



EUROPEAN CENTRAL BANK

EUROSYSTEM

ECB-UNRESTRICTED

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Detailed opinion of the European Central Bank on the Recommendation of the European Ombudsman in Case 644/2015/PMC

1. Summary of the detailed opinion

The European Central Bank (ECB) considers that the manner in which it carried out the 2015 procurement procedure for travel services and handling of travel expenses did not amount to an instance of maladministration. In this context, the ECB refers to a number of factual and legal shortcomings in the assessment underpinning the Ombudsman's Recommendation. The ECB regrets that certain elements - which could have been easily clarified - had not been brought to its attention before the Recommendation was published. All the more so as the Recommendation negatively impacted the ECB's reputation. Despite the fact that the ECB contests the conclusion reached, it is very supportive and appreciative of the Ombudsman's work to foster good governance in the EU institutions. Given the ECB's commitment to good governance and irrespective of the reservations expressed in the detailed opinion, the ECB will accommodate the Ombudsman's recommendation; it will adapt its public procurement framework, in line with the general principles of Union public procurement law, by including an explicit reference on a prior assessment with regard to separating service requirements into lots.

2. Ombudsman's investigation

On **8 May 2015** the European Ombudsman transmitted a copy of the complaint 644/2015/PMC to the ECB and asked for an opinion on the following allegation:

"Certain tender requirements of the ECB's Tender Procedure for the provision of travel services and the handling of travel expenses (no. 2015/S 039-065706) are unjustified and violate the principles of non-discrimination and equal treatment of tenderers, also giving the impression that the ECB is privileging its incumbent Travel Services Provider."

On **14 July 2015** the ECB provided its opinion to the European Ombudsman.

On **24 May 2016** the Ombudsman's services sent an e-mail to the ECB requesting further information.

On **28 June 2016** the ECB replied to the request for further information.

On **6 October 2016** the Ombudsman issued a Recommendation to the ECB, pursuant to Article 3(6) of the Statute of the European Ombudsman, in which she made the following recommendation:

"In order to avoid similar instances of maladministration in future procurement procedures, the European Central Bank should revise its Decision laying down Rules on Procurement with a view to providing, in each procurement procedure, that a specific assessment is undertaken of the merits, or otherwise, of bundling different service requirements into separate lots or just one lot; this revision of its Decision should be completed within six months of the date of this Ombudsman recommendation. In accordance with Article 3(6) of the Statute of the European

Ombudsman, the ECB shall send a detailed opinion, in response to this recommendation, by the end of December 2016."

On **12 and 13 October 2016** the ECB services contacted the Ombudsman's services by telephone and informed them that the Recommendation contained factual errors and, among other things, expressed concern about the reputational impact given that the Recommendation had already been published. The Ombudsman's services invited the ECB to set out its observations thereon in writing.

On **7 November 2016** the ECB provided the Ombudsman's services with clarification on the factual errors in the Recommendation, as detailed below in Section 4(a) to (d).

On **23 November 2016** the Ombudsman's services informed the ECB that the Ombudsman would consider the ECB's position on the basis of a formal reply.

3. Procedural and legal aspects

- 1) According to the "*Ombudsman's well-established decision-making practice, maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it*".¹ Pursuant to Article 3(6) of the Statute of the European Ombudsman, the Ombudsman needs to establish an instance of maladministration in order to make draft recommendations. The ECB considers that, in her Recommendation, the Ombudsman failed to identify a rule or principle binding upon the ECB which the latter had infringed as well as characterising in what way such a rule or principle had been infringed.
- 2) Indeed, in paragraph 19 of the Recommendation, the Ombudsman acknowledged that "*neither the Financial Regulation, nor the Procurement Directive apply directly to the ECB*." Nevertheless, the Ombudsman found it "*useful to be guided by [(i)] the Commission's manual on public procurement as well as by [(ii)] the new Procurement Directive, which recommend the practice of contracting in lots as a means of fostering competition, unless the proper execution of the contract would be undermined by using lots*." The ECB considers it useful to highlight that, in so doing, the Ombudsman referred to (i) an internal document of the European Commission and (ii) Directive 2014/24/EU² addressed at Member States; it is difficult to see how either of these could be legally applicable and binding upon the ECB. In her reasoning, the Ombudsman did not establish and characterise any other failure to observe binding rules or principles.
- 3) Therefore, the Recommendation fails to establish and characterise the alleged instance of maladministration pursuant to the European Ombudsman's own benchmark.
- 4) The ECB notes that the Ombudsman would have had the possibility to make use of her powers to inspect the ECB's public procurement file and establish the relevant facts before issuing her Recommendation.

¹ The Ombudsman confirmed this in her decision in Case 632/2012/MMN, paragraph 37 <http://www.ombudsman.europa.eu/cases/decision.faces/en/53190/html.bookmark>, See also decision in Case 2068/2011/KM, paragraph 29 <http://www.ombudsman.europa.eu/cases/decision.faces/en/54595/html.bookmark>, See also decision in Case 2469/2011/VL, paragraph 15 <http://www.ombudsman.europa.eu/cases/decision.faces/en/53796/html.bookmark>

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, p. 65). Pursuant to its Articles 90 and 91, the Directive became legally applicable only on 18 April 2016, that is, more than a year after the ECB had published the relevant Contract Notice (25 February 2015).

- 5) Article 3(6) of the Statute of the European Ombudsman³ refers to “*draft recommendations*”. However, in her new Implementing Provisions⁴, the Ombudsman refers merely to “*recommendation(s)*”. Given that the Ombudsman addressed the present Recommendation on the basis of Article 3(6) of her Statute, it appears doubtful that she could derogate from the Statute with her Implementing Provisions.

At the time of writing, there are 237 documents entitled “*draft recommendation*” accessible via the Ombudsman’s website (the latest dated 29 May 2015). In each of these cases the Ombudsman closed the inquiry, not with a (draft) recommendation, but with a decision. However, the Ombudsman’s Recommendation in the present case conveys to the public an impression of finality in her assessment:

- 1) In the Recommendation and on her website, the Ombudsman states “*The Ombudsman closed her inquiry with a finding of maladministration against the ECB and a recommendation that it should take steps to ensure such maladministration does not recur in the future*”,⁵ and
 - 2) The wording of the Recommendation to the ECB sets out a finding which, in view of a simultaneous deadline for follow-up action, appears no longer to be subject to a genuine re-examination (“*In order to avoid similar instances of maladministration in future procurement procedures, the European Central Bank should revise its Decision laying down Rules on Procurement ... within six months of the date of this Ombudsman recommendation*”).
- 6) The ECB highlights that, according to Article 1(2) of the Statute of the European Ombudsman, “*the Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties.*” The powers conferred on the Ombudsman must be exercised subject to the general principles of Union law, such as the rights of defence and essential procedural guarantees, as confirmed in the case-law of the Court of Justice.⁶ The ECB is fully committed to good governance principles and continuously endeavours to follow the Ombudsman’s advice and recommendations. The adverse reputational impact⁷ for the ECB through publication of the Ombudsman’s Recommendation, with the insinuation of impropriety in its public procurement procedure, is all the more regrettable. In the ECB’s view, this could have been avoided if the Ombudsman had brought the matters addressed below under 4(a) and (b) to the ECB’s attention. The ECB considers that, by making the closing conclusions (see paragraph 5 above) and publishing them before giving the ECB the opportunity to comment, the Ombudsman infringed its rights of defence.

³ “*If the Ombudsman finds there has been maladministration, he shall inform the institution or body concerned, where appropriate making draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months.*” (Underlining added.)

⁴ Article 6(3) of the Ombudsman’s Implementing Provisions reads: “*Where the Ombudsman finds maladministration, the Ombudsman shall make any appropriate recommendation(s) to the institution concerned in accordance with Article 3(6) of the Statute and ask the institution concerned to provide an opinion on the recommendation(s) within three months. The opinion shall state whether and, if so, how the institution has implemented or intends to implement the recommendation(s). The Ombudsman shall forward the opinion to the complainant, who may submit comments on it within one month.*” (Underlining added.)

⁵ <http://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/71847/html.bookmark>

⁶ See Case T-412/05 *M v European Ombudsman*, ECLI:EU:T:2008:397, p. 197, paragraph 140.

⁷ There is also an adverse reputational impact for the ECB’s service provider which is easily identifiable. As confirmed by case-law, the Ombudsman may incur liability for damages for violating the principle of the right of defence for natural or legal persons that were not parties to the inquiry, even where such conclusions are provisional. See Case T-412/05 *M v European Ombudsman*, paragraphs 136 and 137.

4. Factual aspects

(a) Separation of lots in the procurement procedure of 2011

7) Paragraph 21 of the Ombudsman's Recommendation reads:

"The Ombudsman notes that, contrary to the impression which the ECB may have attempted to convey ... the previous tender procedure in 2010-2011, for the same services, was split into two separate lots. Consequently, in 2010-2011, the ECB does not appear to have had any concerns about there being a disproportionate disadvantage in potentially having two service providers. Furthermore, its concerns in this regard cannot be based on practical experience, given that both lots in the 2010-2011 procedure were won by the same service provider." (Underlining added.)

The ECB launched a contract notice on 22 December 2010⁸ for the provision of travel services and the handling of travel expenses (the 2010-2011 procurement procedure), **which included two lots**. It is essential to look at the scope of the lots in question.

8) Under the contract notice of the 2010-2011 procurement procedure, **Lot 1** included (a) travel services **as well as** (b) an optional implant solution:⁹

"Section II. 1.5 - Short description of the contract or purchase(s):

[...] Lot 1: travel services: 'Travel services' to include offline and online bookings for air, rail, car rental and hotels, based on a transaction fee model and a specific online booking engine Cytric. ECB has approximately 1 500 travellers in Frankfurt and over 11 000 transactions are booked each year. Travel spend is approximately 6 200 000 EUR.

Optional services:

The ECB may optionally ask for, and the successful tenderer must be prepared to provide the ECB with, an implant solution for the handling of travel expenses. The staff for the implant solution shall be supplied in accordance with the requirements laid down in the German Act concerning the supply of temporary labour ('Arbeitnehmerüberlassungsgesetz (AÜG)') [...]" (Underlining added.)

9) The scope of Lot 1 of the 2010-2011 procurement procedure was therefore substantively identical as the 2015 procurement procedure.¹⁰

10) **Lot 2** in the 2010-2011 procurement procedure, by contrast, was described as: "*Providing the ECB with an outsourced solution for the handling of travel expenses*" (underlining added). Consequently, Lot 2 in the 2010-2011 procurement procedure had a different scope, namely, an outsourced solution. In any event, Lot 2 was cancelled during the procedure and thus not awarded.

11) The ECB therefore emphasises that in both the 2010-2011 and the 2015 procurement procedures the substantively identical services (provision of travel services and the handling of travel expenses) were bundled into a single lot and were not split into two.

⁸ Contract notice 2010/S 248-377928:

https://www.ecb.europa.eu/ecb/jobsproc/proc/pdf/en_provision_of_travel_services_and_handling_of_travel_expenses_11827.pdf.

⁹ See Lot 1 of the 2011 public procurement procedure.

¹⁰ See point II.1.5) of the 2015 public procurement procedure:

"The European Central Bank (ECB) is seeking through this open procedure a supplier for the provision of travel services and for the handling of travel expenses. 'Travel services' are to include offline and online bookings for air, rail, car rental, bus and hotels, based on a transaction fee model and a specific online booking engine Cytric. Furthermore, the successful tenderer shall provide the ECB with an implant solution (working at the ECB premises) for the handling of travel expenses. The staff for the implant solution shall be supplied in accordance with the requirements laid down in the German Act concerning the supply of temporary labour ('Arbeitnehmerüberlassungsgesetz (AÜG)')."

Contract notice 2015/S 039-065706:

<https://www.ecb.europa.eu/ecb/jobsproc/proc/pdf/2015-ojs039-065706-en.pdf>

- 12) Therefore, the Ombudsman's conclusion in paragraph 21 that "[the ECB's] concerns ... cannot be based on practical experience, given that both lots ... were won by the same service provider" is **not correct**. Only one lot was awarded which had the substantively identical scope as the 2015 procurement procedure.
- 13) Moreover, the ECB strongly rejects the wording used by the Ombudsman in paragraph 21 of her Recommendation: "The Ombudsman notes that, contrary to the impression which the ECB may have attempted to convey ... the previous tender procedure in 2010-2011, for the same services, was split into two separate lots." (Underlining added.) Whilst the ECB correctly conveyed the facts to the Ombudsman (see also 4(d) below), the Ombudsman's wording implies an attempt to deceive on the part of the ECB, even though this misperception could have been avoided by thoroughly comparing the two contract notices.

(b) Value of the contract of the year 2011 opposed to the year 2015

- 14) According to Paragraph 23 of the Ombudsman's Recommendation:

"However, while in principle it is possible that the bundling of lots into a single tender makes economic sense, the ECB's reference to cost-efficiency deserves close scrutiny. The contract award notice states that the total final value of the contract in 2015 was 1,200,000 Euro. The contract award notice for the 2011 tender procedure sets the final total value of the contract for the same set of services (and over the same time period) at 278,290.34 Euro. This suggests that the final total value, for the provision of what appear to be identical services, increased by approximately 1,000,000 Euro in four years." (underlining added)

- 15) The ECB would like to clarify that the EUR 278,290.34 figure mentioned in point II.2.1) of the contract award notice of the 2010-2011 procurement procedure referred to the estimated annual fees based on the winning tenderer's offer (as stated in the price sheet in Annex 3 of the Invitation to Tender). Thus, the total estimated value for the 4-year contractual term of the 2010-2011 tender equals EUR 1,113,161.36. The ECB understands that, the figure in the 2010-2011 contract award notice might have been misinterpreted, if read solely in comparison with the 2015 contract award notice. This could have been avoided if the Ombudsman had given the ECB an opportunity to comment on the relevant figures before drawing public conclusions in her Recommendation.

	2010-2011	2015
Estimated contract value (in EUR) according to the contract award notice for a single year	278,290.34	300,000.00
Estimated contract value (in EUR) according to the contract award notice over four years	1,113,161.36	1,200,000.00

- 16) The ECB emphasises that the total fee for the 4-year contractual term in 2011 and 2015 for the provision of identical services, did not at all increase by approximately EUR 1,000,000 in four years, as erroneously stated by the European Ombudsman.
- 17) The relative increase in the overall fees is explained by the pricing model used for the calculation: number of travel/service x price per travel/service. The prices per travel/service remained largely the same (a few minor increases, but also a few minor decreases) between both public procurement procedures. In other words, the increase in the estimated overall contract value of the two contracts is due to the increase in the *number of travels/services* provided, and not due to an expensive bid or alleged lack of competition.

(c) Tenderer allegedly had certainty that it would be the only tenderer

18) Paragraphs 24 and 25 of the Ombudsman's Recommendation read:

*"24. ... Nevertheless, it is difficult to understand how a doubling of the volume of services required could explain a fourfold increase in the price for the services. The most obvious explanation for this increase was that there was a severe lack of competition for the tender (there was only one eligible bidder, which happened to be the incumbent service provider) **and** that the only eligible bidder had a reasonable certainty when it submitted its bid that it would have little or no competition. If the incumbent had feared that other bidders might enter that market, it is unlikely that it would have submitted such an expensive bid.*

25. If it can be assumed, on the basis of the facts, that the incumbent was reasonably certain that it would be the only eligible bidder, the ECB should have had at least some awareness that, by bundling the lots, the incumbent would be the only eligible bidder. (Underlining added.)

- 19) The ECB keeps the offers from tenderers strictly confidential at all times. Therefore, no bidder would receive information on the quality, eligibility or even on the existence of the other tenderers' offers prior to making their own bid.
- 20) Moreover, the winning bidder could not have had any reasonable certainty that it would have "little or no competition" as: (i) Lot 1 of the 2010-2011 procurement procedure (with substantively identical scope and requirements as the 2015 procurement procedure) eventually narrowed down to four eligible applications showing a competitive, multi-supplier market, and (ii) the offer of the winning bidder in 2015 did not show a significant price increase in comparison with offer in 2010-2011 (i.e. the *prices per travel/service* remained largely the same, as explained above).

(d) Ombudsman's conclusion

21) Paragraphs 26 and 27 of the Ombudsman's Recommendation read:

"26. In these circumstances, the Ombudsman considers that the ECB should have carefully assessed the economic consequences of bundling the bids. It should have assessed to what extent bundling would have a negative impact on competition, and measured this against any possible internal efficiency gains, in order to arrive at a conclusion as to whether the bundling was detrimental to the financial interests

27. The ECB has said it did not consider it necessary, in advance of the tender procedure, to assess the impact that joining the provision of travel services and the handling of travel expenses in one single lot could have on the number of bids received. It is difficult to understand how the ECB could have taken the view that it was not necessary, in order to protect the financial interests of the EU, to assess in advance all of the factors which could have a bearing on its achieving the best value for money. In the absence of a convincing explanation, the Ombudsman concludes that the manner in which the tender was organised constituted maladministration. Considering that the ECB has in the meantime awarded the contract, this maladministration cannot now be remedied. ... (Underlining added.)

- 22) The ECB notes that, in the e-mail of 24 May 2016, the Ombudsman asked the ECB to compare the 2015 procurement procedure with the 2010-2011 procurement procedure (i.e. to assess the impact of bundling the lots).

The Ombudsman's question:

"... clarify whether [the ECB] carried out an assessment of the impact that the joining of the provision of travel services and the handling of travel expenses in one single lot may have had on the number of bids received (in comparison with the previous procedure, where,

according to the ECB, bids were submitted by 11 commercial operators.” (Underlining added.)

- 23) As clarified in Section 4(a) above, there was no change of the factual circumstances for the 2010-2011 and 2015 procurement procedure. The services (provision of travel services and the handling of travel expenses) were bundled in one lot for both the 2010-2011 and the 2015 procurement procedures. Moreover, given that the scope of the 2015 procurement procedure was substantively identical with the scope of Lot 1 of the 2010-11 procurement procedure, the ECB had a reasonable and founded expectation of a favourable market response also to the 2015 procurement procedure. It is therefore regrettable that ECB's reply, by e-mail of 28 June 2016, on the favourable market response in 2010-2011 – which was factually correct and highly relevant – is not adequately reflected and assessed in paragraph 27 of the Ombudsman's Recommendation.

The ECB's reply:

“... based on the favourable market reply during the 2010 tender and the relevant business requirements (as highlighted in our response from 14 July 2015) such assessment was not deemed necessary.” (Underlining added.)

5. Follow-up action

- 24) The Ombudsman suggests that *“the European Central Bank should revise its Decision laying down Rules on Procurement with a view to providing, in each procurement procedure, that a specific assessment is undertaken of the merits, or otherwise, of bundling different service requirements into separate lots or just one lot; this revision of its Decision should be completed within six months of the date of this Ombudsman recommendation.”*
- 25) Despite the fact that the ECB contests the conclusion reached, it is very supportive and appreciative of the Ombudsman's work to foster good governance in the European Union institutions. *Given the ECB's commitment to good governance and irrespective of the reservations expressed in the detailed opinion, the ECB will accommodate the Ombudsman's recommendation; it will adapt its public procurement framework, in line with the general principles of Union public procurement law, by including an explicit reference on a prior assessment with regard to separating service requirements into lots.*