Fair trial in competition matters: the European ombudsman's perspective

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1. Introduction

As early as in 1974, at the meeting of the Parliamentary Assembly of the Council of Europe, a Recommendation had already been adopted on the role of the ombudsman and the parliamentary commissioner, taking into account the ombudsman and the parliamentary commissioner as (for) the protection of individuals against the authorities and in principle to promote good governance. It pointed out that the citizens' lives are increasingly governed by the authorities, and where the protection of fundamental rights are supervised by the state, the interferences of public authorities into the lives of individuals threaten their fundamental rights. It stated that the usual forms of judicial remedies are not always able to react with the necessary speed and efficiency to the problems and to the complexity of different fields of the administration; thus there is a need for a further guarantee, which is simpler, quicker, cheaper and more efficient, and this could be provided by the ombudsman.[1] Furthermore, in another Recommendation adopted in 1985, the Council of Ministers affirmed this view "…to consider extending and strengthening the powers of Ombudsmen in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration".

The office of the European ombudsman was established in connection with European citizenship by the Maastricht Treaty. European citizenship was needed because the early period of European integration gave no role to citizens and, for the deepening of integration, a sort of identification and means of demonstrating a European 'added value' were required[2] and offered a direct connection between the Union and the citizen. Arising from the European citizenship, any European citizen or any natural or legal person residing or having registered at an office in a Member State of the Union may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. As we look at the term maladministration, a complex of procedural obligations can be observed between the EU administration and the public. Although in different ways, the definition of good administrative practices (good administrative behaviour) has been used by European law since the 1960s, enshrined through the activities of the European Court of Justice.[3] Since the first annual report of the European Ombudsman, he or she has constantly represented the view that three types of errors may give rise to an instance of maladministration and which may even to some extent partly cover each other. These types can be identified as a failure to comply with a legal norm or principle, failure to perform the principle of good administration and failure

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[1] Recommendation 757 (1975) on the conclusions of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states (Paris, 18–19 April 1974).

[2] WARLEIGH A. (2001) 22.

[3] The principle of good administration is enshrined in Court of Justice judgement of 31 March 1992 in Case-255/90 P, Burban (1992) ECR I-2253 and Court of First Instance judgements of 18 September 1995 in Case T-167/94 Nölle (1995) ECR II-2589, and 9 July 1999 in Case T-231/97 New Europe Consulting and others (1999) ECR II-2403. See Council of the EU: Charter of Fundamental Rights of the EU. Explanations relating to the complete text of the Charter. December 2000. Office for Official Publications of the European Communities, 2001. 58.

to respect human and fundamental rights. For example, the European Ombudsman often referred in the past during his or her investigations to Article F of the Maastricht Treaty, which ordered the Community institutions and bodies to respect fundamental rights. We should mention the opinion of the Court of First Instance which stated that the principle of sound administration, does not, in itself, confer rights upon individuals except where it constitutes the expression of specific 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, proclaimed on 7 December 2000 in Nice.[4]

Classical ombudsmen do not have an express mandate for human rights protection and promotion, however, the violation of human rights by government institutions and bodies as maladministration falls within their mandate and thus the European ombudsman, as a true classical ombudsman in the international or supranational level, uses human rights norms that are part of the applicable legal system and applies them in human rights related cases.[5]

2. Legal background

According to the EU ombudsman, in order to prevent an instance of maladministration, the practice of good administration should be followed. We can see in the office's case-law that after an own-initiative inquiry was conducted in 1998 – where the subject matter was the correct procedure determining the relation between the public officials of Community bodies and institutions – to clarify the term of good administrative procedure, the so-called European Code of Good Administrative Behaviour was prepared. The investigation was initiated because of complaints where the offences could have been avoided with a clear and public record of the obligations of the Community officials. I shall point out that the Code can be seen as one of the achievements of the original intentions regarding the establishment of the office: the Union's commitment to a more accountable and transparent administration. Thus, the institutions and their officials are obliged to respect and to follow the principles of good administrative conduct laid down in this code. However, I see the effects of this code in two directions. First, the code gives the opportunity to the official to avoid an instance of maladministration. Second, European citizens who are familiar with the code, can require from the official during the administrative procedure the basic principles set out in it.

We shall point out that in the Finnish Constitution the concept of good administrative behaviour and thus the procedural guarantees cumulated in the behaviour are constitutionally protected as fundamental right and that it is no coincidence that the first European Ombudsman, Jacob Söderman who had before the office of the Finnish Ombudsman also wanted that a similar fundamental right should be included in the Charter of Fundamental Rights.[6]

Also, the Ombudsman published ethical standards form of five public service principles in 2012 as a guide for the EU administration. These are: commitment to the European Union and its citizens, integrity, objectivity, respect for others and transparency.

[4] Case T-193/04 Hans-MartinTillack v. Council [2006] ECR II-3995, para. 127.
[5] REIF L. C. (2004) 386.
[6] The then European ombudsman, Jacob Söderman actively participated in framing the draft constitutional treaty, and he was in the opinion that in the next draft a provision should clearly refer to the right to complain to the ombudsman, which would be consistent with the national constitution of several Member States. He was also on the opinion that adopting subsidiarity and openness as fundamental principles would provide the legal basis for the adoption of an open, reliable, accountable and service oriented public administration. Furthermore, it is necessary to make citizens aware of the remedies, both judicial and non-judicial that include the courts, the ombudsmen and committees of petitions at all levels of the Union.

The right to good administrative procedure embodied in the code has been formulated into the Charter of Fundamental Rights of the European Union as a right enjoyed by the European citizens: the right to good administration in Article 41[7] and the right to refer to the European Ombudsman in Article 43.[8] The importance of the Charter of Fundamental Rights is confirmed by the fact that it has been incorporated into the draft European Constitution. In the preliminary draft constitutional treaty an article on citizenship of the Union was included. Among the new rights was the right to complain to the ombudsman as a new forum for legal redress. It followed the idea that this new forum would contribute to the achievement of an open, reliable and service oriented government. Yet before the Charter became legally binding, the ombudsman stated that the violation of the rights in the Charter constitutes maladministration.

3. The subject of inquiry: maladministration

In the provisions regarding the European Ombudsman, we cannot find any further specification what they understand of the term of maladministration. It is only referred to in the Treaty and the Statute to the extent that the Ombudsman examines instances of maladministration. It is established that maladministration occurs, when an EU institution does not act in accordance with the Community law, or neglects or fails to take account of the principles and rules created by the European Court of Justice and the Court of First Instance. The uncertainty surrounding of the definition of maladministration made the European Ombudsman offer a further clarification in the Annual Report of 1995,[9] stating that many other things may also amount to maladministration, including administrative irregularities, administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and the lack or refusal of information. In 1997, it was further clarified as 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it' and this definition was adopted by a 1998 European Parliament decision.

Regarding the European Parliament, limits of maladministration can be determined by the European Parliament's political power. The classical Ombudsman offices have been established within the frame of the parliament to control the administration, and not for the supervision of the parliament's legislative or other work. Although the situation cannot be fully compared to the European level, the activities of the European Parliament cannot be

[7] Article 41:
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
– the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[8] Article 43: Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

[9] First in the annual reports of 1995 and 1997.

considered as administrative activities, thus complaints in connection with the European Parliament and its Committee on Petitions' political activity are to be considered inadmissible. Therefore, for example in complaint 420/9.2.96/PLM/B, the alleged maladministration, namely poor administration by the Committee on Petitions, the handling of the petitions was more of a political issue than maladministration: as the right to petition laid down in the Treaty has a constitutional value, the Parliament's responsibility is to organize its services so it can perform its institutional functions.[10] Similarly, the decision of the European Parliament about the French nuclear tests in the Pacific was inadmissible because it concerned a political decision.[11]

As we cannot see a clear division of legislative and executive powers at European level, so the European office does not meet the traditional image of Ombudsman ordered to the legislative power,[12] and although basically he or she is a Parliamentary Ombudsman, the supervision is extended as well to the Parliament. Nevertheless, this control is limited: as complaints in connection with activities or decisions with rather political than administrative nature are not considered to be admissible, hence the Committee on Petitions cannot be supervised by the Ombudsman as its activities belong to the Parliament's political actions.

4. The decision-making of the Ombudsman

In cases, where the Ombudsman finds maladministration at the end of the inquiry and there is still a possibility to redress the maladministration by the institution, body, office or agency concerned, or the maladministration is of general nature or more serious, the Ombudsman informs the institution concerned and the complainant about her or his finding with a report and a draft recommendation. If the Ombudsman's draft recommendation is not accepted within the time-frame, it is refused, or the institution concerned cannot find any other acceptable solution, or the Ombudsman does not find the detailed opinion satisfactory then the Ombudsman has authority to make a special report.[13] This report is submitted to the European Parliament, the concerned institutions and the complainant, in which the instance of maladministration is reviewed and a recommendation[14] can be laid down, too. In this case emphasis is on the European Parliament, because it can help to resolve the situation: using the decisions of the Parliament to accept the recommendation and call upon the institution to solve the problem.[15] The significance of the aforementioned is strengthened by the fact that the competence of the European Ombudsman is quite limited, because an Ombudsman decision has no binding power.[16] This means that if there is no problem-solving solution between the concerned institutions and the complainant, the Ombudsman turns to the last and most significant means: using the help of another institution. The importance of a special report is that the concerned institution's political adjudication is at stake. The first special report−concerning the public access of documents−was submitted to the Parliament in 1997 and the case ended successfully.[17] The special report has no legal effects '…vis-à-vis third parties within the meaning of Art. 173 of the Treaty (ex Art. 230 TEC) and is not binding to

[10] See complaint 420/9.2.96/PLMP/B in The European Ombudsman: Annual Report for 1996, s. 14.
[11] See The European Ombudsman Report for the year 1995, s. 9.
[12] MEESE J. M. (200) 182.
[13] See more special reports on http://www.ombudsman.europa.eu/cases/specialreports.faces.
[14] Art. 8(4) of the Implementing Provisions.
[15] For example in case 713/98/IJH, after submitting a special report, the European Parliament called on the European Commission to hand over data requested before by the complainant.
[16] See Case C-167/06 P *Komninou and Others v. Commission* [2007] ECR I-141, para. 44.
[17] Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/F/IJH) http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/378/html.bookmark

the Parliament', as stated by the Court of First Instance in Case T-103/99. Indeed, the Parliament is '…free to decide, within the framework of the powers conferred on it by the Treaty, what steps are to be taken in relation to it'.[18] Therefore, the Parliament can freely decide to adopt a decision about the Ombudsman's recommendation, namely, adopting a decision the Parliament calls upon the concerned institution to settle the case. Regarding the European Ombudsman's other reporting obligation as stated in Art. 228 of TFEU (ex Art. 195 TEC) and Art. 3(8) of Decision 94/262 of the European Parliament, neither the annual report has binding effect to the Parliament, but in the frame of the annual report the Ombudsman has the opportunity to give general observations regarding the conduct of the institutions'.[19;20]

5. Competition law: as a field of subject

According to the statistics, 70 % of the complaints concern the European Commission, which can be explained by the fact that it is the main European institution which has the most direct link with European citizens. The types of maladministration are alleged breach or breach of duties relating to the following: absence of discrimination [Article 5 ECGAB][21], requests for public access to documents [Article 23 ECGAB][22], duty of care (incorrect application of substantive and/or procedural rules) [Article 4 ECGAB][23], duty to state the grounds of decisions and the possibilities of appeal [Articles 18 and 19 ECGAB][24], requests for information [Article 22 ECGAB][25], legitimate expectations, consistency and advice [Article

[18] See Case T-103/99 *Associazione delle Cantine Sociali Venete v. Ombudsman and Parliament* [2000] ECR II-4165, para. 50.

[19] See the annual reports on http://www.ombudsman.europa.eu/activities/annualreports.faces.

[20] See Case T-103/99, para. 50.

[21] 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.

[22] 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) 1049/20013.
2. If the official cannot comply with an oral request for access to documents, the citizen shall be advised to formulate it in writing.

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

[24] 18.1. 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 an 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 sent, the official shall subsequently provide the citizen who expressly requests it with an individual reasoning
19.1. 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, and the time-limits for exercising them.
2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 263 and 228 of the Treaty on the Functioning of the European Union.

[25] 1. The official shall, when he or she 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 or her 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 extensive to be dealt with, the official shall advise the person concerned to formulate his or her demand in writing.

10 ECGAB][26], lawfulness (incorrect application of substantive and/or procedural rules) [Article 4 ECGAB][27], impartiality, independence and objectivity [Articles 8 and 9 ECGAB][28], fairness [Article 11 ECGAB][29], notification of the decision [Article 20 ECGAB][30], reasonable time-limit for taking decisions [Article 17 ECGAB][31].

Regarding the subject matters of complaints in the field of competition policy, the main group is related to the infringement proceeding of the EU Commission, where a decision to close an infringement case can involve maladministration if the Commission fails to explain its decision, or takes into account irrelevant matters.[32] This can be explained by a 1997 own-initiative inquiry against the EU Commission's infringement procedure based on Article 258 of the TFEU (ex Article 226 of the EC Treaty). The ex officio inquiry was necessary because of the many complaints in relation with the administrative side of the infringement procedure. They were mainly about the delay of complaint handling, lack of information (about the stages of the procedure), lack of reasoning (when the Committee adopted the view that the member state had not infringed community law). The own-initiated inquiry was already proposed in 1996, when closing two complaints (complaints regarding the UK'S M40 motor

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3. If an official may not disclose the information requested because of its confidential nature, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he or she cannot communicate the information.

4. Further to requests for information on matters for which he or she has no responsibility, the official shall direct the requester to the competent person and indicate his or her name and telephone number. Further to requests for information concerning another EU institution, the official shall direct the requester to that institution.

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.

[26] 1. The official shall be consistent in his or her 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. Where such grounds exist, they shall be recorded in writing.

2. The official shall respect the legitimate and reasonable expectations that members of the public have in 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.

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

[28] 8.1. 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.

9.1. 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.

[29] The official shall act impartially, fairly, and reasonably.

[30] 1. The official shall ensure that persons whose rights or interests are affected by a decision are informed of that decision in writing, as soon as it is taken.

2. The official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed.

[31] 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 or her 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 matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author as soon as possible. In such a case, a definitive decision should be communicated to the author in the shortest possible time.

[32] See Case 1738/2012/RT. In Good administration in practice: The European Ombudsman's decisions in 2013. 24.

drive and the Newbury Bypass) he stated that without prejudice to the question of whether the principles of Community law might require more developed procedural rights for private complainants under Article 169, the Commission could itself decide to create such rights as a matter of good administrative behaviour, consistent with the case-law of the Court of Justice and Court of First Instance that individuals cannot challenge the Commission's decision not to open infringement proceedings[33], and an administrative process of this kind normally concludes with a reasoned decision communicated to those who have participated in the process[34].

The Ombudsman's power extends to the examination of procedural rights. But what if, according to the complainant, the violation of procedural rights affects the final decision and the Ombudsman accepts the complainant's allegations? The EU Ombudsman points out that the Commission has not yet clarified the matter and made the decision without this. In this case the EU Ombudsman's opinion deals not only with the procedural part but indirectly with the substantive part, too. Indeed, if the complainant's allegations are true, the Ombudsman calls upon the Commission to establish a new procedure saying 'good administrative practice would therefore at least have required the Commission to try and ascertain', which means at the end the review of the prior decision.[35]

Many competition complaints concern the issue of transparency, as the ombudsman also dealt with complaints from companies and other legal entities concerning anti-trust investigations and other cases related to the Commission's competition policy as in a case when the Commission had an electronic copy of an internal e-mail of a competitor that it claimed was crucial evidence but did not release the e-mail until just over a month before fining the cartel, and yet it had had the e-mail for six months. The Commission's explanation about the delay did not convince the Ombudsman, and the Commission's conduct had been

[33] See case 206/207.10.95/HS/UK

[34] See case 132/21.9.95/AH/EN.

[35] This happened in case 642/2004/GG: Preussag AG acquired (what was then) Salzgitter AG, a state-owned company, for DM 2 452 billion. According to the complainant, this price was far below the real value of the company and thus comprised elements of state aid. In December 2003, the complainant asked the Directorate-General for Competition of the European Commission to intervene. In reply, DG Competition stated that it had already examined the transaction; that there were no indications of illegal state aid and that the complainant's letter contained no new elements that would justify a different interpretation of the relevant facts. In March 2004, the complainant turned to the Ombudsman. He alleged that DG Competition had failed to consider his letter of December 2003 with the requisite care in which he argued that statements made at a meeting of a committee of the Parliament of Lower Saxony (the Land most directly affected by the sale of Salzgitter AG to Preussag AG) suggested or proved that there had been state aid. The Ombudsman considered that the document submitted by the complainant in this context suggested that the government of Lower Saxony shared the view that Preussag AG had purchased Salzgitter AG at a price that was not the market price. In the Ombudsman's view, good administrative practice would therefore at least have required the Commission to try and ascertain whether, contrary to its assumption thus far, the sale did contain elements of state aid. However, the Commission had not taken any steps to clarify the statements made at the above-mentioned meeting and this, in the Ombudsman's view, constituted maladministration. He therefore made a draft recommendation that the Commission should take appropriate steps in order to ascertain whether the sale of Salzgitter AG to Preussag AG in 1989 entailed elements of state aid. In its detailed opinion, the Commission informed the Ombudsman that it accepted his findings and had therefore addressed itself to the German authorities in order to clarify the relevant statements. In his observations, the complainant submitted that the Commission should conduct inquiries of its own with a view to obtaining information from independent sources. The Ombudsman took the view that the Commission had accepted his draft recommendation and that the measures taken to implement it were satisfactory. To avoid any possible misunderstanding, the Ombudsman found it useful to add that, if it were to be found that representatives of the government of Lower Saxony did indeed consider the sale of Salzgitter AG to Preussag AG to constitute a 'present' to the latter, good administrative practice would make it necessary for the Commission to conduct a more thorough investigation into the whole case. However, the Ombudsman noted that he had no reason to assume that the Commission would fail to do so if necessary.
Summary of decision on complaint 642/2004/GG against the European Commission, Annual Report 2006. 93.

criticized.[36] However, the Commission does acknowledge in many cases that a procedure has not been totally transparent and negotiates with the complainant with a view to resolve the issue amicably.[37]

Complaints concern the area of institutional or policy matters too, with alleged procedural errors made by the Commission during an anti-trust investigation, e.g. when the Commission failed to take minutes of a meeting despite the fact that the meeting directly concerned the subject-matter of the Commission's investigation.[38]

However, the Ombudsman takes into consideration the discretion power of the Commission as to whether or not to commence proceedings on the basis of a competition as e.g in a complaint about the Commission's failure to respect EC competition rules by not opening an investigation on the basis of his complaint and alleged deficiencies in the Commission's letter-handling policy.[39]

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[36] The German company Infineon made one such complaint. The Commission was investigating it in the 'smart card chips' cartel inquiry, along with Philips, Samsung, and Renesas, and eventually fined them for belonging to the cartel. The Commission had an electronic copy of an internal e-mail of a competitor that it claimed was crucial evidence in the Infineon case. The company asked to see the document, because it doubted its authenticity. The Commission did not release the e-mail until just over a month before fining the cartel, and yet it had had the e-mail for six months. Infineon complained to the Ombudsman that this delay left it only one week to carry out the complex task of analysing the e-mail for authenticity. The Commission's explanation about the delay did not convince the Ombudsman, and she criticised the Commission's conduct. Annual report. 2014. 15.

[37] A case about tender procedure for a supply contract, the Commission acknowledged that the procedure was not totally transparent. It indicated that, at the time of drafting its opinion on this case, it was negotiating with the complainant with a view to resolving the issue amicably. The Ombudsman appreciated the fact that the Commission had taken responsibility for the mistake and that it was negotiating a solution with the complainant. Annual report 2006. 46.

[38] In case 1935/2008/FOR the Ombudsman received a complaint from Intel. The complaint alleged procedural errors by the Commission during an anti-trust investigation of Intel under Article 82 of the EC Treaty. According to the complainant, the Commission failed to take minutes of a meeting with Dell it held on 23 August 2006, despite the fact that the meeting directly concerned the subject-matter of the Commission's investigation of Intel. In his decision dated 14 July 2009, the Ombudsman found that the Commission did gather information relating to the subject-matter of its investigation in the meeting of 23 August 2006. He also found that the Commission did not make a proper note of that meeting and that the Commission's investigation file did not include the agenda of the meeting. The Ombudsman concluded that the Commission had committed an instance of maladministration. The Ombudsman did not, however, make any finding as to whether the Commission had infringed Intel's rights of defence. In addition, the complainant alleged that the Commission encouraged Dell to enter into an information exchange arrangement with AMD. According to the complainant, the effect of this arrangement was to allow AMD to obtain confidential information about Intel that was contained in the Commission's investigation file. The complainant argued that, in acting this way, the Commission circumvented the rules which limited AMD's right of access to the investigation file. As regards this second allegation, the Ombudsman considered that it would not have been in accordance with principles of good administration if the Commission had encouraged Dell to enter into such an information exchange agreement with AMD. However, he noted that the Commission had no responsibility, and indeed no power, to prevent such an arrangement. The Ombudsman found that the possibility of Dell entering into the information exchange agreement was first raised in a telephone call of 30 August 2007 between senior representatives of Dell and senior Commission representatives. However, since the Commission had not made any contemporaneous notes of the content of that telephone call, the available evidence was not sufficient for the Ombudsman to take a position as to whether Dell, or the Commission, had first suggested the agreement. The Ombudsman did not, therefore, make any finding of maladministration as regards the complainant's second allegation. However, the Ombudsman recommended that, in the future, proper internal notes should be made of the content of meetings or telephone calls with third parties concerning important procedural issues.

[39] In case 1142/2008/(BEH)KM the complainant, a German citizen, wrote to the European Commission asking it to commence competition proceedings against E.ON and the Würzburg public utility company. He highlighted that the latter had not protested against price increases made by E.ON, which delivers gas to this company and also has an indirect minority stake in it. In its reply, the Commission's Directorate-General for Competition (DG COMP) outlined that it shared the complainant's concerns about competition in the German energy markets but did not intend to open proceedings on the basis of his complaint. Further letters were exchanged before the complainant turned to the European Ombudsman. In his complaint to the Ombudsman, the complainant alleged

6. Concluding Remarks

According to the Lisbon Treaty '…the Union recognises the rights, freedoms and principle set out in the Charter of Fundamental Rights of the European Union … which shall have the same legal value as the Treaties'.[40] The commitment to the binding nature of the Charter in the Lisbon Treaty reflects the gradual understanding that citizens should be placed at the heart of the European issues which shows the success of the European Ombudsman as well. We wish to underline, however, that the Charter was the first international legal document with explicit declaration of the right to good administration.

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that the Commission failed to respect EC competition rules by not opening an investigation on the basis of his complaint. He also alleged deficiencies in the Commission's letter-handling policy. In its opinion, DG COMP essentially argued that the conduct of the Würzburg public utility company had no effect on cross-border trade and as regards the conduct of E.ON, the Commission had a discretion to prioritise other options of working towards increased competition in the German energy markets rather than those proposed by the complainant. The Ombudsman considered that the Commission's position concerning the conduct of the Würzburg public utility company was correct. He also found that the Commission was right in arguing that it had discretion as to whether or not to commence proceedings on the basis of a competition complaint. In the Ombudsman's view, the Commission acted within the limits of its discretion when deciding not to open an investigation regarding E.ON's conduct. Furthermore, the Ombudsman noted that, although the Commission's reply to one of the complainant's letters was delayed, DG COMP apologised for this fact. Finally, the Ombudsman held that there were no grounds to carry out further inquiries into the Commission's handling of the complainant's other correspondence.

[40] Article 6 of the Treaty on European Union and the Treaty on the Functioning of the European Union.

Good administration in practice: The European Ombudsman's decisions in 2013
Summary of decision on complaint 642/2004/GG against the European Commission, Annual Report 2006
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