commission provided him with a list of five spelling errors and two grammatical errors

¹⁹ The Ombudsman understands this reference to section 1.12 as being to that part of that section stating: "Any contact between the tenderers and the awarding authorities concerning this call for tender is prohibited, except under exceptional circumstances and under the following conditions: (a) before the closing date for the submission of tenders: - at the instance of tenderers: the Commission may communicate to interested parties only additional information solely for the purpose of clarifying the nature of the contract. /.../ Prospective tenderers are required to submit any questions exclusively by e-mail to [the designated] person. Questions should be clear and concise and refer explicitly to the relevant point in the specification. They should be in English, French or German, and the replies will be posted on the website /.../ in these three languages. /.../".

that had been found in his text. The applicant alleged that most of the words and phrases that had been marked as errors had been correct, and therefore the Commission had wrongly rejected his bid. However, the Commission, further to the complainant's complaint to the Ombudsman, had called upon the evaluation committee to re-examine the tender again in order to avoid any possible unfair treatment. This committee accepted two of the complainant's arguments. The final number of errors contained in the bid had therefore been reduced to five, so that the tender had been admitted to the further selection procedure. It had finally been accepted and the complainant had been offered a framework contract. The Commission apologized to the complainant for the inconvenience caused.

[complaint 2633/2006/WP]

2. *Unfair evaluation of bid*

The *principle of fairness* implies that when the administration evaluates whether a bid fulfils the award criteria it assigns the right scores to each bid (norm in context).

Context

The complainant, a German consultancy firm, belonged to a consortium that submitted an offer in response to a call for tender. The complainant was informed by the Commission that the consortium's bid had failed to meet the award criteria, and that the tender had been cancelled because none of the applications submitted had received a sufficient score. The complainant appealed to the Commission to review its decision. The complainant alleged that it had come to its knowledge that a member of the selection committee, had on a visit to a firm that had also participated in the tender, admitted that he had probably made a mistake by not giving the complainant's consortium the scores it deserved. The complainant basically alleged that the Commission had failed to assess its offer appropriately and fairly. The Commission observed that the Commission's services had thoroughly investigated the case but had not discovered any evidence in regard to the alleged irregularity of the tendering process. It also heard the persons concerned who denied the allegations. Therefore words stands against word and therefore the benefit of the doubt was according to the Commission with the accused voting member.

The EO merely notes that the Commission appears to have taken adequate steps to deal with the matters raised by the complainant. He furthermore takes the view that the Commission has also acted within a reasonable period.

[complaint 140/2002/GG]

Article 12

Courtesy

1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately to questions which are asked.
2. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official.
3. If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way and inform the member of the public of any rights of appeal in accordance with Article 19 of the Code.

Norms in context

1. Answer correspondence completely and accurately

The principle of courtesy implies that when answering correspondence, the institutions shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked (art. 12(1)). In the field of tenders this implies that the Commission should provide a complete

and accurate reply to a bidder's questions in a letter concerning the reasons for rejecting his or her bid (norm in context).

*In my view this complaints has been categorised wrongly by the EO; it regards a request for information upon which a complete and accurate answer should have been given (Article 22 EO Code).

Context

By letter the complainant, a consulting firm, was informed that its bid in a tender procedure concerning a contract for technical assistance in the evaluation of projects in the field of the Life Environment programme 2004 was rejected (first letter). The complainants send a fax and e-mail rebutting the reasons of the Commission for rejecting its bid. In its reply the Commission gave a different reason than in its first reply. The complainant alleges that the Commission has sent confusing messages to the consulting firm containing inconsistent reasons for rejecting its bid.

The Ombudsman points out that *the European Code of Good Administrative Behaviour requires that when answering correspondence, the institutions shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked*. Mindful of the special rules governing contacts between the authority launching a tender procedure and the bidders, the Ombudsman notes that the Commission itself has explained that it is entitled to give additional information about the reasons why a particular bid has been rejected when asked in writing by the bidder. The Ombudsman therefore finds no reason why the Commission should not be able to provide a complete and accurate reply to a bidder's questions concerning the reasons for rejecting his or her bid. In the Ombudsman's view, by not acknowledging or answering the complainant's arguments, but merely giving additional reasons for rejecting the consultancy's bid, the Commission failed to reply as completely and accurately as possible to the complainant's letter. This constitutes an instance of maladministration.

As regards the question why the complainant never received the Commission's letter giving additional information, dispatched by fax. The Ombudsman is not aware of any rule or principle requiring the Commission to send letters both by post and by fax, although the use of fax messages constitutes additional service-mindedness. The Ombudsman therefore finds no maladministration by the Commission regarding the matter. However, he notes the Commission's statement that although not obliged to do so, it normally sends letters concerning the evaluation of bids by fax. In order to ensure equal treatment of bidders, the Ombudsman suggests that the Commission could consider formalising and clarifying its procedures in this regard, communicating its conclusions to him. The Ombudsman will make a further remark to this effect below.²⁰

[complaint 538/2004/TN]

Further remark: The Ombudsman notes the Commission's statement that although not obliged to do so, it normally sends letters concerning the evaluation of bids by fax. In order to ensure equal treatment of bidders, the Ombudsman suggests that the Commission could consider formalising and clarifying its procedures in this regard, communicating its conclusions to him.

2. Information in letters/complaints should be clear and correct

The principle of courtesy requires that information given in replies to letters and complaints should be clear and correct (general norm).

*This norm can be better categorised under the principle of “active and adequate provision of information” or “administrative precision” (both are not included in the EO Code).

Context

²⁰ Possible future norm: the principle of equal treatment requires that the Commission makes explicit the way in which it communicates with tenderers about the evaluation of their bids.

The complaint concerned the fact that the Commission replied only after five months to the complainants letter. The EO issued a critical remark. He observed that it is *good administrative practice to reply to letters and complaints from citizens within a reasonable period of time*. It is also *good administrative practice that the information given in this reply should be clear and correct*. [complaint 2103/2004/GG- other aspect under principle of reasonable time-limits for taking decisions (not in the EO Code)]

3. Non offensive and arrogant e-mails

The principle of courtesy implies that e-mail messages send must not give the impression of the official being offensive or arrogant (norm in context).

Context

At the beginning of 2002 the European Parliament published a call for tenders for the translation of verbatim reports of Parliament's sessions into Greek. On 2 July 2002, the tenderers were informed by Parliament that the call for tenders had been cancelled "due to technical reasons". In its complaint lodged at the beginning of September 2002, the complainant alleged that Parliament had failed to inform it about the reasons for cancelling the tender. The European Parliament explained that the information contained in the e-mail of 2 July 2002 had been erroneous and that the call for tenders had in fact not been cancelled. Parliament had informed bidders for the relevant call for tenders on 26 September 2002 that the contract award notice had been published on 13 September 2002 and had apologised for any inconvenience the erroneous e-mail sent on 2 July 2002 could have caused.

The Ombudsman notes that the complainant's allegation was based on the assumption that the call for tenders had been cancelled. Given that the tender was in fact not cancelled, this allegation has thus become devoid of purpose, and there is no need further to inquire into it.²¹

The complainant also considered that the tone of the e-mail by which the EP replied, on 3 July 2002, to inquiries by some of its members as to the reasons of the purported cancellation of the call for tenders was inappropriate and created an impression of arrogant behaviour.

The EO notes *that it is good administrative practice that officials should be courteous in relations with the public* (he refers to art. 12(1) EO Code). The e-mail of 3 July 2002 reads as follows: "We are not going to elaborate on the reasons for cancellation in so far as we do not have to." This message gives the impression that its sender considered that Parliament was under no obligation to provide the information that had been requested. However, no reasons whatsoever were given for this position, and the reply is limited to just one terse sentence. The Ombudsman considers that it is therefore understandable that the complainant and its members took offence at this e-mail. The e-mail was also send to the head of Parliament's Translation Planning Division and another responsible, therefore if no intention to offend or to appear arrogant on the part of the official concerned was intended as suggested by Parliament, there would thus have been ample time subsequently to correct the impression this message was bound to create. The Ombudsman considers that by sending and failing to correct the e-mail message of 3 July 2002, Parliament failed to comply with the obligation to be courteous in relations with the public.

[complaint 1565/2002/GG]

Article 13

Reply to letters in the language of the citizen

The official shall ensure that every citizen of the Union or any member of the public who writes to the Institution in one of the Treaty languages receives an answer in the same language. The same shall apply as far a possible to legal persons such as associations (NGOs) and companies.

²¹ In other words, the applicant needs to submit a new complaint about the fact that the Parliament has not corrected erroneous information, which in my view constitutes a clear violation of the principle of good administration that information provided must be correct.

Norms in context

1. Duty to answer letters

The principle of reply to letters in language of citizen requires that the Community institutions and bodies reply to the letters of citizens. This means that complaint letters of unsuccessful tenderers must be answered (norm in context).

Context

The complainant alleged that CEDEFOP never replied its objection letter regarding the decision to award the tender to another. CEDEFOP observed that there was no legal or substantive grounds justifying the complainant's claim. *Principles of good administration require that the Community institutions and bodies reply to the letters of citizens* (reference to art. 13 EO Code 1999). In the present case CEDEFOP did not reply to the complainant's letter. Even if CEDEFOP considered that there were no legal or substantive grounds justifying the complainant's claim, it should have replied to the letter. Its failure to reply therefore constitutes an instance of maladministration and the Ombudsman makes a critical remark.

[complaint 466/2000/OV]

* [See also complaint 505/2000(OV)SM (not included) and 1396/2001/SM under art. 15 EO Code]

Article 14

Acknowledgement of receipt and indication of the competent official

[None]

Article 15

Obligation to transfer to the competent service of the institution

1. If a letter or a complaint to the Institution is addressed or transmitted to a Directorate-General, Directorate or Unit which has no competence to deal with it, its services shall ensure that the file is transferred without delay to the competent service of the Institution.
2. The service which originally received the letter or complaint shall notify the author of this transfer and shall indicate the name and the telephone number of the official to whom the file has been passed.
3. The official shall alert the member of the public or organisation to any error or omissions in documents and provide an opportunity to rectify them.

Norms in context

1. Transfer of complaint letters of tenderers

The principle of transfer to the competent service requires that the AIDCO when it receives a complaint about an incorrectly run tender procedure financed under the EDF, notifies the author that it transferred his complaint to the Contracting Authority, the correct interlocutor (norm in context).

Other principles of good administration

The principle of reply to letters in language of the citizen requires that complaint letters of unsuccessful tenderers are answered (norm in context).

Context

The complainant was part of a consortium, which applied for a restricted call for tender concerning the project "Southern African Development Community Regional Monitoring, Control and Surveillance of Fishing Activities" financed by the European Development Fund (EDF) in Namibia. He alleged that there was a delay in replying to its letter of 14 May 2001 by EuropeAid Co-operation Office (AIDCO).

In this letter, the complainant informed AIDCO, the Commission's service, that it considered that the tender award procedure for an ACP project in Namibia was incorrectly run (complaint letter). The Commission expresses regret that its services did not reply to the complainant's letter 14 May 2001. They nevertheless forwarded the letter to the Contracting Authority in Namibia, the correct interlocutor. The Commission also acknowledges that its services should have informed the complainant that its letter of 14 May 2001 should have been directly addressed to Namibia's Contracting Authority and not to the Commission services.

The Ombudsman notes that the Commission should have replied to the letter of 14 May 2001. However, he notes that the Commission expresses regret for not having done so and that it acknowledges that its services did not answer the letter of the complainant. No need for further inquiries.

[complaint 1396/2001/SM]

Article 16

Right to be heard and to make statements

[None]

Article 17

Reasonable time-limits for taking decisions

1. The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. The same rule shall apply for answering letters from members of the public and for answers to administrative notes which the official has sent to his superiors requesting instructions regarding the decisions to be taken.
2. If a request or a complaint to the Institution cannot, because of the complexity of the matter which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time.

Norms in context

1. Deadline for requesting tender documents

The principle of reasonable time-limits for taking decisions requires that the Commission supplies tender documents upon request within the announced deadline (norm in context).

Context

The complainant wished to submit a tender to the European Commission to provide services involved in organising meetings in Belgium. The Commission refused to provide him with the relevant documents on the grounds that his request was made after the relevant deadline of 30 June 2003. According to the complainant, the notice of the invitation to tender was published in the Official Journal only on 18 June 2003. He therefore alleged that the Commission failed to comply with the deadline of 24 days to obtain contract documents and additional documents and should postpone the tender. The Commission argues that the deadline of 24 days to obtain contract documents and additional documents runs from the date of dispatch of the tender notice to the Publications Office and not from the date of its publication in the Official Journal. The Commission explains that the relevant provisions of Community law applicable to public procurement provide for appropriate publicity for calls for tenders in order to ensure equal opportunities for all potential bidders.

The Ombudsman examined the invitation to tender published in the Official Journal. The tender notice clearly mentioned the date of dispatch of the notice as 6 June 2003 and that the deadline of 24 days to obtain contract documents runs from that date. The Ombudsman did not find any maladministration.

[complaint 1269/2003/ELB]

2. Reply to letter within reasonable time

The principle of reasonable time-limits for taking decisions requires that letters and complaints from citizens are answered within a reasonable period of time (general norm).

Context

The complaint concerned the fact that the Commission replied only after five months to the complainants letter, one of the partners in a consortium, complained against the decision of the (national) contracting authority to exclude the consortium from the tender procedure. The EO issued a critical remark. He observed that it is *good administrative practice to reply to letters and complaints from citizens within a reasonable period of time*. It is also *good administrative practice that the information given in this reply should be clear and correct*.

[complaint 2103/2004/GG; second aspect under the principle of courtesy]

3. Timely information on rejection tender decisions

The principle of reasonable time-limits for taking decisions requires that tenderers are informed *timely* on the rejection of their tender (norm in context)

Context

The complaint, a company which tender in the framework of a call for tenders for French translation services had been rejected, argued that the Commission had failed to provide adequate information about the requirement to seal the envelope containing the tender with adhesive tape. The EO observed that since this obligation was explicitly set out in the invitation to tender, the Commission provided adequate information about this requirement.

The complainant also argued that there is maladministration in their case because tenders were opened on 16 June 2003 and the rejection of their tender was communicated to them on 14 November 2003. The Commission failed to inform them as soon as possible of the rejection. The Ombudsman recalls Article 148 of Regulation 2342/2002, which contains rules about the contact with tenderers during the procedure.²² He also recalls that similar information was provided in paragraph 1.12 of the General Specifications, which states that "no information of any kind will be given on the stage reached in the evaluation of tenders until the final award of the contract". The Ombudsman notes that the opening of the tenders was public and that the complainants had the opportunity to be present, and that in accordance with applicable rules, the Commission provided the complainants with timely information on the rejection of their tender. He found no maladministration.

[complaint 534/2004/ELB; aspects of informing decision to addressee under the principle of active and adequate provision of information]

Article 18

Duty to state the grounds of decisions

1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.
2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.
3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore

²² "1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

(...)3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender (...)"

made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.

Norms in context

1.1 Adequate reasoning

The principle of the duty to state the grounds of decisions implies that the rejection of tender applications must be valid and adequately reasoned. This means that the reasoning must be able to carry the decision. This means that all relevant facts, circumstances and arguments must be considered, inclusive the vision of those involved (norm in context).

Context

The complainant A EEIG, an European Economic Interest Grouping, has complaint to the Ombudsman about the Commission's rejection of a number of applications for lots under a procurement notice. According to A EEIG (Consortium A is the complainant) the Commission was mistaken to accuse B (B is a legal person, within the legal group (EEIG)) of applying for seven lots rather than the maximum of six. The European Ombudsman notes that it is not his role to assess the admissibility of tenders and to substitute his judgment for that of the Institution concerned as to whether a tender meets the applicable admissibility/eligibility criteria. The Ombudsman's approach in the present decision will therefore be to examine whether the Commission has provided *valid and adequate grounds for its challenged decision*. Article 13 Public procurement notice excludes natural or legal persons from submitting applications for more than six lots under this particular tender. The complainant questions the way the Commission interpreted and applied the prohibition-clause in the case of B. The Ombudsman considers that it is not clear whether this prohibition concerns a legal person which has applied for lots, as an individual legal entity or as a leader or partner of a consortium, but is also a formal member of an EEIG which has applied, as leader or partner of a consortium, for lots, without however taking into account the resources and capacities of this legal person. The EO notes that a normally diligent tenderer could reasonably rely on the Communication, as regards the interpretation of Regulation 2137/85, to the extent that it is relevant to the interpretation of Article 13 of the procurement notice. The EO refers to parts of the Communication and observes that it may reasonably be considered as implying that, when an EEIG submits a tender, it is not presumed that all the members of the EEIG undertake to participate in the performance of the contract. If this is the case, then it should not logically further be presumed that all the members of the EEIG participate in the submission of the tender. But the Commission's challenged decisions were based, in essence, on such a presumption. Moreover, the Commission disposed too easily of the Consortium's reasonable reliance on the above passage of the Communication. The Ombudsman considers that, when the Commission applied article 13 of the procurement notice, it should have adequately addressed the issue raised by the complainant about the information contained in the Communication. However, it failed to do so. The contested decision concerning the rejection, on the basis of Article 13 of the procurement notice, of the Consortium's applications for the different lots was not adequately reasoned.

[complaint 3693/2005/ID]

* See also complaint 466/2000/OV (not included).

1.2. Adequate reasoning

The principle of the duty to state the grounds of decisions implies that the rejection of a proposal under a tender call for proposals must be adequately reasoned (norm in context).

Context

The complainant alleged that his application for funding to the Community's Tempus 2000 programme had been rejected following an inadequate review. He considers the reasons provided spurious.

The EO observes that Community courts have held, that the Commission has a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract

following an invitation to tender.²³ Review of the actions taken by the Commission in connection to tender procedures, is therefore limited to checking that the rules governing the procedure and the statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers.²⁴

The Ombudsman notes that in reply to the complainant's request, the Commission has offered an explanation, first verbally and subsequently in writing, of its reasons not to retain his proposal for funding. They include references to particular aspects of the complainant's proposal such as its needs analysis, trainingship, internal quality control or parity among its activities. Both Mrs. Dubosc's statements as summarised by the complainant in his letter and those of Mr Westlake present a similar reasoning. These explanations appear to provide an adequate statement for the position taken by the institution. The Ombudsman considers that the complainant has not provided sufficient evidence that the Commission misused its powers when carrying out its selection of proposals under the Tempus 2000 call for applications. Accordingly, the Ombudsman has concluded that the Commission acted within the limits of its legal authority.

The Ombudsman has already concluded that the Commission acted within the limits of its legal authority in the assessment of the complainant's proposal. The Ombudsman therefore finds that there is no evidence of maladministration in relation to the Commission's refusal of the complainant's request for a new review.

[complaint 1193/2001/JMA]

2. Reasoned decisions when responsible

The principle of the duty to state the grounds of decisions implies that the Commission should provide adequate reasons for decisions for which it can be held accountable (general norm).

Context

The European Federation of Engineering Consultancy Associations made a complaint to the EO concerning the Federation's proposal that the Commission should set up a public procurement conciliation body. The complainant alleged that the Commission had failed to adequately account for its decision not to pursue the creation of a complaint body for procurement procedures, a possibility that had been raised in a Commission White Paper. The Ombudsman considers that the Commission's opinion in the present inquiry has adequately clarified the reasons why the Commission decided not to pursue the creation of a complaint body for procurement award procedures. As regards the complainant's wish that the Commission considers the idea of creating a complaint body relating to on-going projects, the Ombudsman notes that this idea would not appear to have been a subject in the Commission's White Paper. It would therefore not appear that there has been a discussion and decision on this matter which the Commission is obliged to account for.

[complaint 1217/2000/PB]

3. Decisions must be communicated to those affected

The principle of the duty to state the grounds of decisions requires that the reasons for a decision are communicated to the person affected by it. The decision not to award a particular contract should be reasoned and communicated to the applicants (norm in context).

Other principles of good administration

The principle of active and adequate provision of information implies that the participants of a tender procedure must be properly informed of the proceedings.

Context

The Ombudsman notes that *it is good administrative behaviour to keep the participants of a tender procedure properly informed of the proceedings.* This counts in particular, when an institution decides not to award a particular contract and when this decision affects the participants.

²³ Case 56/77 Agence Européenne d'Interims v Commission [1978] ECR 2215, par. 20; Case T-19/95 Adia Interim v Commission [1996] ECR II-321, par. 49.

²⁴ Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 147.

In reply to a letter of inquiry received by the complainant, the Commission explained that no applicant was selected for the lot in Vienna. The reasons for this decision were not communicated to the applicants. *It is good administrative behaviour to communicate the reasons for a decision to the persons affected by it.* The Commission has provided the reasons for its decision when replying to the questions raised by the complainant in its complaint to the Ombudsman.
[complaint 415/98/VK]

Article 19 ***Indication of the possibilities of appeal***

1. A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.
2. Decisions shall in particular refer to the possibilities of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community.

Norms in context

1. Rejection tender

The principle of indication of the possibilities of appeal requires that information about appeals is provided. This implies that when a tender is rejected tenderers should be provided with information about the available means of appeal (norm in context).

Other principles of good administration

Principles of good administration are of general application.

Context

The complainant's firm submitted several bids for different calls for tenders involving translation work for the Parliament. Parliament rejected his bids on the grounds that the complainant's tenders, did not comply with the requirements set out in Article 143 (3) of the implementing Regulation, which imposes on bidders who use self-adhesive envelopes the obligations both to seal the envelope with adhesive tape and to sign across the seal. The complainant argued that Parliament's decision was based on an incorrect interpretation of provision 143(3), since his bids had not been submitted in self-adhesive envelopes, as explicitly referred to in that provision, but rather in boxes closed with adhesive tape. The complainant firstly alleged that the above provision only applied to self-adhesive envelopes (this aspect is treated under art. 9 EO Code).

Secondly, he alleged that Parliament has not provided the complainant with information about possibilities of appeal against its rejection of the bid. The EO observed that the Financial Regulation is silent as regards the means of appeal available to tenderers. Under Article 100.2 (1) of the Financial Regulation, the contracting authority has only to notify the candidates or bidders, whose applications or tenders are rejected, of the grounds on which the decision was taken. Nevertheless, *principles of good administration, including information about appeals, are of general application*, and there is no indication that the Community legislator intended that the relevant provisions of the Financial Regulation concerning information to tenderers should exclude *the general principle of good administration concerning the provision of information about possibilities of appeal*. By not providing those details on the available means to appeal its decisions, the Parliament failed to abide by its own Code of Conduct. This constituted an instance of maladministration and the EO made a critical remark.
[complaint 287/2005/JMA]

2. Indicate possibility of appeal

The principle of indication of appeal requires that decisions should, where appropriate, refer to the possibility of starting judicial proceedings in accordance with Article 230 EC (general norm- laid down in art. 19(b) EO Code). This implies that unsuccessful tenderers and candidates are informed of the possibility of starting judicial proceedings in accordance with Art. 230 EC (norm in context).

Context

The Commission informed the Ombudsman that it had adopted, on 3 July 2003, a Communication in response to the own-initiative inquiry. The Ombudsman has carefully examined the Communication, which establishes a procedure to provide information rapidly to unsuccessful tenderers and candidates, so that the latter have the opportunity to bring judicial proceedings to challenge an award decision, before the relevant contract is signed. The procedure applies to contract awards covered by Article 105 of the Financial Regulation. The Ombudsman notes that the Commission's Communication does not expressly provide that unsuccessful tenderers and candidates shall be informed of the possibility to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. The Ombudsman points out that, according to the *Commission's Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public*, decisions should, where appropriate, refer to the possibility of starting judicial proceedings in accordance with Article 230 EC. The Ombudsman considers that it would be in conformity with *the principles of good administration* to provide such information to unsuccessful tenderers and candidates. [IO/2/2002/IJH]

Article 20

Notification of the decision

[None]

Article 21

Data protection

[None]

Article 22

Requests for information

1. The official shall, when he has responsibility for the matter concerned, provide members of the public with the information that they request. When appropriate, the official shall give advice on how to initiate an administrative procedure within his field of competence. The official shall take care that the information communicated is clear and understandable.
2. If an oral request for information is too complicated or too comprehensive to be dealt with, the official shall advise the person concerned to formulate his demand in writing.
3. If, because of its confidentiality, an official may not disclose the information requested, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he cannot communicate the information.
4. Further to requests for information on matters for which he has no responsibility, the official shall direct the requester to the competent person and indicate his name and telephone number. Further to requests for information concerning another Community institution or body, the official shall direct the requester to that institution or body.
5. Where appropriate, the official shall, depending on the subject of the request, direct the person seeking information to the service of the Institution responsible for providing information to the public.

Norms in context

1a. Request for information on public procurement procedures

The principle of requests for information requires the Community Administration provide members of the public with the information they have requested, unless it invokes valid and adequate grounds for not doing so (general norm, not in the EO Code). Requests for information on public procurement procedures must be provided, unless there exist valid and adequate grounds for not doing so (norm in context).

1b. Re-direct request for information

The principle of requests for information requires that an official receiving requests for information on matters for which he is not responsible should either (i) direct the person making the request to the person responsible for dealing with such matters, by providing the name and contact references of that person (art. 22(4) EO Code), or (ii) forward the request directly to the person responsible for such matters (general norm- aspect (ii) not in the EO Code).

Context

The complainant's, the European Roma Rights Centre (ERRC), bid in the context of Open Call for Tender concerning a comparative analysis on Roma, Sinti, Gypsies and Travellers in public education, had not been successful. The complaint regarded the failure of the EUMC to reply to the e-mail request for further information of the ERRC, and to establish and apply transparent award criteria in this tender.

In respect of the first allegation EUMC argued that the complainant should have send his request to mr. A instead he send it to mr. D. It further sustained that formal requests for information on procurement procedures should be sent by regular or registered mail and not by e-mail. The Ombudsman, first, noted that *principles of good administration require that the Community Administration provide members of the public with the information they have requested, unless it invokes valid and adequate grounds for not doing so.* Moreover, the principle of equal treatment of tenderers, which is a general principle of Community law(2),²⁵ implies the existence of an obligation of transparency, the purpose of which is to enable verification that the principle of equal treatment of tenderers has been complied with and to ensure a degree of advertising sufficient to enable the Community Courts and the Ombudsman to review the impartiality and integrity of the procurement procedures(3).²⁶ When it comes to a decision to award a tender, the duty to provide reasons, which is enshrined in Article 253 of the EC Treaty, addresses the need to ensure an appropriate level of transparency in the contract-awarding procedures(4).²⁷ Moreover, *principles of good administration require that an official receiving requests for information on matters for which he is not responsible should either (i) direct the person making the request to the person responsible for dealing with such matters, by providing the name and contact references of that person, in accordance with Article 22(4) of the European Code of Good Administrative Behaviour, or (ii) forward the request directly to the person responsible for such matters.* Neither of these steps was taken in the case at hand. The EUMC has not referred to any specific rules supporting its argument that formal requests for information on procurement procedures should be sent by regular or registered mail and not by e-mail. The EO noted that the EUMC's opinion did not adequately explain the EUMC's failure to reply to the complainant's request, nor has it provided information on the points awarded to the complainant's offer and to the selected offer, with respect to each one of the criteria. A friendly solution was in the end reached, and the EUMC sent the requested information.

[complaint 1858/2005/BB; aspect of complaint under the principle of transparency]

2. Contact during tender procedure

²⁵ Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091, paragraph 69.

²⁶ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 61-62.

²⁷ Cf. Case C-92/00 *HI* [2002] ECR I-5553, paragraph 46.

The principle of request for information in tender cases implies that questions asked during a tender procedure must be answered as far as this does not give candidates an unfair advantage over others (norm in context).

Context

The complainant, a consultancy firm, submitted an offer in response to an Open Call for tenders for the supply of technical support services to the Commission. It claims that the Commission failed to reply to questions contained in letters addressed to it. It appeared from the evidence that some of the questions had been answered in a letter and by phone. The Ombudsman also considers that the Commission's argument according to which answering certain questions asked by one candidate during a tender procedure might give this candidate an unfair advantage over others does not appear to be unreasonable. The Commission provided in its opinion in this complaint answers to all the questions which according to the complainant it had not answered. The EO therefore found no maladministration.
[complaint 278/2000/GG]

3. Provision of correct information

The principle of request for information requires that the information provided upon request is clear, understandable and correct (general norm art. 22(1) EO Code, aspect of “correct” is not mentioned in the EO Code).

Context

The complainant alleged that, despite all the reasonable requests he made to the Commission in order to obtain information on the call for tenders, the Commission was not able to send him the requested information and this because its services did not provide him with the correct address for asking for the tender documentation. The Commission observed that the complainant had used wrong information obtained from a non official external Website over which it had no control.

The Ombudsman considers that the Commission cannot be held responsible for the fact that the complainant has used a non-official Website which contained wrong information, and consequently missed the deadline. The EO regretted that the Commission has however communicated an erroneous fax number to the complainant about the responsible person to contact. In the future the Commission should make sure that it communicates correct fax numbers to citizens who request for information.

[complaint 882/98/OV]

Article 23

Request for public access to documents

1. The official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001.²⁸
2. If the official cannot comply with an oral request for access to documents, the citizen shall be advised to formulate it in writing.

Norms in context

1. Request for copies of proposals

The principle of public access to documents requires that in case of requests for information received by the Commission from other participants in the public procurement procedure, the confidentiality of this type of information is balanced against the interest in providing transparency (norm in context).

Context

²⁸ O.J. L 145/43, 31.5.2001.

The Commission published a call for proposals for the promotion of energy efficiency in the European Community under a Community energy saving programme, "SAVE II". The complainant's proposal for funding was not selected by the Commission. The complainant requested the Commission for copies of eight successful proposals submitted under the procedure.

The Commission referred to the call for proposals, published in the Official Journal, which stated that: "Information given to the Community relating to a proposal application or the contract will be treated as confidential." On this basis, the Commission considered itself unable to provide the complainant with copies of the other tenderers' proposals.

[complaint 1086/97/IJH]

Further remark: It appears that the Commission made a broad undertaking to observe confidentiality in respect of all information it received from participants in the procedure in question. It is clear that the Commission is bound to respect such an undertaking. It is also clear that such an undertaking hinders transparency and the participating parties' right of information. Therefore, the Ombudsman suggests that in view of promoting transparency in its activities, the Commission should reconsider the relevance of such a broad undertaking.

[complaint 818/2001/PB; category (lack or refusal of information); no review]

Article 24

Keeping adequate records

[None]

Article 25

Publicity for the Code

[None]

PRINCIPLES AND NORMS NOT INCLUDED IN THE EO CODE

The active and adequate provision of information

The principle of active and adequate provision of information requires the Institution to provide information upon request (now in art. 22) and on their own initiative about procedures or activities which are undertaken to the general public or those persons involved. The information that is provided is correct, understandable and consistent (general norm).

Norms in context

Publicity

1. Method of submission tenders

The principle of active and adequate provision of information requires that tender conditions are made public in advance and that they are drafted in a clear, unambiguous and consistent manner. This implies that information about the method of submission of tenders is explicitly provided (norm in context).

Context

The complainant, a company which tender in the framework of a call for tenders for French translation services had been rejected, argued that the Commission had failed to provide adequate information about the requirement to seal the envelope containing the tender with adhesive tape. The EO observed that since this obligation was explicitly set out in the invitation to tender, the Commission provided adequate information about this requirement.

The complainant also argued that there is maladministration in their case because tenders were opened on 16 June 2003 and the rejection of their tender was communicated to them on 14 November 2003. The Commission failed to inform them as soon as possible of the rejection. The Ombudsman recalls Article 148 of Regulation 2342/2002, which contains rules about the contact with tenderers during the procedure.²⁹ He also recalls that similar information was provided in paragraph 1.12 of the General Specifications, which states that "no information of any kind will be given on the stage reached in the evaluation of tenders until the final award of the contract". The Ombudsman notes that the opening of the tenders was public and that the complainants had the opportunity to be present, and that in accordance with applicable rules, the Commission provided the complainants with timely information on the rejection of their tender. He found no maladministration.

The Ombudsman would like to recall that following his own-initiative inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission, the Commission adopted a Communication,³⁰ which deals with the procedure for informing candidates and tenderers, after a contract has been awarded and before the actual contract has been signed, in respect of public procurement contracts awarded by the Commission. The Ombudsman notes that the complainants do not appear to have supplied evidence of failure by the Commission to follow the procedure it adopted as a result of the own-initiative inquiry.³¹

[complaint 534/2004/ELB; aspect of timely information on decisions under the principle of expediency]

²⁹ "1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

(...)3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender (...)".

³⁰ COM(2003)395 final.

³¹ The decision on the own-initiative inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission (OI/2/2002/IJH) is available on the website of the European Ombudsman at the following address: <http://www.ombudsman.europa.eu/decision/en/02oi2.htm>.

Consistency

2. Method of submission tenders

The principle of active and adequate provision of information requires that tender conditions are made public in advance and that they are drafted in a clear, unambiguous and consistent manner. This requires that information about the method of submission of tenders is consistent in the different documents relating to a tender (norm in context).

Context

By letter the complainant, a consulting firm, was informed that its bid in a tender procedure concerning a contract for technical assistance in the evaluation of projects in the field of the Life Environment programme 2004 was rejected.

In respect of one argument of the complainant the EO made a further remark. Point 10.5 of the Vade Mecum on Public Procurement Procedures (which stipulates that applications must be submitted in three copies), although it seems to have been applied equally to all bidders, does not seem to correspond to the wording of the call for tender in question, which suggests that bids not submitted in one signed original and two copies will not be considered valid. The Ombudsman considers that to ignore a failure to comply with a provision of the call for tender could seem unfair to bidders who do comply with the provision in question. In order to avoid the possible appearance of unfairness in future, the Ombudsman suggests that it could be useful for the Commission to re-examine the relationship between the Vade Mecum and calls for tenders as regards the number of copies of bids that are required to be submitted and communicate to him its findings. He makes a critical remark in this respect.

[complaint 538/2004/TN; other aspects under the principle of objectivity and under the principle of courtesy]

Clarity

3. Documents to be submitted

The principle of active and adequate provision of information requires that tender conditions are made public in advance and that they are drafted in a clear, unambiguous and consistent manner. This implies that information concerning documents that have to be submitted with a tender should be clear and unambiguous (norm in context)

Context

The complainant, a translation bureau, alleged that the FAQ website, read together with the tender specifications, made it unclear whether certified information on sub-contractors had to be submitted. It was also generally unclear which copies of supporting documents had to be certified, especially if copies of diplomas did not have to be certified. According to the Commission the tender specifications were unambiguous as regards the requirement of certified information and copies. Furthermore, the answer to the FAQ in question only confirmed what was already clear from the tender specifications.

The Ombudsman points out that *information concerning documents that have to be submitted with a tender should be clear and unambiguous*, especially since an incomplete tender in most cases cannot be remedied after the deadline for submissions. However, in view of the wording of the FAQ to which the information in question constituted an answer, the Ombudsman does not consider that the information on the FAQ website was unclear or inconsistent with the tender specifications. The Ombudsman therefore finds no maladministration by the Commission as regards this part of the complaint.

[complaint 949/2003/IJH]

4. Tender conditions

The principle of active and adequate provision of information requires that tender conditions are made public in advance and that they are drafted in a clear, unambiguous and consistent manner. This implies that in tender procedures *the administration clearly sets out the conditions that applicants have to fulfil* (norm in context).

Context:

The complainant is a translator who submitted an offer in reply to a call for tenders published by the European Commission. The Commission rejected the application on the grounds that the complainant had failed to submit the necessary document.

It is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil. In the present case, the Commission required applicants to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. It seems that for a person such as the complainant it was impossible to obtain such a document from a public authority or a person or body vested with public authority as the wording of the term implied. The Commission has failed to clarify that an attestation by other persons or bodies, e.g. a tax consultant or a lawyer, would be regarded as sufficient. The exclusion of the complainant for failure to submit such a document thus constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

[complaint 866/2001/GG]

Duty to inform tenderers

5. Inform citizen of decisions within reasonable time

The principle of active and adequate provision of information requires that the EU institutions and bodies inform the citizens concerned in due time about the decisions and the administrative measures they take. If, because of the complexity of the issue, the matter cannot be decided upon within a reasonable time-limit, the institution or body should inform the citizen thereof as soon as possible. This implies that delays in the tender procedure must be communicated to tenderers (norm in context).

Context

The complainant, a Dutch firm, participated in the tender procedure launched by the European Parliament for furniture for the bars and restaurants of its building in Brussels. The complaint concerned an alleged failure to inform the complainant by the European Parliament with regard to the tender procedure.

The EO observes that *principles of good administration require that the EU institutions and bodies inform the citizens concerned in due time about the decisions and the administrative measures they take. If, because of the complexity of the issue, the matter cannot be decided upon within a reasonable time-limit, the institution or body should inform the citizen thereof as soon as possible.* The complainant made an offer and was only informed by the Parliament more than two years later that its offer was not retained (November 1999). The Parliament did not keep the complainant informed about the delays which occurred in this tender procedure, including those related to the exposition of the furniture. The Parliament however pointed out that it had installed the necessary structures ensuring that all bidders are kept informed in writing in the event of any delays in a call for tender, and that sufficient safeguards now exist to ensure that similar problems will not occur in the future. The Ombudsman therefore considers that no further inquiries are necessary into this aspect of the complaint.

[complaint 78/99/ADB]

6. Duty to actively inform tenderers of proceedings

The principle of active and adequate provision of information requires that the participants of a tender procedure are properly informed of the proceedings (norm in context)

Context

The Ombudsman notes that *it is good administrative behaviour to keep the participants of a tender procedure properly informed of the proceedings.* This counts in particular, when an institution decides not to award a particular contract and when this decision affects the participants.

In reply to a letter of inquiry received by the complainant, the Commission explained that no applicant was selected for the lot in Vienna. The reasons for this decision were not communicated to the applicants. *It is good administrative behaviour to communicate the reasons for a decision to the persons affected by it.* The Commission has provided the reasons for its decision when replying to the questions raised by the complainant in its complaint to the Ombudsman.

[complaint 415/98/VK; the other aspect is mentioned under the principle of the duty to state reasons]

Publicity tender questions and answers

6. Questions on FAQ website

The principle of active and adequate provision of information requires that admissible tenderers questions and their answers are published on the FAQ website in order to give all tenderers access to the same information about the tender procedure (norm in context).

Context

The complaint submitted by a translation bureau concerns a call for tenders for translations into the languages of the candidate countries. The complainant alleges that the European Parliament wrongly interpreted the term "certified copy" in the tender specifications to mean that the certified mark had to be in its original. The Ombudsman takes the view that Parliament's interpretation of the term "certified copy" as an "attestation that this is a true copy of the original by an appropriate authority", and that "a copy of a certified copy is by definition not a certified copy", is the normal interpretation of that term.

The complainant also alleged that the European Parliament failed to publish, on the FAQ website, his question concerning the interpretation of the term "certified copy" and its answer, which was sent to him in an email on 23 April 2003. According to the complainant, this failure constitutes a serious breach of the tender specifications. The European Parliament argues that the complainant's question was strictly speaking not admissible, since the wording of the tender specifications was clear and had in addition been reinforced by the clarifications published on the FAQ website prior to the 23 April 2003. Parliament nonetheless replied to the complainant to direct his attention to the website publications. The answers to the complainant's admissible queries were thus given to all potential tenderers in the replies to admissible requests for clarification, published on the FAQ website on 24 April 2003.

The Ombudsman notes that the rationale of publishing the tenderers' questions and their answers on the FAQ website is to give all tenderers access to the same information about the tender procedure and thereby ensure equal treatment. The Ombudsman considers that the information given by Parliament in its e-mail to the complainant was already available from the tender specifications and the FAQ website sufficiently clearly so that all tenderers were equally informed. He found no maladministration.

[complaint 745/2003/IJH]

* [See complaint 2103/2004/GG under art. 12 EO Code and complaint 415/98/VK under art. 18 EO Code]

Transparency

The administration must behave in a visible/transparent manner, this means among other things that decisions are made public or actions made known in advance, and that the decision-making process is accessible and understandable and that there is access to the information underlying this process.

Norms in context

Publicity

1. Award criteria

The principle of equal treatment in public procurement procedures implies the existence of an obligation of transparency (provision of information). *The principle of transparency* requires that the administration establishes and applies transparent award criteria. This means that the weighting of the award criteria to be taken into account by the contracting authority in identifying the economically most advantageous offer must be made public well in advance (norm in context).

Context

The complainant's, the European Roma Rights Centre (ERRC), bid in the context of Open Call for Tender concerning a comparative analysis on Roma, Sinti, Gypsies and Travellers in public education, had not been successful. It complained to the Ombudsman about the failure of the EUMC to reply to his e-mail request for further information, and to establish and apply transparent award criteria in this tender. In support of the second allegation the complainant argued that the EUMC had failed to make the "quality/price ratio" public at the time the Open Call for this Tender was issued. The EO noted that the Open Call for this Tender did not appear to refer to the precise weighting of the award criterion concerning price in relation to the award criteria concerning qualitative factors. In addition, the EUMC did not made reference to any such provisions. The EUMC stated in its opinion that it decided to apply a simple Quality/Price ratio, and that this was the method that had been announced. The EO observed that the EUMC's references to the Call for Tender and to the Vade Mecum on Public Procurement do not explain its decision to apply a "simple quality/price ratio". Nor did it announce this method. The Ombudsman considered that the EUMC's statement that the procedure at issue was transparent, with respect to the establishment and application of a simple quality/price ratio, is not convincing. He also recalled that the principle of equal treatment of tenderers is a general principle of Community law.³² This principle implies *the existence of an obligation of transparency*, aimed at making it possible to verify that the above principle has been complied with and at ensuring a degree of advertising sufficient to enable the Community Courts and the Ombudsman to review the impartiality and integrity of the procurement procedures.³³ More specifically, this means, *inter alia*, that the award criteria stated in a tender notice must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.³⁴ Furthermore, the relative importance, that is, the weighting, of the award criteria to be taken into account by the contracting authority in identifying the economically most advantageous offer must be specified in the tender notice or tender documents referred to in the tender notice, at least where: (i) the decision on this matter has been made at the time of the issuance of the call for tender or of the relevant tender documents referred to in the tender notice³⁵; or (ii) the decision on this issue contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation.³⁶ Moreover, the decision on this subject will not be compatible with Community law if it is adopted after taking into account elements, or, more generally, circumstances likely to give rise to discrimination against one of the tenderers.³⁷ The EO concluded that the EUMC failed to show, in any way, that the establishment of the "simple quality/price ratio", on the basis of which it identified the economically most advantageous offer in this case, was consonant with the Community law requirements concerning transparency in the context of tender procedures. The EO proposed managed to reach a friendly solution in this case.
[complaint 1858/2005/BB, aspect under the principle of requests for information]

2. Tender conditions

The principle of transparency requires that the administration in tender procedures sets out the conditions that applicants have to fulfil as clearly as possible (norm in context).

Context

The complainant had not been awarded the tender contract because according to the Commission it lacked the necessary experience in the water research field. The complainant claims that the selection procedure was not transparent, given that the selection criteria had required the applicant firms to have "the necessary experience and record in the water research field" whereas the bid lodged by the complainant's firm had been rejected by the Commission on the grounds that it did not have "hands on experience of the design of water treatment facilities".

The EO observes that tender procedures need to be transparent. It is therefore *good administrative practice in such procedures for the administration to set out the conditions that*

³² Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091, paragraph 69.

³³ Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 61-62.

³⁴ Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42.

³⁵ Cf. Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 90-100.

³⁶ Cf. Case C-331/04 *ATI EAC* [2005] ECR I-10109, paragraphs 24, 28, 29.

³⁷ Cf. Case C-331/04 *ATI EAC*, cited above, paragraphs 24, 30 and 31.

applicants have to fulfil as clearly as possible. In the present case, the decisive criterion was that applicants had to have "hands on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants. By omitting clearly to spell out this criterion, the Commission has thus failed to render the selection procedure as transparent as it could and ought to have been. This constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

[complaint 1043/2000/GG; other aspect under non-discrimination]

* [See complaint 1043/2000/GG under art. 5 EO Code]

Duty to provide information upon request

3. Provision of information upon request after tender award

The principle of transparency requires that the administration provides information upon request about the evaluators and the reasons for the failure of their application once the selection is over (norm in context).

Context

The complainant alleged that the procedure applied by the Commission to award TACIS funds is not transparent enough, in particular as regards the selection criteria, the selection committee's work, and the qualification of the experts in charge of the selection. The Commission explained that the procedure was as transparent as other Commission procedures (...). The Ombudsman notes that the issue of transparency in TACIS tender procedures is tackled in Annex III of Regulation 1279/96³⁸ and more generally in The Financial Regulation³⁹ under Title IX Section III. The complainant however considered that *the selection process should be public and the names and qualifications of the evaluators known in advance*. There appears to be *no specific legal obligation regarding these issues*. In the present case, applicants can request and obtain information about the evaluators and the reasons for the failure of their application once the selection is over. Thus, the measures of confidentiality taken by the Commission do not appear to infringe *the general principle of transparency of the decision-making process*. The Commission appears to have acted in accordance with the rules binding upon it. No instance of maladministration was therefore revealed.

[complaint 649/99/ADB]

Exercise of discretionary powers

The principle of the exercise of discretionary powers implies that when the official has been granted discretionary powers it cannot abstain from exercising those powers.

Norms in context

1. Exercise of discretionary powers

The principle of the exercise of discretionary powers implies that when the official has been granted discretionary powers to ask for clarifications regarding a tender, it would be contrary to this principle not to exercise this power at all (norm in context).

Context

³⁸ Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia (OJ L 165, 04/07/1996, p. 1 -11).

³⁹ Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, OJ L 070 , 16/03/1990, p. 1 -7.

The complainant's bid for tender was rejected by Parliament on the grounds that the proof submitted concerning the exclusion criteria was not compatible with the proof required in the Call. According to the complainant, his bid was rejected for the formalistic and trivial reason indicated above, although it could have asked the complainant to correct such a flaw in its tender. This amounted to an abuse of discretion, taking into account the time it took Parliament to make a decision on the admissibility of the tender.

The Ombudsman, first, notes that, according to point 2.1 of the General Specifications of the Call, a consortium's failure to provide, as regards the exclusion criteria 1), 2) and 5), "proof [in] the form of a recent extract from the judicial record or, failing that, a recent equivalent document issued by a judicial or administrative authority in the country of origin showing that those requirements are satisfied," with respect to each member of the consortium, would lead to the exclusion of the tender. Simple photocopies of such documents were not compatible with the relevant criterion in the Call. Moreover, this requirement was explicit and unexceptional. Accordingly, the flaw in the complainant's tender was not "insignificant", but essential, in the sense that it constituted a ground for the exclusion of its tender. The EO also referred to the General Specifications of the Call in which it is prohibited to have "any contact between the tenderers and the contracting authorities concerning this call for tender is prohibited, save, by way of special exception, under the following conditions: After the tenders have been opened: At the instance of the contracting authorities: if clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected, the contracting authorities may contact the tenderer." This last provision, concerning the possibility of the contracting authority to contact a tenderer, should be strictly interpreted, not only as a "special exception" to the prohibition, but also in view of the need to ensure the equal treatment of tenderers,⁴⁰ all of whom were under an equal duty to diligently draw up their tenders and submit them in accordance with the conditions of the Call.⁴¹ In the context of such an interpretation, the correction of the above-mentioned flaw in the complainant's opened tender, which amounted to a deviation from an explicit, unexceptional and essential requirement of the Call, would not seem to be a "clarification" in connection with the tender or a correction of an "obvious clerical erro[r]" contained in the tender

However, the Ombudsman also notes Parliament's statement that "for the calls for tenders organized in 2003 the authorising authority did not make use of its liberty to ask for supplementary documentation or certification when missing." This argument does not seem to be consonant with the Call and "*the principles of good administration concerning the exercise of discretionary powers*". First, the contracting authority did not enjoy such a "liberty" according to the General Specifications of the Call. Second, if the applicable provisions attributed such a discretionary power to the contracting authority, then it would be contrary to the principles of good administration for the contracting authority to decide not to exercise this power at all (see T-211/02). Therefore, the Ombudsman will make a relevant further remark below.

[complaint 1315/2005/BB]

The active and adequate gathering of information

The principle of active and adequate gathering of information requires the administration to actively collect the necessary information in the light of taking decisions on future actions.

Norms in context

1. Contact during tender procedure

The principle of active and adequately gathering of information: The principle that the administration must treat tenders equally implies that the administration may contact the tenderer if clarification is required in connection with a tender or if obvious clerical errors contained in the tender must be corrected, on the condition that this would not entail a modification of the terms of the tender (norm in context).

⁴⁰ Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091.

⁴¹ Cf. Case T-19/95 *Adia Interim v. Commission* [1996] ECR II-321, paragraph 47.

Context

The complainant's bid had been rejected on the grounds that his bid did not satisfy the requirements of the tender dossier as regards the projection stand. He complained about the failure of the Commission to request additional clarification about the technical specifications of this item.

The Ombudsman observes that the tender notice does not contain specific provisions regarding the issue of request for clarification. Article 99 of Regulation 3418/93⁴² provides that "...every invitation to tender shall in particular: ... (h) prohibit any contact between the institution and tenderers during a procurement procedure save in the following exceptional circumstances: ... [(second paragraph)] after the opening of tenders: if some clarification is required in connection with a tender or if obvious clerical errors in the tender need to be corrected, the institution may contact the tenderer provided that the terms of the tender are not modified as a result." The Court of First Instance has held that the second paragraph of Article 99(h) cannot be interpreted as imposing a duty on the institutions to contact tenderers⁴³ The Ombudsman notes that the above-mentioned prohibition provided for in the second paragraph of Article 99(h) of Regulation 3418/93 is an expression of the principle of equal treatment of tenderers, which is a general principle of Community law.⁴⁴ This principle implies *inter alia* that all tenders must correspond to the technical specifications set out in the tender notice.⁴⁵ and that tenderers are in a position of equality when their tenders are being assessed.⁴⁶ In this context, the Ombudsman refers to *Adia Interim SA v Commission*.⁴⁷ The EO observes that the Commission could reasonably have concluded, that the provision of clarification regarding the projection stand, which would have the purpose and effect of remedying the tender's departure from the pertinent tender conditions, would have resulted in the modification of the terms of the complainant's tender, in violation of the principle of equal treatment of tenderers.

However, the EO issues a further remark. The Commission appears to argue that it might be obliged to request clarification regarding a tender when there is a particularly obvious error, even if such clarification would entail a modification of the terms of the tender. Such an argument does not seem to be consonant with the principle of equal treatment of tenderers, which is a general principle of Community law, and with the second paragraph of Article 99(h) of Regulation 3418/93.
[complaint 142/2005/BB]

2 Contact during tender procedure

The principle of active and adequately gathering of information: The principle that the administration must treat tenders equally implies that the administration may contact the tenderer if clarification is required in connection with a tender or if obvious clerical errors contained in the tender must be corrected, on the condition that this would not entail a modification of the terms of the tender (norm in context). Clarification must be asked when the flaw/ambiguity in the tender has a simple explanation or can be easily resolved (norm in context).

Context

⁴² OJ 1993 L 315, p. 1. Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977.

⁴³ Case T-19/95 *Adia Interim SA v. Commission* [1996] ECR II-321, paragraph 44.

⁴⁴ Case C-57/01 *Makedoniki Metro, Mikhaniki AE and Elliniko Dimosio* [2003] ECR I-1091, paragraph 69.

⁴⁵ Case C-243/89 *Commission v. Denmark* [1993] ECR I-3353, paragraph 37; Case C-87/94 *Commission v. Belgium* [1996] ECR I-2043, paragraphs 70-74.

⁴⁶ Case C-19/00 *SIAC Construction Ltd and County Council of the County of Mayo* [2001] ECR I-7725, paragraph 34.

⁴⁷ Case T-19/95 *Adia Interim SA v. Commission* [1996] ECR II-321, paragraphs 41-48. In that case, the Commission abstained from contacting the applicant even though the selection committee had detected a "systematic error in the calculation" of the cost of certain working hours in the course of assessing the applicant's tender. The Court of First Instance dismissed the application for annulment of the Commission's decision to reject the applicant's tender, holding *inter alia* that any contact between the Commission and the applicant, in order to seek to jointly clarify the nature and the cause of such a systematic calculation error, would involve a risk of making adjustments to other elements of the tender, relating to the establishment of the tender price. Such contact would have entailed "an infringement of the principle of equal treatment to the detriment of the other tenderers, all of whom, in common with the applicant, are under an equal duty to take care in drawing up their tenders".

The complainant's bid for tender was rejected by Parliament on the grounds that the proof submitted concerning the exclusion criteria was not compatible with the proof required in the Call. According to the complainant, his bid was rejected for the formalistic and trivial reason indicated above, although it could have asked the complainant to correct such a flaw in its tender. This amounted to an abuse of discretion, taking into account the time it took Parliament to make a decision on the admissibility of the tender.

The Ombudsman, first, notes that, according to point 2.1 of the General Specifications of the Call, a consortium's failure to provide, as regards the exclusion criteria 1), 2) and 5), "proof [in] the form of a recent extract from the judicial record or, failing that, a recent equivalent document issued by a judicial or administrative authority in the country of origin showing that those requirements are satisfied," with respect to each member of the consortium, would lead to the exclusion of the tender. Simple photocopies of such documents were not compatible with the relevant criterion in the Call. Moreover, this requirement was explicit and unexceptional. Accordingly, the flaw in the complainant's tender was not "insignificant", but essential, in the sense that it constituted a ground for the exclusion of its tender. The EO also referred to the General Specifications of the Call in which it is prohibited to have "any contact between the tenderers and the contracting authorities concerning this call for tender is prohibited, save, by way of special exception, under the following conditions: After the tenders have been opened: At the instance of the contracting authorities: if clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected, the contracting authorities may contact the tenderer." This last provision, concerning the possibility of the contracting authority to contact a tenderer, should be strictly interpreted, not only as a "special exception" to the prohibition, but also in view of the need to ensure the equal treatment of tenderers,⁴⁸ all of whom were under an equal duty to diligently draw up their tenders and submit them in accordance with the conditions of the Call.⁴⁹ In the context of such an interpretation, the correction of the above-mentioned flaw in the complainant's opened tender, which amounted to a deviation from an explicit, unexceptional and essential requirement of the Call, would not seem to be a "clarification" in connection with the tender or a correction of an "obvious clerical erro[r]" contained in the tender. Therefore, Parliament's decision to reject the complainant's tender did not amount to an instance of maladministration. [1315/2005/BB; other aspect mentioned under the principle of exercise of discretionary powers]

* [See for other norms in context: complaint (232/2001/GG) under the principle of "impartiality and independence", and complaints (2539/2005/MF) and (1167/2004/PB) under the principle of "objectivity"]

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⁴⁸ Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091.

⁴⁹ Cf. Case T-19/95 *Adia Interim v. Commission* [1996] ECR II-321, paragraph 47.