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Technical Paper: Comparative analysis of “International and Russian experience in terms of powers, competencies and practices of Business Ombudsman Institution”

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Table of Content

1	Executive Summary	4
2	Overview of international practices of Business Ombudsman or Similar Institutions	6
2.1	Introduction.....	6
2.2	General principles for the effective functioning of Ombudsman Institutions.....	7
2.3	Basis for the functioning of business ombudsman institution.....	10
2.4	Nature and differences between the competences, powers and practice of business ombudsman institution.....	16
2.5	Cooperation of business ombudsman with legal and business associations	24
3	Analysis of Practices of Business Ombudsman Institution in the Russian Federation.....	25
3.1	Introduction.....	25
3.2	Basis for the functioning of business ombudsman institution at the Federal Level.....	26
3.3	Basis for the functioning of business ombudsman institution at the Regional Level	28
3.4	Nature and differences between the competences, powers and practice of business ombudsman institution Federal and Regional levels	31
3.5	Cooperation of business ombudsman with legal and business associations at the Federal and Regional Levels	37
3.6	Modus Operandi of institutions dealing with complaints	40
3.7	Specifics of Business Ombudsmen in the Russian Federation	42
4	Conclusions and Recommendations	45
4.1	Conclusions.....	45
4.2	Recommendations to further develop the Business Ombudsman in the Russian Federation.....	46
5	Appendix 1: Model forms.....	49
5.1	Complaint Forms used by Ombudsmen in CoE Member States and/or other international practices	49
5.2	Complaint Forms used by Business Ombudsmen in the Russian Federation (Federal and Regional Level).....	51
6	Appendix 2: Case studies.....	55
6.1	Practical examples of the steps taken by business Ombudsman Institutions	55

1 EXECUTIVE SUMMARY

Historically the Institution of the Ombudsman is known for its role of protecting individuals against maladministration or violation of certain rights. The majority of functioning Ombudsman Institutions in the world focus on the protection of Human Rights, there is also an ever growing number of other Ombudsmen such as the Ombudsmen for the protection of children's rights, Ombudsmen for the protection of Consumer's Rights (Financial Ombudsmen) etc.

In an effort to strengthen the small businesses and provide incentives to the development of entrepreneurship a number of countries have created Ombudsman Institutions which defend businesses and entrepreneurs against maladministration and violation of their rights. The emphasis is put on protection of business and entrepreneurs as subjects that greatly contribute to the economic development and social wellbeing of countries.

Despite a great number of Ombudsman Institutions in Europe and many other countries, there are only few cases of Ombudsman Institutions with a clear mandate to protect the rights and interests of businesses vis-a-vis government agencies. In some cases, Ombudsman Institutions are mandated to accept complaints from both, individuals, as well as from businesses. The legal and administrative framework and the status of the Business Ombudsman Institutions follow country-specific patterns and there does not seem to be one universal model for such institutions.

Whilst the National Ombudsman Office in the United States or the European Ombudsman work to defend business' interests in conflicting situations with practically any government organisation, the mandate of the Ombudsman institutions in the United Kingdom or France is rather confined to the government organisations where the Ombudsman is attached to. These are typically the Revenue (Tax and Customs) authorities (U.K.) or the Ministry of Economy and Finance (France). The Business Ombudsman in Georgia is also predominantly dealing with issues in the area of taxation, despite the fact that this body is not subordinated to the Revenue Service but to Parliament.

The Ombudsman for the Protection of Entrepreneurs Rights in the Russian Federation (Federal Business Ombudsman) is among the newest Institution with specific powers to protect the entrepreneurs from violation of their rights.

Currently the Federal Business Ombudsman in the Russian Federation is functioning as an independent institution with the President's Administration. Starting from 1st of January 2015 the Federal Business Ombudsman as an Institution will become an independent government body with the status of a legal entity

The Federal legislation has established exclusive powers of the Federal Business Ombudsman, as well as the main powers of regional Ombudsmen, which can be further specified in regional legislation. The Business Ombudsman in Russia is granted broad powers in relation to the protection of entrepreneurs' rights. Among others the Federal Business Ombudsman has the following competencies:

- Protect the rights and legitimate interests of Russian and foreign business entities in the Russian Federation and of Russian business entities abroad;
- Monitor the observance of business entities' rights and legitimate interests by Federal, regional governments and local authorities;
- Promote the development of public institutions aimed to protect the rights and legitimate interests of business entities;
- Interact with business communities; and
- Participate in developing and implementing the state policy in the field of entrepreneurship, protection of rights and legitimate interests of businesses.

This document aims to provide a comparative analysis of the powers practices and competencies of Business Ombudsman Institutions in other countries in comparison with those in the Russian Federation. However such comparative analysis of the Business Ombudsman in Russia and similar institutions in other countries is fairly difficult due to the fact that only a small number of countries have a similar institution. In most countries the functions to protect human rights, in general, and the rights of entrepreneurs, in particular, are performed by a single Ombudsman, while in Russia these rights are protected by two separate offices of which one aims to protect the Human Rights and the latter aims to protect the rights of entrepreneurs.

In this regard, it seems more adequate to compare only the functions on protecting entrepreneurial rights by the Ombudsman in countries where there is no separate Business Ombudsman, - with the similar functions performed by Business Ombudsman in Russia, and not compare the institutions per se.

2 OVERVIEW OF INTERNATIONAL PRACTICES OF BUSINESS OMBUDSMAN OR SIMILAR INSTITUTIONS

2.1 Introduction

The institution of an ombudsman is a traditional institution for conflict resolution and consensus-building which has his modern-day history based on the legal and political-administrative systems of the Scandinavian countries. Since the mid-1990ies, standards and recommendations for the effective functioning of Ombudsman institutions have been formulated by the U.N. (in the “Paris principles”) and the Venice Commission of the Council of Europe. The general objective of an Ombudsman is: “... to protect citizens’ against maladministration”¹, i.e., to defend individual’s rights against actions taken by government and public administration. The Ombudsman is not meant to settle disputes between two individuals or two judicial persons.

Despite the existence of Ombudsman institutions for the protection of basic rights of individuals in a great number of countries, there are only few countries where an Ombudsman institutions has been established with a mandate to defend rights of business owners/entrepreneurs vis-a-vis government/administration.

This section of the technical paper will covers Business Ombudsman institutions in the following countries:

- USA: Office of the National Ombudsman, established 1996 at the Small Business Administration (a government body);
- Georgia: The Business, or Tax Ombudsman was established in 2011. There is as of now only limited evidence to assess its performance and impact in practice.
- United Kingdom: The Adjudicator deals with complaints vis-a-vis the Revenue & Customs Department, the Valuation Office Agency, and the Insolvency Service;
- France: Le Médiateur des ministères de l’économie et du budget looks into cases that fall under the competencies of this Ministry.²
- On a supra-national level (EU) the European Ombudsman accepts complaints against the activities of EU institutions from both, individuals, and also from businesses which are registered in Europe.

In other countries, an institution to mediate between businesses and the administration is offered as a service by chambers of commerce, often acting on a regional level. This is the case, for instance, in:

- Spain, where the Chambers of commerce of, e.g., the La Rioja, Burgos, or Murcia regions are offering the service of a ‘defendor del empresarios’ to their members;
- In Austria, the Regional Chamber of Commerce of the Kärnten region had installed the institution of a ‘Korruptionsombudsmann’ following a series of scandals about illegal party-financing, linked to awarding of public contracts in 2011. After the political party involved in these scandals lost the majority in subsequent elections, the situation has reportedly substantially improved, and the Korruptionsombudsmann is no longer active since 2013.

There is a great number of other “Ombudsman” institutions that ‘involve business’ in many other countries. Some of those have a very specific mandate and were therefore not included in this study

¹ cf., e.g. Doc. 13236, 21 June 2013, Strengthening the institution of ombudsman in Europe, Report to the Parliamentary Assembly of the CoE Committee on Legal Affairs and Human Rights, Rapporteur: Mr Jordi XUCLÀ, Spain <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19786&lang=en>

² In France, there is a range of some 20 Médiateurs in organisations delivering public services, incl. postal services, utilities, broadcasting, railways, insurance, etc

(e.g., the Office of the Foreign Investment Ombudsman in South Korea deals with issues involving foreign-invested companies only). The largest number of ‘ombudsmen involving business’ serve an obverse function to that of protecting entrepreneurs vis-a-vis the actions of government organisation by dealing with complaints brought forward by individuals (customers, clients, service users) against the businesses as the provider of these services. These “Industry Ombudsmen” as they are frequently called are therefore not to be mixed up with the “Business Ombudsmen” to protect the legitimate rights of businesses. This distinction being made there are, nevertheless, Ombudsman institutions that serve a double purpose of defending business’ rights vis-a-vis government organisations, as well as defending the employees in the respective sector against the business owners (e.g., in their capacity as employers). A good example for this double-purpose Ombudsman-like body is ‘Fair Work Building and Contracting’ of the Government of Australia. Neither of these institutions which put business in the role of the defendant have been included in this study.

In most of the cases included in this study, the function of the Business Ombudsman is understood as a service which is offered to business to help them to settle disputes about decisions taken by a government agency. In some countries, the Ombudsmen Institutions are actively encouraged to also propose recommendations to the government with the aim to improve the legal framework for doing business, or to improve the internal procedures of government institutions. The legal framework for the Business Ombudsman Institution can be quite different, ranging from constitutional provisions (Masstricht Treaty of the European Community), to a firm legal background (Tax Code of Georgia), governmental decrees (France, U.S.) to a service offered by regional chambers of commerce, i.e. non-governmental organisations (Spain).

All Business Ombudsman Institutions aim to provide a channel for effective, timely, independent, but at the same time ‘officially mandated’ communication between businesses and the authorities. No Ombudsman Institution will, however, interfere in ongoing legal proceedings, and Business Ombudsman Institutions require the complainants to have used all means to settle the issue with the respective authority before, without having obtained a satisfying result. While issues of ‘maladministration’ can be addressed with the help of an ombudsman, general policy decisions cannot be disputed through an Ombudsman. Some Ombudsman Institutions confine their role to communicating the issue to a high-level official at the respective authority (e.g., in the U.S.), other Ombudsman Institutions actively engage in mediation and propose recommendations.

2.2 General principles for the effective functioning of Ombudsman Institutions

The following principles refer to Ombudsman Institutions in their ‘initial meaning’ (i.e. as defenders of elementary Human Rights); not all provisions might be equally relevant for business ombudsman institutions. The aim of this section is to clarify which of the ‘general ombudsman principles’ can be applied for a comparative analysis of business ombudsman institutions and for developing recommendations for improvement in the practices used by Federal and regional business ombudsmen in the Russian Federation.

2.2.1 United Nations

General principles for the functioning of ombudsman institutions have been agreed by the U.N. (Resolution 48/134 adopted by the General Assembly on “National institutions for the promotion and protection of human rights” of 04 March 1994, the so-called ‘Paris Principles’).³

The Paris Principles list a number of responsibilities for national institutions, which fall under five headings. First, the institution shall monitor any situation of violation of human rights which it decides to take up. Second, the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and general

³ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/134&Lang=E&Area=RESOLUTION

compliance and implementation with international human rights instruments. Third, the institution shall relate to regional and international organizations. Fourth, the institution shall have a mandate to educate and inform in the field of human rights. Fifth, some institutions are given a quasi-judicial competence.⁴

These were further specified / re-inforced by Resolution 67/163 adopted by the General Assembly on “The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights” of 20 December 2012, which encourages member states:

- to establish independent and autonomous Ombudsman institutions;
- to provide for an adequate legislative framework and sufficient financing for the Ombudsman;
- to actively raise awareness of the important role of the Ombudsman.⁵

2.2.2 Council of Europe - Venice Commission

The Council of Europe’s Venice Commission [European Commission for Democracy through Law] has published a compilation of ‘best practice’ examples from legislative acts regulating the establishing and functioning of Ombudsman Institutions in several of the CoE’s member states. (The focus is on East European and CIS countries, which may increase the relevance of these examples as they all refer to countries with developing democracies [and market economies]; on the other hand one may object to this compilation as one that lacks examples from countries where Ombudsman institutions have long been established and are functioning well. The note made above (‘general ombudsman vs. specialised business ombudsman’) applies.)

The following principles have been identified:⁶

Legal (constitutional) guarantee

To promote and preserve the independence of an Ombudsman it is essential that the status of this institution should rest on a firm legislative foundation. Ideally, this institution shall enjoy constitutional guarantees.

Criteria for office - general criteria for selection and appointment of the Ombudsman

It appears to be common understanding that the individual holding the position of the ombudsman needs to be a well-respected individual with very high morals and integrity. Less commonly agreed is the question which formal education, work experience, etc the individual needs to have. Whereas some countries require the ombudsman to possess a higher legal education, other countries do not require this explicitly.

Criteria for office - Incompatibilities

The function of the Ombudsman shall not be compatible with another function or profession, public or private, neither with the belonging to political parties or unions.

Election of the Ombudsman

The ‘classical’ Ombudsmen (i.e. Human Rights defenders) are uniformly appointed by Parliament. Where this is not the case, it is strongly recommended to do so.

⁴ http://en.wikipedia.org/wiki/Paris_Principles

⁵ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/488/38/PDF/N1248838.pdf?OpenElement>
ALTERNATIVE URL: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/163

⁶ The CoE Venice Commission’s Compilation is made up of quotations from the Venice Commission’s Opinions on individual countries’ legislation. For the sake of better readability of this paper, individual cases’ sources are not identified. All citations can be taken from the Compilation which is available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2011\)079-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)079-e)

Status of the Ombudsman institution in relation to other public institutions - Rank and salary

The Ombudsman (individual at the head of the ombudsman institution) shall be given a rank comparable with the top ranks in civil service / the judiciary (e.g., equal to a minister, Head of the national Supreme Audit Institution, Supreme Court) and this shall also be reflected in his/her salary.

Immunities

Ombudsmen shall be immune from legal process in respect of words spoken or written and acts performed by them in their official capacity. A similar provision shall apply to the staff of the Ombudsman institution.

Independence from other state institutions

Where the ombudsman is subordinated to any ministry, the powers and responsibilities for the minister to carry out his/her supervisory duties need to be clearly developed. It needs to be ensured that this supervisory role of the minister does not undermine the independence and autonomy of the ombudsman.

Term of office

A term of office of five to seven, but certainly more than four years, is considered appropriate. The possibility for reappointment is rather not preferred.

Termination of the Ombudsman's term of office

It seems generally agreed that the following criteria shall suffice for terminating the Ombudsman's term of office: his/her own wish; reaching retirement age; criminal conviction; severe ill-health (both, physically, and mentally). A greater variety of solutions can be found when it comes to the required majority in cases where the ombudsman can be dismissed by parliament (or the institution which has appointed him/her).

Budgetary independence

The Ombudsman institution shall be given budgetary independence, i.e the right to propose its own budget, and the guarantee that this budget be included in the annual budget (subject to the level of shortening of general government's expenditure in case such a situation is required). The proposed budget of the Ombudsman institution shall be related to the number of complaints received / dealt with.

Scope of the monitoring competence

The general mandate and function of an Ombudsman to protect citizens (or entrepreneurs and businesses) from maladministration, i.e. the violation of rules, laws and procedures, as well as the unfair application of these (in form of unjustified delays, incorrect behaviour of officials, selective application of laws and rules) applies to all forms of ombudsman institutions. The best practices identified by the Venice Commission's Compilation do also reach out to the encourage Ombudsman institutions to also "promote" better governance, instead of only "protecting" (human) rights and freedoms. In no country may the ombudsman institution intervene in ongoing legal procedures, nor may it deal with issues of general 'policymaking'.

Powers of investigation

It is a generally agreed principle that Ombudsmen shall have the powers to request all necessary information from any public body, and that such information be received without delay.

Powers of recommendation/proposition

Ombudsman institutions shall have the right to propose amendments to current legislation, or the internal procedures of a government's organisation, based on their findings. Public institutions which were addressed in the scope of a complaint dealt with by the Ombudsman shall be required to react within a given time span to the Ombudsman's recommendation. They can, however, not be required to obey / take action as a result of the Ombudsman's recommendation.

Relations with courts

Ombudsman institutions generally should not interfere with the judiciary. They may, however, advise the complainant as to the legal remedies that may be available to them.

Applicants and formalities for application

The recommended principle that every natural or legal person may apply to the Ombudsman necessarily needs to apply to business ombudsman institutions. Another interesting aspect is the question whether third parties may lodge a complaint, or whether the Ombudsman may begin action at its own initiative. Subsequent questions resulting from these are whether the (natural or legal) person whose rights are affected needs to give consent (which in the case of legal entities might become an issue if cases are concerned that happened prior to, or have led to the liquidation of a business.) No uniform 'best practice' appears to have been identified in these cases.

Organisation of the ombudsman Institution

It is recommended that Ombudsman institutions be granted the right to decide about the opening of regional representative offices - preferably this decision shall be at the discretion of the Ombudsman, i.e. not prescribed by law. This would guarantee a suitable arrangement to ensure ease of accessibility, trust and confidence in the powers and independence of the Ombudsman institution, and performance (e.g. time to react to complaints). The question whether regional ombudsman institutions shall be subordinated to (branch offices), or rather be independent from the ombudsman institution on the national level will depend a lot on the geographic / demographic specifics of the country concerned, as well as on the 'maturity' of the democracy and market economy in general.

2.3 Basis for the functioning of business ombudsman institution

2.3.1 Legal basis for the functioning of the business ombudsman institution

The Ombudsman Institutions in the U.S., France, and Georgia are established by, and operate within the framework of a legal act. (U.S.: Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996⁷; France: government decree of 2002⁸; Georgia: Tax Code of 2011⁹).

The establishing of the National Ombudsman for Small Businesses in the U.S. through the SBREFA resulted from a review of the effectiveness of earlier adopted legislation to protect especially small businesses from excessive administrative burdens. This law, the Regulatory Flexibility Act of 1980, requires federal agencies to consider the impact of regulation on small businesses. Government agencies shall, wherever possible, consider how regulation can be implemented in such a way as to make the regulatory burden on small business more equitable. In March 1996 the U.S. Congress strengthened the Regulatory Flexibility Act by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA), which mandates that federal agencies establish a policy or programme that reduces, or even waives, civil penalties for violations of a statutory or regulatory requirement by a small entity. As an instrument to mediate conflicts between government agencies and small businesses, the institute of the National Ombudsman, together with regional 'outreach offices' ["Regional Small Business Regulatory Fairness Boards"] was established. The key objective for

⁷ <http://www.sba.gov/advocacy/825/12186>

⁸ <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000407822&dateTexte=>

⁹ unofficial translation provided by the Georgian Revenue Service www.rs.ge/common/get_doc.aspx?doc_id=9033

establishing the National Ombudsman in the U.S. therefore is to support small businesses as a vital sector of the U.S. economy.

In France, the rationale for establishing the ‘Médiateur des ministères de l’économie et du budget’ in 2002 can be traced back to general administrative reform initiatives of the 1990ies which aimed, inter alia, to improve the responsiveness of public administration to citizen’s complaints.¹⁰ In 2004, 2 years after establishing the Médiateur in the Ministry of Economy and Finances, a ‘Club of mediators in public service [delivering organisations]’ was formally established. This club comprises similar mediators of many state-owned enterprises (e.g., the French Railways, several national TV stations, gas-, water-, and electricity providers, and financial institutions) which have been established in this period. Whilst the ‘Médiateur des ministères de l’économie et du budget’ with its mandate to mediate conflicts or dissatisfaction with the activities of the ministry of economy and finance can be expected to benefit the business community in the country, it seems that the key objective for establishing this institution was rather to improve governance and public administration, rather than to directly improve conditions for businesses.

The introduction of the Business Ombudsman in Georgia through a provision of the 2011 Tax Code is just one element of the fundamental reform of the taxation and customs regime in this country which was started in 2004. Tax reform in Georgia comprised many elements which are typically applied for improving the business climate, like lowering and simplifying tax rates, reducing the administrative burden for paying taxes, introduction of electronic tax declarations and payment, etc. The reform was implemented in three stages which provided for a new version of the Tax Code adopted in 2011.¹¹ This Code introduced the Business Ombudsman which more precisely would need to be labelled ‘Tax Ombudsman’. Both terms are being widely used, and the internet-address of this Ombudsman, for instance, is <http://www.businessombudsman.ge>. The respective Article 42 of the Tax Code, however, clearly relates the mandate of the Ombudsman to “.. monitor the protection of the rights and legitimate interests of taxpayers in Georgia, identify the violation facts thereof, and support the restitution of violated rights.” A government decree which was adopted as early as in February 2011 develops further details of the work of the Ombudsman. The firm integration of the establishing of the Tax Ombudsman in the ambitious overall Tax reform of Georgia suggests that this instrument is considered a ‘must have’ in the efforts to create one of the most favourable environments for businesses in the world.

The European Ombudsman is based on the provisions of the Treaty establishing the European Community, in particular the Maastricht Treaty of 1992. The scope and proceedings of its activities are further detailed by implementing provisions.¹² Adopted in the period when the political order in Europe changed fundamentally, the Maastricht Treaty consolidated a new format of the European Community which from that moment on went beyond its original economic objective and aims to become a political and administrative union. The creation of an Ombudsman must therefore be seen as an instrument to contribute to the main objectives of the Maastricht Treaty, which include the strengthening of the democratic legitimacy of the European institutions; the improved effectiveness of these institutions; and the establishing of an economic and monetary union.

2.3.2 Independence from other institutions

Ombudsman institutions with a specific mandate to protect the rights of businesses (as in the U.S.), or with a field of activity that suggests a significant number of complaints and issues be addressed to them by businesses (as in the U.K., or in France) are typically established by, and in some way or

¹⁰ “Mediation in Disputes between Public Authorities and Private Parties: Comparative Aspects”, Salvija Kavalnė, Ieva Saudargaitė, in: "Jurisprudence" - Mykolas Romeris University periodical reviewed research papers, Vilnius, Lithuania, 2011, No 18(1), <http://jurisprudence.mruni.eu>

¹¹ cf., e.g., a summary presentation by the Georgian Ministry of Finance: <http://www.imf.org/external/np/seminars/eng/2011/revenue/pdf/rusuda.pdf>

¹² <http://www.ombudsman.europa.eu/en/resources/provisions.faces#def3>

another subordinated to, a body of the executive branch of government. In the U.S. this government agency is the Small Business Administration (SBA); in France the Ministry for Economy and Finance; and in the U.K. the Revenue Department (HM Revenue & Customs - HMRC).

Truly independent ombudsman institutions - as recommended by the U.N. and the Venice Commission of the Council of Europe - are being found only in those cases where the Ombudsman institution serves a 'double purpose', i.e., deals with individuals and their complaints about infringements of human and social rights alongside with businesses and their complaints about unfair treatment in taxation, public procurement, and other maladministration. An example for this case is the European Ombudsman. The business ombudsman in Georgia appears to be the only case of those covered by this study where a dedicated business ombudsman institution has been established as an independent body which is accountable directly to the Parliament.

Where business ombudsman institutions are established by chambers of commerce, like in Spain, these are independent from government to the same extent as the chambers are.

In particular, the National Ombudsman in the U.S. is designated by the SBA Administrator (i.e., Head of the SBA). As the Ombudsman is an office at the SBA it must be assumed that the right to dismiss the Ombudsman from office, as well as financing of Ombudsman is at the discretion of the SBA Administrator. The Ombudsman reports annually to the SBA Administrator and to the heads of the affected agencies.¹³

The Médiateur in France is appointed by the Minister of Economy and Finance for a period of 3 years. The office of the Médiateur is an integral part of the organisational structure of the Ministry, and the Médiateur reports annually to the Minister.

Whilst the Adjudicator's Office is a part of HMRC (Her Majesty's Revenue and Customs), the person of the Adjudicator herself is not. The Adjudicator's Office's work, its relation with the Revenue Department (HMRC), and also the conditions for this work to be made available by HMRC are developed in detail in a Service Level Agreement concluded between a senior official of HMRC (Permanent Secretary for Tax at HMRC) and the Adjudicator. The Service Level Agreement has been concluded in 2009, and remains in force until it is terminated by either of the parties. The mere existence of such an agreement makes clear that the work of the Adjudicator's office is a service rendered to HMRC. HMRC undertakes to provide the Adjudicator's Office with all necessary resources to perform this service, the status of the Adjudicator's office's staff are identical to those of other HMRC staff. Although there is no administrative independence of the Adjudicator's office from HMRC, the Service level Agreement states that the Adjudicator's Office shall have an operational independence which is deemed necessary for it to credibly perform its function. "To ensure the Adjudicator's Office's (AO) independence when supporting the Adjudicator in providing an independent review of unresolved complaints, the AO Head of Office's accountabilities and line of reporting into HMRC will be such as to position the office at arm's length from the operational lines of HMRC's business that the Adjudicator may investigate."¹⁴

The Adjudicator is required to report annually. The Service Level Agreement between the Adjudicator and HMRC states that "...there will be no right of veto for HMRC over the contents of the report, but as a courtesy HMRC will see an advance copy and the Adjudicator will consider any comments HMRC may wish to make."¹⁵

The funding of the Adjudicator's Office is based on a business plan and the subsequent budgetary request which the Adjudicator submits to HMRC. The same requirements to value-for-money criteria

¹³ SBREFA, Sec 30(b)(2)(D)

¹⁴ "Service Level Agreement for the provision of complaints adjudication services for HM Revenue & Customs by the Adjudicator's office", [further: SLA] 22 June 2011, Art. 3.7

¹⁵ SLA, Art. 2.29.

apply as for other HMRC operations. Additional financing requests may - if properly justified - be put forward during the course of the financial year. This was the case, e.g. in FY 2012/13 when a sharp increase in workload was met with the hiring of additional staff. The budget of the Adjudicator's Office consists almost exclusively of salary costs (>95%), and was at 2.3 mn Pounds (approx. 2.7mn Euro) in FY 2012/13.

The Tax Code provides for the business ombudsman in Georgia to be appointed by the Prime Minister of Georgia, in agreement with the Chairman of the Parliament of Georgia. Reasons for dismissing the Ombudsman are specified in the secondary legislation and comprise fundamental issues like deprivation of citizenship; deteriorating physical or mental health; criminal conviction. Apart from these, the legal framework provides for dismissal of the Business Ombudsman at the discretion of the Prime Minister. It seems worth noting that the Business Ombudsman has changed already three times during the short period of its existence since 2011. Reasons for dismissing, or resigning of the former incumbents have not been made public. The budgetary needs are established by the Ombudsman which submits the budget request to the State Chancellery (which can be compared to a Prime Minister's office). The Business Ombudsman, therefore, is in administrative terms not fully independent from the executive branch of government. The Ombudsman is reporting annually to the Budget and Finance Committee of the Parliament of Georgia.¹⁶

An exception to the observed pattern of Business Ombudsman Offices being in most cases subordinated to bodies of the executive branch of government (except for Georgia) is only the European Ombudsman which is appointed by the European Parliament for a period of 5 years (corresponding with term of European Parliament; re-appointment is possible) and reports to the European Parliament on an annual basis. The procedure of allocating the annual budget to the office of the European Ombudsman is the same as for any other body of the European Community; the staff of the Ombudsman office has the same status as civil servants in other Community bodies.

2.3.3 Immunities

Based on the information available so far, Business Ombudsman do not appear to be benefiting from any provisions which would grant them immunity from criminal, administrative, or financial liability with respect to activities undertaken in their official capacity. The European Ombudsman Office including its staff is covered by some provisions of the "Protocol on the Privileges and Immunities of the European Communities", these are, however, confined to issues clarifying taxation, or the exemption thereof.¹⁷

2.3.4 Status

With the Business Ombudsman Offices in the majority of countries covered here being part of the executive branch of government, it follows that the status of the offices, and of their staff, is equal to that of other departments, or civil servants, respectively. This applies also to the Ombudsman, i.e the individual that heads the institution.

In the cases included in this study the widely-used practice to appoint well-respected individuals to the position of the ombudsman appears to be upheld. The current European Ombudsman, Ms Emily O'Reilly of Ireland, used to be the Ombudsman in her home country, Ireland from 2003 to 2013 and is known for her work to protect and develop freedom of information acts, and to promote and develop the institution of an ombudsman in many countries of the world.¹⁸ Her predecessors, Mr. Jacob Söderman of Finland, and Mr Nikiforos Diamandouros of Greece, also held the position of an

¹⁶ Tax Code, Art 42

¹⁷ Art. 10 / 3 of the Statute of the European Ombudsman, referring to Art. 12-15, 18 of the Protocol on the Privileges and Immunities of the European Communities

¹⁸ <http://www.ombudsman.europa.eu/en/press/cv.faces>

ombudsman in their respective home countries before, and are widely respected politicians (Söderman) or academics (Diamandouros) in the field of human rights and social protection.¹⁹

In the Kärnten region of Austria, the Korruptions-Ombudsman ('corruption-ombudsman')²⁰ who was established after a series of scandals involving illegal financing of the ruling political party in return for undue advantages in, e.g., public procurement tenders was the former President of the regional Chamber of Commerce who was retired at that moment in time. The reputation and integrity of this individual, Mr Karl Koffler, was undisputed which made up for a crucial factor in the establishing of this institution for this specific purpose.²¹

Somewhat contrary to this, the business ombudsman in the U.S., Mr Brian Castro, is a bit more of an expert who has worked in many functions that aim at creating and defending fair conditions for business 'behind the scenes'. A lawyer by training, he has worked as an attorney and advocate helping small businesses and non-profit organisations succeed in heavily regulated environments. He has worked in civil service as Senior Counsel to the Financial Industry Regulatory Authority Department of Enforcement, a Congressional aide, and a law clerk in U.S. District Court. As a legal counsel he has participated directly in all phases of the federal regulatory process: from legislative drafting and enactment, to proposed regulation and agency rule, to government investigation and enforcement action, and, ultimately, to judicial resolution. This is, his exposure and visibility to the broader public before taking office as the ombudsman likely was less prominent than that of the European Ombudsman, or the institution introduced in Austria. His profound technical knowledge is, however, undisputed and will likely have played a significant role for his appointment.²²

Except for the European Ombudsman which is not permitted to "engage in any political or administrative duties, or any other occupation, whether gainful or not" during his/her term in office and is required to perform his/her duties with complete independence and free from instructions by governments or any other body,²³ no specific requirements for incompatibilities of holding office as an ombudsman with other activities appear to exist in other countries.

2.3.5 Institutional set-up and organization

2.3.5.1 National vs. regional level organisation

The National Ombudsman in the U.S. and the Adjudicator's office in the U.K. have set up regional offices. The Ombudsman in the U.S. is required by the legal act which has established the ombudsman institution (SBREFA) to establish 10 offices throughout the country. Each office serves an area comprising several States.

The 10 regional cities where they are based and the areas they cover are:

- Boston: New England states;
- New York: Mid Atlantic states;
- Philadelphia: South Atlantic states;
- Atlanta: Southeastern states;
- Chicago: Midwestern states;
- Dallas: Southern states;
- Kansas City: Heartland states;
- Denver: Rocky Mountain states;
- San Francisco: Western states; and
- Seattle: Northwestern states.

¹⁹ http://en.wikipedia.org/wiki/Jacob_Söderman; http://en.wikipedia.org/wiki/Nikiforos_Diamandouros

²⁰ In German language the term 'corruption' is frequently used when, in fact, 'anti-corruption' efforts are meant.

²¹ http://www.ots.at/presseaussendung/OTS_20110329_OTS0206/wk-koffler-wird-korruptions-ombudsmann

²² <http://www.sba.gov/ombudsman/881/753763>

²³ European Ombudsman's Statute <http://www.ombudsman.europa.eu/en/resources/statute.faces>

In the U.K., the Adjudicator's office which is headquartered in London, has regional offices in Derby, Nottingham, Liverpool, and Newcastle.

In both cases, the regional offices are deconcentrated (as opposed to decentralised, or even devolved) representative offices that have the function to collect and distribute information between the Ombudsman's headquarter and the businesses closer to their point of location. Specifically, in the U.S., the offices - which are officially known as "Small Business Regulatory Fairness Boards" have the powers to receive/collect "a copy of the appraisal form", to hold follow-up meetings on a specific concern, and to report back on such issues to be included in the Ombudsman's annual report to Congress. The boards cannot adjudicate complaints directly. The Regional Small Business Regulatory Fairness Boards comprise of five volunteer small business owners who serve a term of not more than 3 years.

The Médiateur in France, and the European Ombudsman do not have regional offices. The Médiateur is based in Paris, the European ombudsman in Strasbourg, France. Also, the Business Ombudsman of Georgia does not have regional offices which, given the small size of the country, may not be surprising.

In Spain, and Austria the business ombudsman institutions are operated by regional chambers of commerce and do, therefore, deal with complaints of businesses with their respective regional administration in the first instance. The 'defensoras del empresarios' of the regional chambers of commerce in Spain do also accept complaints that relate to issues which entrepreneurs are facing with national government's organisations.

2.3.5.2 Staff and office organisation

The offices of the business ombudsman institutions differ substantially in their size and number of staff. There appears to be a correlation between the number of staff and the mandate of the ombudsman, i.e. ombudsman offices tend to have substantially greater numbers of staff where their mandate also covers complaints by individuals.

The Office of the National Ombudsman in the U.S.- which is working to protect the interests of small businesses - comprises 7 staff: the Ombudsman and his Deputy, 3 case management specialists, and one administrative and communications specialist, each.²⁴ A similar staffing structure is found at the Office of the Business Ombudsman of Georgia where the Ombudsman is supported by a Deputy and five other staff. The office of the Médiateur des ministères de l'économie et du budget in France comprises 16 staff (Annual Report 2011). The Médiateur accepts complaints from individuals alongside with complaints submitted by legal persons. As the nature of the complaints is limited to actions of the Ministry for Economy and Finance, these complaints will be de-facto limited to 'business-cases' and, henceforth, the scope of work of the Médiateur is more likely to be compared with that of the Ombudsman in the US, and not, for instance, with that of the European ombudsman. The Adjudicator's office in the U.K. is also dealing with complaints from individuals, as well as from legal entities. In 2012/13, 99% of the cases accepted by the adjudicator's office related to the U.K. Tax authority (HMRC). Detailed figures are not provided but it can be assumed that many of these cases relate to personal taxes and not to business-related taxation. This workload is dealt with by 49 permanent staff. Due to a heavy increase in the workload, additional staff was hired on a temporary basis, totalling the number of staff at 135. (Annual Report 2013)

The office of the European Ombudsman must not be compared with these institutions. Other than the ombudsman institutions in the U.S., the U.K., and France, the European Ombudsman deals with a number of cases that are not related to business at all, it needs to be able to deal with complaints in all

²⁴ <http://www.sba.gov/ombudsman/891/13130>

23 Maastricht Treaty languages, and it pays great attention to the awareness raising about the right to complain which is reflected in their orga-chart. The European Ombudsman employs 84 staff.

Cabinet of the European Ombudsman:	5 staff
Secretariat-General:	3 staff
Communication Unit:	11 staff
Complaints and Inquiries Units:	35 staff
Registry:	16 staff
Personnel, Administration, and Budget Unit:	13 staff
Data Protection Officer:	1 staff

2.4 Nature and differences between the competences, powers and practice of business ombudsman institution

2.4.1 Scope of monitoring competence

Business Ombudsman Institutions in the countries included in this survey do not distinguish from ‘typical (Human/Basic Rights) Ombudsman Institutions in that they are mainly a tool to help business owners and managers to see their rights not be infringed for reasons of ‘maladministration’. Maladministration comprises issues like unjust delaying of processes by any governmental organisation or public service provider; withholding of information which, according to the legal framework, the public shall have access to; poor or misleading advice given by a government organisation; inappropriate staff behaviour; or contestable use of discretionary powers, which may apply, e.g., in cases of exceptional circumstances which are not ‘described in any book’. In the case of the Small Business Ombudsman in the U.S., the description of “excessive or unfair regulatory enforcement, such as repetitive audits or investigations, excessive fines, penalties, threats, retaliation or other unfair enforcement action by a federal agency” is used instead of ‘maladministration’ to describe the mandate of the Ombudsman.

Some of the Business Ombudsman Institutions are explicitly mandated to monitor the implementation of current legislation and to recommend improvements with the aim to improve conditions for business operation (Georgia); others may not have the mandate to monitor the usefulness and appropriateness of legislation but are encouraged to recommend improvements to the processes and internal structures of government organisations for delivering their service to the public. This is the case in the U.K., and France.

Equally, parallels can be drawn when it comes to the issues that cannot be dealt with by a Business Ombudsman: no ombudsman office will accept complaints in cases where there is a legal investigation ongoing; general government, or departmental policy decisions are typically beyond the mandate of the Ombudsman; and Ombudsman offices will typically accept a case only when the complainant can prove that her or she has exhausted all prior means of clarifying the issue with the respective organisation.

Business Ombudsman Institutions perform this role by providing an independent but officially established channel to bring the problem to the attention of the respective agency, and by exerting their right to mediate an impartial solution or recommendation.

The European Ombudsman accepts complaints only from citizens of EU member countries, or from businesses registered in any of these countries. The defensoras del empresario in Spain offer their service to businesses which are members of the respective chambers of commerce. The U.K. Adjudicator’s office is providing their service “for free and impartially for all” (statement on their website), which may suggest that foreign businesses might also forward a complaint if a department of HRMC is involved. No dedicated information about the availability of its services is given by the Business Ombudsman of Georgia - the importance which the Government of Georgia pays to the

efforts to improve the overall business climate, and to attract foreign investment suggests that foreign businesses might also address issues to the Ombudsman. A detailed list of issues that fall under the mandate of each of the Business Ombudsman Institutions covered in this study is given in the table 1 below.

In any case, the Ombudsman will become active only after the complainant has made a credible attempt to settle the matter of dispute with the agency concerned, and if this attempt has led to no satisfactory result.

Table 1*: Competencies of the Ombudsman Institutions covered in this study:

	U.S.	U.K. (The Adjudicator works also for individuals)	France (The Médiateur works also for individuals)	Georgia (The ‘Business Ombudsman’ is also known as the ‘Tax Ombudsman’)	EU (works also for individuals)	Spain (regional)	Austria (Kärnten region, operated 2011 - 2013)
Protection of entrepreneur’s rights and interests							
Protection of rights and legal interests of taxpayers	The Ombudsman will accept complaints with regard to the Revenue Service (IRS). There is, however, another ‘helpline’ available with the IRS - the Taxpayer Advocate Service (with some 2000 staff) ²⁵	✓	✓	✓	n.a. (European Ombudsman deals only with issues vis-a-vis EU organisations, taxes are collected by member states.)		
Deal with the complaints of businesses against Government bodies (“maladministration”)	✓	✓	✓	✓	✓	✓	
Deal with contractual disputes, problems with calls for tender, late payments					✓		
Oversee state bodies interaction with businesses against any misconduct				✓			

* Source: author’s compilation

²⁵ <http://www.irs.gov/uac/Taxpayer-Advocate-Service-6>

	U.S.	U.K. (The Adjudicator works also for individuals)	France (The Médiateur works also for individuals)	Georgia (The ‘Business Ombudsman’ is also known as the ‘Tax Ombudsman’)	EU (works also for individuals)	Spain (regional)	Austria (Kärnten region, operated 2011 - 2013)
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Contribute to improved legislative and administrative framework

Identify loopholes in legislation which make the enforcement ambiguous or not transparent				✓			
Address the Government with recommendations on how to improve the legislation or enforcement				✓			
Suggest improvements in government organisation’s internal structure or procedures		✓	✓		✓		

Improve communication between public and private sector

Conduct regular consultations with business circles and taxation professionals in order to maintain a two-way communication with the sector representatives	✓			✓			
Participate in the Tax Dispute Council meetings				✓			
Report (confidentially and anonymously, if needed) about cases of corruption							✓

2.4.2 Procedure for handling of complaints

All of the surveyed Business Ombudsman Institutions offer an easy-to-use online tool to submit a complaint (an exception is the U.K. Adjudicator's Office which can be contacted only via fax or ordinary mail). Some Ombudsmen do explicitly require the information and documentation of earlier communication with the agency concerned be attached when addressing the Ombudsman (this is the case for the U.K., and U.S. Ombudsmen). The Ombudsmen in Georgia, or those operated by the regional chambers of commerce in Spain require very little information not exceeding contact details and a short description of the case. (Sample forms in Annex)

In some cases, a time limit for forwarding a case to the Ombudsman applies - in the U.K. this is 6 months after the final reply from the government agency has been received; the European Ombudsman accepts cases within a period of two years since the problem has arisen.

Once received by the Ombudsman office, the complainant usually receives a confirmation / process number, and many Ombudsmen Institutions promise to report back to the complainant about every action they take. The cases are checked for the eligibility with the Ombudsman's mandate and, if found to be appropriate, the Ombudsman will begin investigating by contacting the respective agencies.

The U.K. adjudicator's office provides the most elaborate description of possible results of the investigation process by describing two possible scenarios - resolution by mediation which leads to a mutually acceptable solution; or resolution by recommendation where such a solution cannot be found.

BOX 1: Resolution by mediation vs. Resolution by recommendation at the U.K. Adjudicator's Office

Resolution by mediation

Mediation is the process whereby both parties reach an agreement on how a case may be settled. Our investigator will review the complaint and if there is scope to propose a mediated settlement they will work with the complainant and the department to achieve this on behalf of the Adjudicator.

Resolution by recommendation

Where mediation is inappropriate, the investigated case will be presented to the Adjudicator. The Adjudicator will review the case in detail. She will write to you and to the department outlining her views and any recommendations.

We call these letters 'recommendation letters' because they set out what, if anything, the Adjudicator 'recommends' the department should do to put things right. If the Adjudicator believes that the organisation has already dealt with the complaint adequately, she will say so. However we resolve the complaint, it must be consistent with the organisation's own instructions and Codes of Practice. This could include asking the organisation to apologise and to meet any additional costs that you have incurred as a direct result of their mistakes or delays – things like postage, telephone calls or the cost of professional advice. Or we might ask the organisation to make a small payment to recognise any worry and distress that you have suffered. To date, the departments we investigate have accepted all of the Adjudicator's recommendations.

Source: <http://www.adjudicatorsoffice.gov.uk/howwork.htm>

2.4.3 Powers of investigation

The 'officially established' Ombudsman Institutions in the U.S., U.K., France, the European Ombudsman are empowered to request information from all government organisations they deem necessary. This information comprises copies of available documents, as well as explanations by

officials. The powers of the European Ombudsman also extend to documents which are regarded as confidential.

Article 5: Powers of investigation²⁶

5.1. Subject to the conditions laid down in the Statute, the Ombudsman may require Community institutions and bodies and the authorities of Member States to supply, within a reasonable time, information or documents for the purposes of an inquiry. They shall clearly identify any information or documents which they regard as confidential.

5.2. The Ombudsman may inspect the file of the institution concerned. The institution concerned shall clearly identify any documents in the file which it regards as confidential. The Ombudsman may take copies of the whole file or of specific documents contained in the file. The Ombudsman informs the complainant that an inspection has taken place.

5.3. The Ombudsman may require officials or other servants of Community institutions or bodies to give evidence under the conditions laid down in the Statute. The Ombudsman may decide that the person giving evidence shall do so in confidence.

The mandate of the European Ombudsman also provides for investigations be made at the own initiative of the Ombudsman. In such cases, all other provisions remain the same as for investigations which are based on a complaint submitted to the Ombudsman.²⁷ All other Ombudsmen Institutions covered by this study do not develop this aspect clearly so that it must be assumed that they may act only in response to a complaint be made.

2.4.4 Power of recommendations and making proposals

The Ombudsmen in the U.K., France, Georgia, as well as the European Ombudsman have the mandate to recommend a solution they deem an acceptable solution for both parties (“resolution by mediation” in the U.K.; “friendly solution” in case of the European Ombudsman).

In case the recommendation cannot be accepted by either of the parties, the Adjudicator in the U.K. offers a recommendation (cf. Box 1); the European Ombudsman may close a case with a “critical remark” and recommendations which, ultimately, may be presented to the European Parliament.²⁸ If the Adjudicator (U.K.) cannot reach a solution, the complainant has the right to take the issue to the U.K. Parliamentary Ombudsman. In case the recommendation offered by the Médiateur in France does not help to find a solution, he may address the issue directly to the attention of the minister.

Contrary to the practice in the European Business Ombudsman Institutions, the national Ombudsman in the U.S. does not normally end a case with recommendations put forward to the parties. Instead, the typical outcome of the cases dealt with by the Ombudsman is a direct reply by the government agency to the complainant with the Ombudsman playing more of a role of a business’ advocate aiming at i) the issue be looked at at a more senior level in the government agency concerned, and ii) principles of fairness being duly respected when dealing with the issue.

Apart from reaching solutions to individual cases, some Ombudsman Institutions have the mandate to give recommendations for improvements of procedures and the internal structure of government organisations concerned.

²⁶ European Ombudsman’s Implementing Provisions <http://www.ombudsman.europa.eu/en/resources/provisions.faces#hl14>

²⁷ European Ombudsman’s Statute, Art. 3; European Ombudsman’s Implementing Provisions, Art. 9

²⁸ European Ombudsman’s Implementing Provisions, Art. 6-8

BOX 2: Ombudsman to recommend improvements in the internal structure of a government agency

An example from the recent practice of the U.K. Adjudicators office:

Normally, the Adjudicator's Office should be the one dealing with "the difficult exceptions, not the one to handle routine matters that are well within the capability of departmental staff to resolve successfully". Under this assumption, any increase or decrease in complaints submitted with respect to all government agencies that fall under the mandate of the Ombudsman would be considered normal. In this specific case, however, the number of complaints submitted which all referred to a very typical problem, had grown significantly for three subsequent years. The Adjudicator had taken this as a sign of a systemic problem in the Department. This issue was addressed to the management of the agency and corresponding measures have been taken.

Source: The Adjudicator's Annual Report 2013

2.4.5 Power of publishing reports and rankings

The Ombudsman's reports are generally made public and, in the cases of the European Ombudsman, the U.S., and Georgia, are presented to the respective parliaments. These reports do not only serve the purpose of holding the Ombudsman to account for their work during the course of the year, but they also serve as a powerful tool to enhance the credibility of the work of the Ombudsman institution. By bringing - individual, or aggregated - cases and statistics of poor-performing government departments to the attention of parliament, these Ombudsman reports can be used for a performance assessment of the respective government agencies. The Business Ombudsman in the U.S. takes this 'performance assessment' of government agencies one step further by compiling a ranking of the various government department's compliance with the fairness principles vis-a-vis small businesses. This ranking assesses government agencies according to the following criteria:

1. Timeliness of response to small entity comments
2. Quality of response to small entity comments
3. Agency non-retaliation policy
4. Agency regulatory enforcement compliance assistance
5. SBREFA notice

The former two criteria are thereby assessed by the Ombudsman office based on their own experience with the respective agency; the latter three criteria are assessed based on a questionnaire that the Ombudsman office circulates to the government agencies. Each criterion is evaluated on a scale of five grades with "A" being best, and "F" being worst performance. An example of the Federal Agency Rating for 2011 is given on the next page. These rankings can be used for a comparison, and progress assessment in-between departments of a certain sector of government; for a comparison between government sectors; and also for a year-on-year assessment of progress made.²⁹

²⁹ National Ombudsman 2011 Report to Congress, Small Business Administration, Washington D.C.

Table II-1. Rating of Agencies According to FY 2011 Criteria

Cabinet Level Agency (# of comments)	Comments		Non-Retali-ation Policy	Compliance Assistance	Informs about SBREFA	Overall	Additional Complaints/ Comments Referred
	Timeliness	Quality					
AGRICULTURE							4
Food Safety & Inspection Service (1)	A	A	A	A	C	A	2
Animal & Plant Health Inspection Service (2)	A	A	A	A	C	A	1
Food & Nutrition Service (1)	C	A	A*	A	C	B	1
COMMERCE							
National Oceanic & Atmospheric Administration (47)	A	A	A	A	A	A	7
DEFENSE	N/A	N/A	Did not respond to the ONO questionnaire				11
EDUCATION	N/A	N/A	A	A	A	A	
ENERGY	N/A	N/A	Did not respond to the ONO questionnaire				
HEALTH & HUMAN SERVICES							2
Food & Drug Administration (7)	A	A	A	A	A	A	3
Centers for Medicare & Medicaid Services (4)	A	A	A	A	C	A	32
HOMELAND SECURITY							
Coast Guard (1)	A	A	A	A	A	A	1
Customs & Border Protection (4)	F	N/A	Did not respond to the ONO questionnaire				3
Immigration & Customs Enforcement (3)	A	A	A	A	A	A	2
HOUSING & URBAN DEVELOPMENT	N/A	N/A	A	A	A	A	3
INTERIOR	N/A	N/A	A	A	B	A	
JUSTICE	N/A	N/A	A	A	C	B	1
LABOR							2
Occupational Safety & Health Administration (34)	A	A	A	A	A	A	
Wage & Hour Division (5)	A	A	A	A	A	A	
Mine Safety & Health Administration (10)	B	A	A	A	A	A	
Employee Benefits Security Administration (2)	A	A	A	A	A	A	
STATE	N/A	N/A	A	B	A	B	
TRANSPORTATION							1
Federal Aviation Administration (1)	A	A	A	A	C	A	1
Pipeline and Hazardous Materials Safety Administration (1)	A	A	A	A	C	A	
Federal Motor Carrier Safety Administration (1)	A	A	A*	A*	C	A	
TREASURY	N/A	N/A	Did not respond to the ONO questionnaire				1
IRS (8)	B***	N/A	A	A	A	A	3
VETERANS AFFAIRS	N/A	N/A	Did not respond to the ONO questionnaire				2

Excerpt from the Federal Agency Rating for 2011 of the U.S. National Ombudsman 2011 Report to Congress

2.5 Cooperation of business ombudsman with legal and business associations

The information available from the Ombudsman Institutions covered in this study suggests that the resources made available to the Ombudsman offices is corresponding with the workload they are facing. In cases where the workload increases substantially, the Ombudsman Office has the right to ask for an increase in their budget to employ additional staff. Such a case was reported, e.g., from the U.K. Adjudicator's Office where the number of new cases has increased from 1,200 in 2010-11 to 2,600 in 2012-13. To cope with this increased workload the Adjudicator's office has grown from 49 staff working in three cities to 135 staff working in 5 cities.³⁰ The U.S. National Ombudsman relies on a network of 10 regional offices to support its work (c.f. Section 4.5.1. National vs. regional level organisation). These regional offices ('Fairness Boards') are staffed with local businesspeople who perform their work on a voluntary basis (i.e. 'pro-bono work', only travel expenditures are being reimbursed)³¹. The existence of such regional 'Fairness Boards' and the relation between the Ombudsman Office and the Regional Fairness Boards is, however, regulated by law (Small Business Regulatory Enforcement Fairness Act of 1996").

In addition to the resources to be made available to enable the Ombudsman office to perform its functions self-sufficiently, other provisions for working in independence would make any formal or informal contacts with legal or business associations rather difficult. For instance, Article 9, pt.1 of the statute of the European Ombudsman states that “[t]he Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he shall neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties.”

Whilst the above narrative holds true for the officially (i.e., based on a Law or government decree) established Ombudsman Institutions, the situation will likely be different in the case of the Ombudsman Institutions offered by the regional Chambers of Commerce in Spain. In these cases, the Ombudsman is *de facto* offered by a business association. More detailed information about the availability of resources and expertise on a mandatory or voluntary basis, and on provisions to secure the independence of the Ombudsman is, however, not available.

³⁰ The Adjudicator's Annual Report 2012-13

³¹ Each Board shall consist of five members, who are owners, operators, or officers of small business concerns, appointed by the Administrator; after receiving the recommendations of the chair and ranking minority member of the Committees on Small Business of the House of Representatives and the Senate. Not more than three of the Board members shall be of the same political party. No member shall be an officer or employee of the Federal Government, in either the executive branch or the Congress. (SBREFA, Sec.30, b, 3)

3 ANALYSIS OF PRACTICES OF BUSINESS OMBUDSMAN INSTITUTION IN THE RUSSIAN FEDERATION

3.1 Introduction

The first Ombudsman Office established in Russia first was the Human Rights Ombudsman³² Office, whose goal is to ensure the creation of a democratic state of law and the development of legal awareness of citizens and public officials.

The legal framework for the creation of this institution was the Declaration of the Rights and Freedoms of the Man and Citizen adopted by the Supreme Soviet of the RSFSR (**Russian Soviet Federative Socialist Republic**) on 22 November 1991. This document lays down the foundation for the appointment of the Parliamentary Ombudsman for Human Rights. This document reflected the basic provisions of the international legal acts on human rights, and above all – those of the Universal Declaration of Human Rights of 10 December 1948.

In 2012 with a Presidential Decree a new Federal Business Ombudsman Institution was established within the Administration of the President of the Russian Federation³³, the goal of this institution, is to protect the rights of entrepreneurs.

The establishment of this new Ombudsman institution in the Russian Federation was accounted for by the unsatisfactory business environment and high risks relating to doing business. Despite the steady progress in some areas of business regulation and the implementation of measures aimed at the establishing of institutional environment for a developing market economy and fighting corruption, a number of factors that have negative effect on the entrepreneurship and the business have not been eliminated.

Some of the efforts undertaken by the Russian Federation since the early 2000s, include the following actions by the Russian Government:

- Starting in 2001 laws and regulations were adopted to deregulate the economy and reduce administrative barriers,
- In 2004 a Program of Administrative Reform was launched,
- In 2008 the development of anti-corruption legislation started; and
- In 2010 the regulatory impact assessment was introduced.

However, despite the measures taken, no significant improvement of the business climate was noticed, which could be attributed to some of the factors listed below:

- Corruption which is one of the major contemporary challenges in the Russian Federation;
- Insufficient development of competition in the entrepreneurial sphere,
- High monopolization of the economy.

Considering the above, we can infer that there was a clear need to take special measures to ensure protection of rights of entrepreneurs and investors. In this regard there are a number of actions that took place between 2010 and the establishment of the Federal Business Ombudsman Institution in 2012. These include:

- In 2010, the First Deputy Chairman of the Russian Government was appointed as Ombudsman for investment;

³² Ombudsman for Human Rights - <http://ombudsmanrf.org/>

³³ The Business Ombudsman under the President of the Russian Federation to protect the rights of entrepreneurs – <http://ombudsmanbiz.ru>

- In 2011, the Deputies of President's representatives in the federal districts were charged with responsibility to assist business in promoting investment projects
- In 2012, the Prosecutor General of the Russian Federation established the Department for Oversight of the rights of entrepreneurs.
- In 2012, the institutional initiatives of business associations to improve business climate and protect the rights of entrepreneurs lead to certain feasible the results –Business Ombudsman of the Russian Federation was appointed under the President of the Russian Federation.

The Federal Business Ombudsman received imperative powers to provide feedback and oversight of the activities of state and municipal authorities who are violating the rights of subjects of entrepreneurship.

Another important task was to identify systemic problems of legal regulation of entrepreneurial activity which violate the rights and lawful interests of employers.

The Business Ombudsman Institute in Russia has its own specifics for it relies on the cooperation with the civil society represented by business associations, legal and expert community, whose representatives not only participate in advisory boards, but are also involved in handling applications and claims on the basis of the relevant regulations and memoranda. This cooperation with the civil sector ensures a high level of independent expertise in handling applications and complaints and taking adequate decisions based on public verdict, transparency and public supervision.

The difficulties which the Business Ombudsman is facing in his day-to day work may be accounted for by the state of the institutional environment in Russia which is characterized by high levels of corruption, interference of the authorities in entrepreneurial activity, weak legal institutions-, and the unsatisfactory state of the judiciary and law enforcement.

Given the above, the Business Ombudsman has to undertake serious efforts to combat institutional systemic problems that generate mass-scale violations of the rights of entrepreneurs. Over a period of six month the Ombudsmen received about 4,500 complaints from individual entrepreneurs or companies. The large flow of complaints makes it difficult to profoundly examine each particular case. Serious resources are required to ensure a qualitative analysis of such a load of complaints. This great number of complaints for such a short period of time raises concerns about the risk that the number of complaints will significantly exceed the resource potential of the Business Ombudsman's Office.

A positive trend of cooperation is observed in connection with the establishment of the Business Ombudsman Institution: first and foremost, this is manifested through the high level of cooperation of all the business community with the Business Ombudsman, as well as through the support by the legal and expert organizations and their creative collaboration on improving the business climate and strengthening the legal institutions in Russia.

3.2 Basis for the functioning of business ombudsman institution at the Federal Level

3.2.1 Legal basis for the functioning of the business ombudsman institution

After the inauguration, the Russian President Vladimir Putin, in the Presidential Decree № 596 "On the long-term national economic policy" of 7 May 2012, identified the measures to improve economic policy, including the creation of the Institute for the Protection of the Rights of Entrepreneurs to carry out activities at the federal and regional levels.

The first Presidential Ombudsman for Entrepreneurs' Rights, Boris Titov was appointed by Presidential Decree № 87, of June 22, 2012.

On May 7, 2013 Federal Law № 78-FZ "On Ombudsmen for the Protection of the Rights of Entrepreneurs in the Russian Federation" was adopted. It determined the legal basis for the

Ombudsmen both at the federal and regional levels, the status, and the procedure for appointment thereof, legal guarantees and powers. Federal Law N 294- FZ of 02.11.2013 amended the main law in order to expand and clarify the authority of the Ombudsman.

3.2.2 Status

The status of the Presidential Ombudsman for entrepreneurs' rights is defined by the Federal Law. Changing the status of the Ombudsman shall require decisions of the Federal Assembly of the Russian Federation and the approval of the President of the Russian Federation, which can be deemed as a proper guarantee of his status.

Currently, the Ombudsman is a public official of the Russian Federation and this position is within the structure of the Presidential Administration of the Russian Federation. The Office of the Ombudsman (it is functioning on the basis the Public Chamber of the Russian Federation) was created to provide support to the Federal Business Ombudsman.

The Ombudsman is financed from the federal budget on an annual basis, and receives the funds necessary to ensure the work of the Ombudsman's office. The funding for Office of the Federal Business Ombudsman for 2013-2014 was assigned to the Public Chamber of the Russian Federation . The budget was allotted based on the number of regular employees and the amount of work foreseen in the performing of Ombudsman's duties. The budget for the year 2013 allotted to the Federal Business Ombudsman is approximately 4 mln. Euro.

3.2.3 Institutional set-up and organization

Several boards (such as the Public, Expert and Coordination Boards) were established with the aim of supporting the activity of the Federal Business Ombudsman, furthermore representatives of the Federal Business Ombudsman were appointed in various economic spheres (Public Ombudsmen). The Business Ombudsman also invited lawyers to participate in the work to protect the rights of entrepreneurs on a «pro bono» basis.

The Federal law stipulates for the right of the regions of the Russian Federation to establish the position of the regional Ombudsman for entrepreneurs' rights. The Ombudsmen's activity shall be based on the model developed at the Federal level.

All the bodies and institutions described above form the Institute for the Protection of the rights of entrepreneurs (Business Ombudsman institute).

3.2.4 Independence from other institutions

The Ombudsman is independent from other authorities in the Russian Federation and reports directly to the President of the Russian Federation.

To ensure the independence of the Ombudsman, certain status, institutional guarantees, and guarantees for the participation in the activity of the Ombudsman are provided for by the law as described below.

3.2.4.1 Status guarantees

The main guarantee for the status the Ombudsman is his/her direct appointment to the position by the President of the Russian Federation. The Ombudsman does not report to any other authorities except the President of the Russian Federation.

According to the Federal law, the term of office of the Ombudsman is set to five years. The same person cannot be appointed as the Ombudsman for more than two consecutive terms.

The Federal law stipulates directly that the Ombudsman does not have the right to engage in any activities for remuneration, with the exception of lecturing, engaging in research or other creative work. In his/her activities, the Ombudsman cannot be guided by the decisions of the political party or any other public association (of which he might be a member). The Ombudsman shall have no right to

be a member of the Federation Council and the State Duma of the Federal Assembly of the Russian Federation, a deputy in other legislative (representative) state power body in the Russian Federation.

3.2.4.2 Organizational guarantees

On January 1, 2015 the Ombudsman for entrepreneurs' rights and its working staff will become an independent government body with a status of a legal entity.

The funding of the Business Ombudsman's activities shall be determined by the Federal Assembly of the Russian Federation (within the budget of the Russian Federation on the basis of number of regular employees and the amount of due performing Ombudsman's powers).

3.2.4.3 Public participation in appointing the Ombudsman

Under the Law, the Business Ombudsman shall be appointed by the President of the Russian Federation with the consideration of the opinion of the business community.

Thus, the person who meets the specific criteria may be appointed to the high position of the Ombudsman only if the potential candidate conforms to the interests of the business community: it is expected that the appropriate consultations be held in this regard. The first Ombudsman was selected from the candidates nominated by business associations.

The Business Ombudsman's Office operates on the principles of transparency and openness: it works closely and actively with mass media, reports to the public and publishes success stories. The civil society institutions are involved in dealing with complaint: for the purpose of the Ombudsman's Office greater transparency and openness the Public Board was established.

3.2.5 Immunity

The Federal Law sets a high standard and requires comprehensive reasons for relieving the Business Ombudsman from his/her duties. Under the Law, he/she may be relieved of duties only by the decision of the President of the Russian Federation. The status of the Ombudsman as a representative of the President is the extraordinary one: the law does not establish specific grounds for his dismissal, leaving those at the full discretion of the President. Such dismissal may be caused by some ethical reasons or by the loss of the President confidence.

There are no special procedures stipulated by the Law for initiating criminal proceedings against the Ombudsman, although such ideas were initially announced, even among the members of the Parliament.

3.3 Basis for the functioning of business ombudsman institution at the Regional Level

3.3.1 Legal basis for the functioning of the business ombudsman institution

The first regional law establishing the position of the Ombudsman for entrepreneurs' rights was adopted in 2011 in Ulyanovsk region. At that time, the decision to establish a Federal Ombudsman Office was only a concept in its very early stage.

The Business Ombudsman of Ulyanovsk region according to the law had a small scope of competencies (monitoring and making inquiries at regional and municipal authorities levels) and was protecting only the rights of small and medium business. The wage of the Ombudsman was set equal to salary of Deputy Chairman of the Government of the Ulyanovsk region.

The position of a regional Ombudsman for entrepreneurs' rights was established by Federal Law № 78 -FZ of May 7, 2013 "On Ombudsmen for the Protection of Entrepreneurs in the Russian Federation". This law set the basis for the status, competence, appointment procedure of Regional Ombudsmen. The Regional Law - a regional legislative body finds it possible to adopt such a law, specifies the status, appointment procedures, goals and objectives, and the powers of regional Ombudsmen. Currently, regional laws are adopted in 48 regions out of 83.

The Federal Law of 02.11.2013, N 294- FZ “On incorporation of amendments and amplifications to the Federal Law on the Protection of the rights of entrepreneurs in the Russian Federation” expanded and clarified the competence and authorities of the regional Business Ombudsmen.

3.3.2 Status

The Status of the Regional Business Ombudsman is determined by the regional law in accordance with the requirements of Federal law. For example in Arkhangelsk and Tomsk regions the Business Ombudsman is the vice-governor. In Orel region and in the Republic of Bashkortostan the Business ombudsman are created as independent authorities.

The protection of the rights of entrepreneurs, in accordance with the current federative constitutional model, refers to the joint jurisdiction of the Russian Federation and the regions. Insofar, the Russian Federation shall determine the status and powers at the Federal level, while the constituent subject of the Russian Federation shall take an independent decision whether such a position should be established, and should that be necessary, shall grant the Ombudsman the powers at the regional level, and provide the organizational and technical resources thereto.

The Regional Ombudsmen are funded from the regional budget. The funding of the Regional Ombudsman’s activities should be determined by the Regional authorities (within the budget of the Region on the basis of regular number of employees and the number of the regional entrepreneur entities).

3.3.3 Institutional set-up and organization

The post of the regional Ombudsman is established by a specific regional law (adopted by the legislative bodies and signed by the governor).

Appointment of a candidate to the post of a regional Ombudsman is exercised in accordance with the Federal law, after the approval of the Federal Business Ombudsman for the protection of entrepreneurs’ rights with the account of the opinion of the business community. The term of office shall be determined, as a rule, by the regional law mostly for a term of 5 to 6 years, with the right to be re-appointed to the position.

Organizational, legal, analytical, informational, documentary, financial and logistical support of the regional Business Ombudsmen shall be provided by a state agency or division specified by the Law, or by the already existing divisions (usually operating within the administration of the regional Governor). As usual in different regions the Ombudsman have up to 10 employees (The Republic of Bashkortostan) – who provide all administrative and documentary work.

In Ulyanovsk region the Ombudsman for entrepreneurs’ rights together with the Regional Human Rights Ombudsman and the Regional Ombudsman for children’s rights form a special body to coordinate of their joint activities – “the House of Justice”. The legal, administrative and organizational support for the activity thereof shall be provided by the staff of the “House of Justice”. The Ombudsman shall be funded from the regional budget.

The Regional Ombudsman shall not have the right to combine his/ her work with any other public service position in the Russian Federation, other civil service municipal service positions in the Russian Federation.

The regional Ombudsman’ interaction with legal and business associations shall be similar to that at the federal level.

3.3.4 Independence from other institutions

The Ombudsman shall be independent from other power bodies in the Russian Federation and the regions and shall directly report to the regional governor.

To ensure the independence of the Ombudsman, certain status and institutional guarantees, as well as mechanisms to provide for public participation, were introduced, as detailed below.

3.3.4.1 Status guarantees

The Ombudsman is not subject to other federal and regional authorities, except those specifically identified in the law. The Regional Ombudsman holds a public office in the region, as a rule, at the rank of vice-governor or regional minister: the position of the Ombudsman is very high in the administrative hierarchy. The Ombudsman is not entitled to hold any other public office in the Russian Federation, other regional offices of the Russian Federation, the state civil service positions and positions of municipal service.

The Regional Business Ombudsman shall not have the right to combine his/ her work with any other public service position in the Russian Federation, other civil service municipal service positions in the Russian Federation.

The term of office of the Ombudsman is determined by the regional law: changes in the term of office shall require amendments in the regional law.

Regional Ombudsmen may be relieved of his/her duty only with approval of the Federal Ombudsman for entrepreneurs' rights.

3.3.4.2 Organizational guarantees

The amount of budget allocations for the Ombudsman activities shall be determined by the Regional authorities (within the regional budget).

3.3.4.3 Public participation

Under the law, the regional Ombudsmen are to be appointed by regional governments with the account of the opinion of the business community.

The procedures per se of selecting the appropriate candidate are not defined by the federal law and remain at the discretion of regional legislatures.

Regional laws determine the subjects and the procedures for the election to the Ombudsman's position, and there is a significant procedural variety depending on the specific region. Some regions just declare that business community shall take part in the nomination of candidates, while others give a detailed prescription of such procedures in laws.

In Yaroslavl' region, for instance, the Governor may nominate the candidate for the position of the Ombudsman, as well as public associations of entrepreneurs, and Coordination Boards for SMEs in Yaroslavl oblast. The Yaroslavl Duma shall make the final decision regarding the candidate upon the agreement and approval of the Ombudsman under the RF President. The Regional Ombudsman shall be appointed to the position by the Decree of the Governor of Yaroslavl region. In Khanty-Mansi Autonomous District, Ombudsman is nominated during the primaries - candidates present their program, conduct the "election campaign»; inform the public about their actions. Each municipality sends its business community representatives who elect 3 top candidates (who have received most of the electoral votes). The list of candidates is forwarded to the Governor for his approval. Such list of the candidates is of advisory nature.

3.3.5 Immunity

The Regional Ombudsman powers may be stopped before time exclusively with the consent of the Federal Business Ombudsman.

No special procedures have been provided for with regard to the initiation of criminal proceedings against the Business Ombudsmen. Also there is no special procedure established for the dismissal from the position, though initially there were such ideas, also on the part of the legislators.

3.4 Nature and differences of competences, powers and practices of business ombudsman institution at Federal and Regional levels

3.4.1 Scope of monitoring competence

The Competencies of the Federal and Regional Ombudsmen are set forth in the Federal law, specifically to:

- protect the rights and legitimate interests of Russian and foreign business entities in the Russian Federation and of Russian business entities abroad;
- monitor the observance of business entities' rights and legitimate interests by Federal, regional governments and local authorities;
- promote the development of public institutions aimed to protect the rights and legitimate interests of business entities;
- interact with business communities;
- participate in developing and implementing the state policy in the field of entrepreneurship, protection of rights and legitimate interests of businesses.

The above competences are implemented in the Ombudsman's activity and the activity of the staff thereof, as well as public institutions operating under the Ombudsman.

The main difference between the Federal and Regional Ombudsmen is that the Federal Ombudsman is responsible for the protection of business at the national level, while the regional Ombudsmen are responsible only for the entities registered in the territory of their region.

Some regional laws grant the regional Ombudsmen some other competences (in conformity with the decision of regional legislative bodies), which include:

- activity aimed to improve the investment climate;
- legal education for entrepreneurs to protect their legitimate rights and interests;
- interaction with the business community and the development of inter-regional cooperation to protect the rights and legitimate interests of entrepreneurs;
- promotion of entrepreneurship,
- informing the public about the status of observance of entrepreneurs rights and legitimate interests;
- promotion of entrepreneurship in the region.

Pursuant to the administrative policy in the Russian Federation, to start defending the rights of entrepreneur the Ombudsman needs the entrepreneur's complaint or an application.

The competencies are perused directly by the Ombudsmen and their offices, as well as other structures of the Ombudsman institute. The competencies are perused by the Ombudsman's office primarily when dealing with the complaints, as well as in the analysis of the legal, economic and statistical information and media publications.

On the other hand, competences are perused in the activities of public institutions. So, at the federal level, each of the public institutions (Ombudsman institution) in accordance with their regulations is involved in the examination of complaints. For example, Center of public procedures "Business against corruption"³⁴ with the support of pro-bono lawyers, handles cases related to criminal prosecution, public ombudsmen deal with cases relating to administrative violations in various spheres of business regulation.

Public examination at institutional level is carried out by Boards under the Federal Business Ombudsman Institution:

³⁴ Center of public procedures «Business against corruption» - <http://www.nocorruption.biz/>

- Coordination Board - the analysis of systemic problems identified in by public ombudsmen, developing proposals to improve state regulation of individual areas of business;
- Expert Board - analyzing the state institutions, performance, proposing the measures to development of measures to strengthen them (work on improving justice, criminal and administrative law, mediation procedures, etc.);
- Public Board - interaction with the business community to develop proposals to improve public policy on entrepreneurship.

The competencies of regional Ombudsmen are far less than those of the Federal Ombudsman – because the law granted (the most effective powers such as: issuing directives in order to suspend the regulations running contrary to the law, including acts, and decisions of regional governments and municipal authorities that violate the rights and lawful interests of business, bringing the officials who obstruct the lawful activities of the Ombudsman, or do not fulfill the legitimate demands of the Ombudsman, and fail to meet deadlines for providing information to administrative liability) only to the Federal Business Ombudsman.

Regional law may provide additional powers to Regional Ombudsmen (based on the competencies of the regions), and may determine some additional principles of work at regional level.

For example, according to the existing administrative practice, the Ombudsmen before using their competences and powers for protecting the rights, are obliged first to get a complaint.

However by the decision of the local Legislative Assembly, in the Republic of Tatarstan, the Regional Ombudsman is granted the power to take appropriate measures within the competence thereof and/or on his own initiative, if there is a gross violation of the rights and legitimate interests of businesses or in instances of particular public significance (these powers are similar to those of the Prosecutor's Office).

3.4.1.1 Power of investigation

The Ombudsman doesn't have special powers to conduct a full-scale investigation in connection with the complaints and applications received, however, he has the powers to gather information from both parties to the conflict (enterprises and state/municipal bodies), directly protect the rights of the applicant and submit proposals to amend or cancel laws and regulations, The Ombudsman shall take every effort to get high quality and reliable information with regard to the conflict, to understand which party is at fault.

When dealing with the complaints, the Federal, regional or public ombudsman shall verify the information provided in the complaint, make requests on behalf of the parties to the dispute (also the government officials), and personally communicate with the applicants and other parties to the conflict. All the powers of the Ombudsman are based on the Federal law.

For such purposes the Federal and regional Ombudsmen have the power to make enquiries: request information and receive necessary information, documents and materials within 15 days from public authorities, local governments and officials, visit places of detention of suspects and accused persons without any special authorization just providing professional ID.

The Federal and regional Ombudsmen also have the power to participate in on-site inspections conducted for the purpose of government and municipal supervision, if the applicant requests the Ombudsman to do so.

The Federal Ombudsman for the protection of entrepreneurs' rights shall also have unimpeded access to the public authorities and local governments.

Regional laws may also provide additional powers to Regional Ombudsmen (based on the jurisdiction of the regions).

Thus, in Khanty-Mansi Autonomous District the Ombudsman may submit to the state authorities, local authorities, and other bodies a request to bring civil servants guilty of violating the rights and legitimate interests of businesses to disciplinary, administrative or criminal liability in the manner prescribed by the federal law.

The Ombudsman in Yaroslavl region shall be entitled to freely visit in connection with his activities all state agencies, local government bodies, meet government officials.

The Ombudsman in the Republic of Tatarstan has the right to publish his opinion on the complaints received in all periodic press, one of the founders (co-founders) of which are the public authorities of the Republic of Tatarstan. The Law prohibits denying implementation of such powers on any grounds. It is noteworthy that except direct powers granted to the Ombudsmen themselves, it is also possible to work for the protection of the rights of entrepreneurs in cooperation with other bodies of the government: the Prosecutor's Office, the police and etc. The properly formalized and objective requests forwarded to such bodies provide fast and effective results: the officials cannot dismiss the request or delay the process.

Some ministries and agencies at federal and regional level signed agreements providing a framework for informational and technical cooperation, including the determining of the officials responsible for the interaction with the Ombudsman Institution.

These include:

- General Prosecutor's Office - 10/10/2012,
- Accounts Chamber of the Russian Federation - 07.12.2012,
- Ministry of Internal Affairs - 18.02.2013,
- The Ministry of Civil Defence, Emergencies and Disaster Relief of the Russian Federation - 11.04.2013,
- The Federal Service for Supervision of Consumer Rights Protection and Human Welfare - 31.07.2013,
- Federal Bailiff Service of the Russian Federation - 26.11.2013.

The Public Ombudsman shall participate in the Public Boards of the respective ministries and agencies. All the above shall give the Ombudsman's office at every level the power to interact directly with decision-makers.

3.4.2 Power of recommendations and making proposals

Under the Law, the Ombudsman shall have powers to stop violations of the rights and legitimate interests of business entities in the field of entrepreneurship.

The Ombudsman has the power to issue directives in order to suspend the regulations running contrary to the law, acts, and decisions of regional governments and municipal authorities that violate the rights and lawful interests of business (The Ombudsman shall be obliged to appeal in court wrongful decisions and actions).

He/she has the right to demand disqualification of officials of the government, local authorities who are guilty of violating the rights and legitimate interests of businesses and may also demand that the latter be brought to disciplinary, administrative or criminal liability.

The officials who obstruct the lawful activities of the Ombudsman, do not fulfill the legitimate demands of the Ombudsman, fail to meet deadlines for providing information (documents, materials, response to the application or request) to Ombudsman, shall be brought to administrative liability.

The Ombudsman shall have the right to submit the opinion thereof to the power bodies: provide expert opinion on draft laws that shall be mandatory for consideration (and the Ombudsman must be

notified about the results of such consideration in written form and within the deadlines not exceeding 30 days from the day of the receipt thereof); specifically:

- to the Government of the Russian Federation;
- the Federal executive power bodies;
- executive power bodies of the constituent subjects of the Russian Federation,
- Local self-government bodies.

In the legislative process the Ombudsman has the power to initiate new legal acts (amending or repealing the law), concerning the activities of the Ombudsman. Pursuant to the Law, the Ombudsman may send such proposals to the state authorities and local governments, members of the Federation Council of the Federal Assembly of the Russian Federation, deputies of the State Duma of the Federal Assembly of the Russian Federation.

The Ombudsman also has the power to make motivated proposals to suspend/cancel the implementing regulations of the executive branch of the government. Such proposals may be addressed to the President (in relation to the acts of the Government), to the Government (in relation to the regulations issued by ministries and agencies – executive branch), to the governors (in relation to the acts issued by regional authorities).

The regional Ombudsmen shall also have the right to initiate new legal acts, make substantiated proposals to suspend/cancel regulations of the executive branch of the government, forward expert evaluation of drafts of legal acts and regulations, but at the regional level.

The Federal and regional Ombudsmen also have the right to appeal against regulations, decisions and actions of government bodies and officials in court, if such decisions and actions:

- do not conform to the law or other regulatory legal act;
- violate the rights and legitimate interests of business entities in the field of entrepreneurship;
- illegally impose duties on entrepreneurs;
- create other barriers for entrepreneurial activity.

If the Ombudsman did not receive a complaint from specific persons, the Ombudsmen may file a complaint on behalf of third parties (for the protection of the rights and lawful interests of subjects of entrepreneurial activity).

It is only the Federal Ombudsman who has the right to appeal in court an act of economic court that have entered into force (in administrative proceedings).

The Ombudsman in the Yaroslavl region has the right to forward to the regional and local authorities, his/her proposals aimed to improve the protection of the rights and legitimate interests of entrepreneurs.

In Moscow and Yaroslavl region the regional Ombudsmen are provided with the right to participate in meetings of regional legislatures, governments and committees. The Yaroslavl Ombudsman for entrepreneurs' rights has the right to make presentations at the Yaroslavl Regional Duma sessions with the consent thereof.

3.4.3 Mediation as a tool for Ombudsman

Mediation approach is an essential principle for the Ombudsman's for the protection of entrepreneur's rights institute. When dealing with the complaints received by the Ombudsman's office, lawyers and public ombudsmen communicate with the authorities, requesting information relating to the essence of the complaints. During such negotiations public ombudsmen seek to resolve the conflict and thus protect the claimant from possible undue pressure exerted by the authorities. In certain cases, such interference is sufficient for resolving the issue.

Many complaints addressed to the Ombudsman are the result of a corporate dispute, when the parties to the dispute seek to focus the attention of the authorities on unlawful (in their opinion) activities of the counterparty. Such disputes are mostly dealt with in a public procedure when both parties to the conflict are invited to settle their differences by referring to Arbitration court, Joint RSPP (Russian Union of Industrialists and Entrepreneurs)³⁵ Commission on Corporate Ethics, or mediators.

Joint commission on Corporate Ethics examines the actions of both parties in compliance with the ethics principles set forth in the Charter of the corporate and business ethics. The mediators' panel decides which party is violating the ethics principles and makes recommendations to remedy violations of corporate ethics. If the recommendations proposed by the Commission are not fulfilled, it may lead to the expulsion of the culpable party from business associations, and including such party into the list of unreliable business partners, as well as other sanctions.

Classical mediation procedure in accordance with the provisions of the Federal Law of 27 July 2010 N 193 -FZ "On Alternative Resolution Procedure involving Mediator (Mediation Procedure)" has been applied in Russia since 2011. This procedure is not mandatory, and is based on a voluntary agreement of the parties aimed to reach a mutually acceptable solution. This procedure, however, (despite the fact that it allows to keep the facts of the dispute confidential) has not been broadly applied.

In Russia there are independent mediation services at two major business associations. They are the RSPP Joint Service of Mediation and the Facilitators of Reconciliation Procedures at the Chamber of Commerce³⁶.

The President Ombudsman is now creating a special mediation service: it shall involve mediators to help to deal with complaints, promote mediator training, and educate entrepreneurs to conduct conflict-free business.

At the federal level public institutions operating with the Business Ombudsman also participate in executing the above powers in preliminary discussion of the relevant measures and decisions taken by the Business Ombudsman's .

3.4.4 Procedure for handling of complaints

Ombudsman considers complaints of the subjects of entrepreneurial activity in accordance with the procedure established by:

- Federal Law N 78-FZ of 7 May, 2013 «On the Ombudsman for the Protection of the Rights of Entrepreneurs in the Russian Federation»;
- Federal Law N 59-FZ of 2 May, 2006 "On the Procedure for Considering Applications of citizens of the Russian Federation";
- and the following acts of the Ombudsman:
- Procedure for working with the Applications" (Approved by the Ombudsman under the President of the Russian Federation for the Protection of the rights of entrepreneurs on 6 June, 2013)
- Regulations for the consideration of Applications by the Center of Public Procedures "Business against corruption";
- Regulations for the work of the Public Representative of the Ombudsman under the President of the Russian Federation for the Protection of the Rights of Entrepreneurs (approved by Order #1 of 25 December, 2012 of the Ombudsman under the President of the Russian Federation);
- Procedure for consideration by the Regional Ombudsmen for the Protection of the rights of entrepreneurs in the RF of applications received from the Ombudsman (approved by Order N

³⁵ Russian Union of Industrialists and Entrepreneurs – <http://rspp.ru>

³⁶ The Chamber of Commerce – <http://tpprf.ru>

2 of 24.04.2013, of the Ombudsman for the Protection of the rights of entrepreneurs under the President of the Russian Federation).

The Federal Business Ombudsman deals with the complaints according to standard operating procedures:

- registration of complaints, formal filter (3 days);
- legal expertise and dispatching treatment (10 days);
- consideration of the application;
- implementation of measures to protect the rights; and
- work with system problems

The Authorized departments and institutions for Consideration of Applications are Business against Corruption Center, Public assistants to Business Ombudsmen, Regional assistants to Business Ombudsmen, pro bono legal experts, the Expert Board under the Business Ombudsman.

The Legal Department of the Federal Business Ombudsman has the authority to approve the draft response, and take measures to protect the rights of the applicant and the implementation thereof

The Draft response to the applicant, along with the expert opinion, is sent to the Department of legal expert evaluation to be further approved and signed by the Ombudsman.

After the petition is sent on behalf of the Ombudsman to public authorities and (or) local government, the staff informs the Public Ombudsman on the results of consideration of the Ombudsman's petition in the power bodies.

If the response on the essence of the issue cannot be provided without the disclosure of information constituting a state secret or other secret protected by the Federal law, the individual who filed the application shall be informed that it is not possible to provide a response on the essence of the issue raised in the application due to inadmissibility to disclose such information.

The Ombudsman is to inform the applicant of the results of the implementation of the measures to restore the latter's violated rights and legitimate interests at least once in two months.

Once the results of the consideration of the complaint are available the Ombudsman is obliged to fulfill one or more of the following actions, specifically, to:

- explain to the applicant the issues relating to his rights and legitimate interests, including the forms and methods of protection thereof provided by the legislation of the Russian Federation;
- refer the complaint to a government authority, local government body or a public official whose jurisdiction covers the resolution of the complaint on the merits. It shall be prohibited to file a complaint for the consideration of a public official whose decision or action (failure to act) is appealed;
- refer to a public authority, local authority or official, whose decisions or actions (failure to act) are perceived as violations of the rights and legitimate interests of subjects of entrepreneurial activity, the decision specifying the steps to reinstitute rights and observe the legitimate interests of the above persons;
- apply to court with the request to deem the below listed acts null and void;
- non-regulatory acts, decisions and actions (failure to act) of government bodies (with the exception of the Prosecutors Office, Investigative Committee of the Russian Federal bodies of judicial power. judiciary);
- local self-government bodies, other bodies, organizations having by force of federal law certain state or other public powers;
- public officials if the contested regulatory act, decision and action (failure to act) do not conform to the law or other regulatory legal act and violate the rights and legitimate interests

of subjects of entrepreneurial activity, illegally impose certain obligations on them, create other barriers for entrepreneurial activity;

- file suit to court to protect the rights and lawful interests of other persons, including group of persons who are subjects of entrepreneurial activity;
- refer to government and local authorities, other bodies, organizations having by force of federal law certain state or public powers, file a motion to bring the perpetrators culpable of violations of the rights and legitimate interests of the subjects of entrepreneurial activity, to disciplinary, administrative or criminal liability in accordance with the legal procedure; and
- Information about the results of the consideration of complaints of entrepreneurs may be placed on the official website of the Ombudsman, in the "Internet" on condition of absolute anonymity of the personal data.

The Ombudsman and the regional ombudsmen have the right to refuse to testify with regard to information that has become known to them in connection with their duties (part 4 of Art. 69 CPC RF).

3.5 Cooperation of business ombudsman with legal and business associations at the Federal and Regional Levels

At the federal level legal and business-associations cooperate with the Business Ombudsman through membership in the Public Board and the Expert Board under the Business Ombudsman in the Board, as well as in its working groups.

The Expert Board under Business Ombudsman (hereinafter – the Board) is formed to provide expert and consultative assistance to Business Ombudsman’s activity. The Board is formed from competent representatives of legal and expert community, representatives of the biggest business associations (Business Russia, Chamber of Commerce and Industry of Russian Federation, Support of Russia, RSPP).

The main objectives of the Expert Board are:

- to develop proposals for the improvement of the legislation and law enforcement practices;
- to detect and analyze systemic problems and corruption practices leading to infringements of businessmen’s rights;
- to prepare analytical materials for public use; and
- to draft reports on the observance of the businessmen’s rights

The Public Board under the Business Ombudsman is formed to ensure cooperation between government representatives and civil society to enhance the protection of businessmen’s rights.

The Board consists of representatives of the four largest business associations (All-Russian Public Organization “Business Russia”, Chamber of Commerce and Industry of the Russian Federation, All-Russian Public Organization of Small and Medium-sized Businesses “OPORA” of Russia (Support of Russia), All-Russian Public Organization “The Russian Union of Industrialists and Businessmen”) and other business associations, expert, legal and human rights organizations and also representative of the Expert Board under the Business Ombudsman, representatives of the Coordinating Board under the Business Ombudsman and the Head of the Business Ombudsman’s staff.

The main objectives of the Board are:

- to guarantee openness, transparency, and publicity of consideration of applications addressed to Business Ombudsman;
- to guarantee participation of civil society in the examination of businessmen applications to Business Ombudsman
- to discuss areas which of work for the appointed representatives of Business Ombudsman ;
- to discuss potential candidates of the representatives of Business Ombudsman in the respective areas of activity;

- to discuss candidates for the position of the Business Ombudsmen at the regional level;
- to detect and analyze problems in cooperation between business and government in the sphere of protection of businessmen rights;
- to develop proposals regarding the improvement of the legislation and law enforcement practices in protecting businessmen's rights and interests;
- to discuss the Annual Report to the President on the observance and protection of businessmen's rights in the Russian Federation;
- to discuss the possibilities and forms for the participation of public organizations engaged in the sphere of protection of businessmen's rights, examination of applications to Business Ombudsman either at the federal, or regional level;
- to discuss the Business Ombudsman's decisions regarding the suspension of unlawful acts issued by Federal executive power bodies, regional executive power bodies and local authorities.;
- to discuss the Business Ombudsman's decisions regarding temporary removal or disqualification of officials for interference and hindering entrepreneurial activity unless the above activity is of criminal nature.

Members of business associations often act as Public Ombudsmen and take a part in the Coordination Board's activity.

Coordinating Board under Business Ombudsman is formed for coordination of the Business Ombudsman representatives' activity according to the certain directions. It consists of public ombudsmen and the President of the Expert Board under Business Ombudsman.

The Coordinating Board under the Business Ombudsman has following objectives, to:

- jointly with the Business Ombudsman's staff systematize and summarize complaints and businessmen's applications, detect the most problematic areas of business activity ;
- coordinate the work on the topical issues, businessmen's appeals, concerning several business areas and recommend measures to resolve these problems;
- maps out information policy relating to the contacts between business community and government agencies in order to eliminate problems and promote decisions reached;
- determine the most topical business areas where the involvement of Public Ombudsman is required;
- recommend candidates for the public ombudsmen's positions from competent and respected experts in the appropriate sphere;
- recommend directions for educational programs concerning businessmen's rights protection
- Consider cases relating to conflicts of interests in the public ombudsmen's activity and recommend measures for the elimination thereof.

“Business against corruption” Centre of Public Procedures (hereinafter – BAC) is a nonprofit organization which unites representatives of business community, government agencies, public organizations counter corruptive pressure on business and combat raiding.

The BAC conducts public examination of businessmen applications addressed to Business Ombudsman relating to criminal cases and corruption. The BAC retains lawyers to take part in such examinations on a “pro bono” basis. Members of legal associations render legal assistance to Business Ombudsman based on cooperation with the BAC

The BAC has the following functions, specifically it:

- Considers businessmen applications on cases relating to criminal prosecution, raiding and corruption, which were submitted either to the BAC, or to Business Ombudsman (in accordance with his/her order);
- Holds hearings of such cases in the presence of parties concerned;
- Returns public verdict upon the result of the hearing.

The BAC administrative bodies are the Presidium and the BAC Director. Apart from the administrative bodies there are Public and Supervisory Boards.

The Public Board of the BAC consists of businessmen-experts, politicians, professional lawyers and economists, representatives of public organizations and mass media.

“Pro bono” expert legal assistance to Business Ombudsman is provided on the basis of agreement about gratuitous expert legal assistance by professional lawyers who are competent in specific areas of regulation (hereinafter – legal experts) .

Expert legal assistance is provided to professionally assess applications and complaints filed to the Business Ombudsman and draft legal recommendations to protect businessman rights. The Business Ombudsman shall share information about the legal expert and the activity thereof at public official meetings, in publications dealing with the issue of applications and complaints filed to the Ombudsman and on which the legal expert is working to inform community about such expert assistance and maintain positive business reputation of the legal.

Methodological support of “Pro bono” legal assistance shall be provided by the Business Ombudsman’s staff. Currently the “Pro bono” legal assistance is coordinated both by BAC and by the Coordination Department of the Public Ombudsmen.

Public representatives of Business Ombudsman (public ombudsmen)

Public representatives of Business Ombudsman (hereinafter - public ombudsmen) are Business Ombudsman’s voluntary assistants who work with businessmen’s applications addressed to Business Ombudsman in different entrepreneurship areas.

Public Ombudsmen are appointed by the Business Ombudsman from competent and acknowledged experts in the respective areas. They perform expert and representative functions.

Public ombudsmen when signing the public document – the Memorandum - undertake obligation for a limited period of time to prepare expert opinions on applications to the Business Ombudsman. They may also organize public discussions of topical issues and act as mediators.³⁷

Cooperation between business ombudsmen and legal- and business-associations at the regional level is organized in the same manner as the Federal one.

For instance, there are “Business against corruption” regional centers of public procedures which are established by the Federal BAC center. Applications filed to the Federal center can be passed to regional centers, if there are such regional centers in the location where the application was filed. Information about the acceptance of an application and any changes in the status thereof shall be published in the Applications Register at the Federal BAC Center web-site.

The regional businessmen’s activity is characterized by broad cooperation with public chambers. Business-associations most often act as operators of the public chamber.

Business Ombudsman’s public chambers - Business Ombudsmen are entitled to establish public chambers in the Russian Federation to render information and advisory assistance to businessmen on issues concerning Business Ombudsman’s authority, in particular, provide assistance in preparing applications to Business Ombudsman.

A Public chamber has the following objectives:

- Organization of consultations for businessmen about issues raised in an application to the Business Ombudsmen
- Organization of initial examination of businessmen applications

³⁷ Under Federal law № 193 of 27.07.2010 “Alternative procedure of disputes settlement with mediator (procedure of mediation)”

- Disseminate information about typical infringements of businessmen rights and ways to resolve such issues;
- Preparation of materials (summary on the subject matter of the dispute, expert opinion, etc.) to refer the materials to the regional business ombudsman.

A Public Chamber may be a legal entity or it may constitute part of a regional business ombudsman's staff or be a voluntary institute under the regional business ombudsman.

Methodological support of public chambers' activity is provided by the Business Ombudsman's staff together with the staff of the regional business ombudsman's.

3.6 Modus Operandi of institutions dealing with complaints

3.6.1 The work of the Business against Corruption» (BAC) Public Procedures Center

BAC is considering applications addressed thereto in accordance with its regulations.

An application may be forwarded for consideration to a regional BAC, if such a center is organized and operates in the region, from which the appeal was received.

Information about the acceptance of an application, as well as any change in the status of its consideration shall be reflected in the Register of Applications placed on the BAC web-site.

1) Phase I. Processing of an application and gathering materials related to the application.

The BAC Secretariat within 7 working days after receipt of an application shall be processing thereof. The Secretariat may request the applicant's documents and materials. Consideration of the application may be suspended for either 30 or 60 days. In case of non-receipt of the requested materials and documents the work on handling the application shall be completed due to lack of interest on the part of the applicant.

2) Phase II. Regional expert opinion

If an application is of great regional importance or causes serious public response in the region, the BAC Secretariat within 7 working days shall file a request to the regional office of the "Business Russia" All-Russian public organization Regional Ombudsman or the regional BAC (if there is such in the region).

3) Phase III. Identifying the positions of the opponents in the conflict

BAC Secretariat shall be working to clarify the positions of the opponents in the conflict.

4) Phase IV. Legal examination

The application with the materials annexed thereto that are provided by the applicant shall be forwarded to the *Pro Bono* legal expert. Legal examination of the application shall be carried out within 30 working days.

5) Phase V. Submitting the Application for the session of the BAC Public Board

After the receipt of the legal expert opinion, the BAC Secretariat within 7 working days shall prepare a summary drawn on the basis of the application and the relevant materials and thereafter shall be forwarded with the legal expert opinion attached to the co-chairs of the BAC.

The co-chairs of the BAC shall take a decision regarding further consideration of the application by the BAC Public Board ; and in the event of refusal a motivated response shall be sent to the applicant.

6) Phase VI. The BAC Public Board

The BAC Public Board shall consider the application in the public open procedure with the involvement of the parties to the conflict, experts and representatives of the authorities

Pursuant to the decision of the Public Board letters shall be forwarded to the authorities, public associations and organizations concerned. If necessary, the response shall be sent to the Applicant.

7) Optional step. BAC Supervisory Board

BAC Public Board together with the Co-Chairs may decide to send the materials to sign the Public Appeals and members of the Supervisory Board of BAC in case a conflict in the facts and circumstances within the competence of the federal authorities.

3.6.2 Work of the Public Ombudsmen

Authorized unit: Department for coordination of public ombudsmen.

Overall time to prepare the response of Public Ombudsman to the Federal Business Ombudsman shall not exceed 20 working days.

The Public Ombudsman shall have the right to:

- request documents and materials necessary for its investigations;
- send requests for specifications to the government authorities, local self-government bodies, and other parties to the conflict (response time - 15 days);
- seek clarification from the officials of government and local authorities on matters to be clarified in connection with the complaints of businessmen
- organize and conduct public hearings on the complaints of entrepreneurs on specific cases;
- retain independent experts and (or) centers of expertise;
- request information regarding the business reputation of the applicants; and
- meet with the applicants under consideration of specific complaints from entrepreneurs.

The expert opinion on the case and the draft response to the applicant with the legal justification of the stated position the Public Ombudsman shall forward to the Federal Ombudsman for the approval and subsequent response to the applicant. In the event the complaint is deemed justified and the violations described in the complaint are confirmed, as well as other violations of the rights of the entrepreneur are detected, the Public Ombudsman in his expert opinion addressed to the (Federal) Ombudsman shall submit a plan of actions to protect the infringed rights of the applicant.

To this end, he shall prepare a petition on behalf of the Federal Business Ombudsman addressed to:

- the public authorities and (or) local authorities with the justification of the problem and the proposal to change the previous decision, which led to the violation of the rights of the entrepreneur;
- the Prosecutor's Office demanding oversight activities and the Prosecutor's response measures; and
- the Court.

In case there is no confirmation of violations described in the complaint of the entrepreneur, the Public Ombudsman in his expert opinion to the (Federal) Ombudsman shall provide justification to the conclusions drawn and shall draft the response to the applicant.

3.6.3 Regional Ombudsman

In accordance with the regulations for the functioning of the Regional Business Ombudsman, he/she upon reception of a complaint by entrepreneurs should take actions as provided below:

- within 3 days shall contact the applicant to establish direct contact and, if necessary, to obtain additional materials;
- Following the first action the Regional Business Ombudsman has in disposal 7 days to study the facts described in the application of the entrepreneur, clarify the scope of legal relationships to which the complaint relates, shall forward the approximate schedule of

activities relating to the application to the Department for the work with the regional ombudsmen;

- Every 2 weeks he/she should report to the Department for coordination of public ombudsmen in the established format on the work done in relation to the application;
- within 30 days shall prepare and file an expert opinion to the Federal Business Ombudsman, and shall complete the appeal.

If there are doubts regarding the adequacy and (or) reliability of the position of the applicant, the regional Ombudsman has the right to organize a check on the application to clarify the facts stated in the application of the entrepreneur.

For the purpose of considering the application Regional Ombudsman has the right to:

- forward requests for clarifications to public authorities, local governments, other parties specified in the entrepreneur's application, and request documents and materials necessary for verification;
- seek clarification from public officials and local authorities on issues to be clarified in relation to entrepreneurs' application, including the officials in charge of the interaction with the Ombudsman in the federal executive power bodies;
- organize and conduct public hearings on consideration of entrepreneurs' applications on specific cases;
- engage independent experts and (or) centers of expertise ;
- request information about the business reputation of the applicants;
- hold meetings with applicants relating to collective complaints of entrepreneurs.

Upon the results of the entrepreneur's application the Regional Ombudsman is to prepare and forward in the name of the Federal Ombudsman (via the Department for the Work with Regional Ombudsmen)

- a substantiated Opinion in the approved format, which with regard of the applicable law and upon the results of the examination carried out on the case shall reflect one of the conclusions listed below:
- a draft response to the applicant, or a request to the Federal authorities on behalf of the Ombudsman;
- a cover letter addressed to the Ombudsman requesting that :
- the draft response be approved and sent in the established procedure r to the applicant, or a request be forwarded to the Federal authorities ;
- the case be closed and supervision of the case be discontinued.

3.7 Specifics of Business Ombudsmen in the Russian Federation

The post of the Ombudsmen for the Protection of Entrepreneurs' Rights in the Russian Federation (Federal Business Ombudsman), which enjoys a high status and broad powers, was established specially to resolve issues specific for the Russian Federation, some of these conditions may apply to other countries with economies in transition, in particular, those relating to supremacy of law, protection of ownership, improvement of the safety of business, and creation of a favorable business environment.

The Ombudsman's office in the Russian Federation through its activities aims to contribute to decreasing risks in conducting business, improve business environment and to:

- compensate for the weakness of legal institutions;
- overcome improper law enforcement practices;
- bring down the corruption pressure on business.

The Russian Business Ombudsman, due to the specifics of the institutional environment, is an Ombudsman in all the spheres of entrepreneurial activity where there are systemic issues and corruption risks which are most often interrelated. The objective of the Ombudsman is to protect entrepreneurs against arbitrary actions in conditions of imperfect legal environment, absence of the

rule of law and existing legal nihilism in society. The activity of the Russian Ombudsman helps to decrease uncertainty and ambiguity for entrepreneurs.

On the whole, the activity of the Russian Business Ombudsman conforms to the principles set by the Venice Commission: the Ombudsman has been granted a high status and the proper guarantees of independence.

Venice Commission principles	Implementation in Russia
Legal (constitutional) safeguards	
<p>In order to promote and preserve independence of the Ombudsman, it is important that the status of this institution be based on firm legal foundation. Ideally, this institution should be using constitutional safeguards.</p>	<p>The Ombudsman functions on the basis of direct force of the Federal Law - the act of supreme force which is second in priority to the Constitution of the Russian Federation. In constituent subjects of the Russian Federation regional laws were adopted which had been harmonized with the Federal Law.</p>
Service criteria: general criteria for the election and appointment of the Ombudsman	
<p>It is general practice that the person holding the position of the Ombudsman should be a respected person with very high moral standards and unquestionable level of integrity. The requirements regarding the necessary level of his/her education, work experience, etc. come second. At the same time, in certain countries the Ombudsman should have the higher legal education, while other countries do not strictly follow this requirement.</p>	<p>The requirements set to the person in this position conform to the international ones. The Ombudsman enjoys a very high status among officials since he/she reports directly to the President of the Russian Federation. This suggests very high requirements set to his professional and ethical qualities.</p>
Service criteria– Incompatibility of duties	
<p>The work of the Ombudsman should not be combined with any other work or profession, either public or private: the Ombudsman should not join either any political parties or professional unions.</p>	<p>The Ombudsman shall be prohibited to engage in entrepreneurial or any other paid for activity, with the exception of lecturing, scholarly or any other creative activity. The Ombudsman is not prohibited to be member of a political party and/or a public association. However, when taking a decision the Ombudsman shall not be governed by the decisions of the party the member of which he is.</p>
Ombudsman’s elections	
<p>"Classical Ombudsmen" (in other words human rights activists) are appointed by the Parliament. In countries where the situation is different it is highly recommended to apply this particular election procedure.</p>	<p>The President of Russia is the Head of the Russian Federation. The Ombudsman is appointed directly by the President. When the Ombudsman is appointed, the opinion of the entrepreneurial community is taken into account, which presupposes a broad public support of the candidate, and the support of the civil society.</p>
The status of the Ombudsman’s institution vs. other public institutions. The status and salaries.	

<p>The Ombudsman (an individual at the head of the Ombudsman's office) should be granted a rank comparable with the highest posts in civil service/in judicial power bodies (for instance, it equals the post of a minister or department, head of the national highest body of financial supervision, the Supreme Court), and this too should be reflected in the amount of his/her salary.</p>	<p>The Russian Ombudsman is independent; his status is high as of the other state power representatives. Starting with 2015, the Ombudsman for the Protection of Entrepreneurs' Rights under the President of the Russian Federation will become an independent government body.</p>
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Specific features of the Ombudsman's Office in the Russian Federation:

- reliance on the support of broad public: associations of entrepreneurs and expert organizations. Such interaction raises the status of the Ombudsman's work and ensures high quality expertise and transparency for considering complaints. On the other hand, this provides extra possibilities for resource maneuver;
- broad imperative powers make up the foundation of the Ombudsman, the powers are adequate to dealing with the existing problems with law enforcement. From the very start the Ombudsman was oriented to the existing realities of conducting business in Russia and aimed at stopping improper use of authoritative powers, also for profiteering purposes;
- the high level status of the Ombudsman, who is directly responding to the Head of the State, makes him/her an independent arbiter in the disputes between the representatives of the authorities and business, and protects thereof against the potential pressure on the part of law enforcement bodies and other bodies with executive powers ;

the imperative powers of the Business Ombudsman in Russia are stronger than those that ombudsmen have in other countries. Upon the request of the Ombudsman the government bodies shall be obliged to reinstitute the rights of an entrepreneur (had such rights been violated). This is ensured by the right of the Business Ombudsman to bring an official to administrative liability and even to finally disqualify him/her.

4 CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

The analysis of the cases where Ombudsmen offices have been established to protect businesses' interests against maladministration shows that there is a significant variety of format, mandate, organisational structure, powers and scope of these Ombudsman offices. Despite the great variety in format and powers granted, the Ombudsman offices appear to demonstrate a sound correlation between format and the functions they are expected to perform. For example, where the mandate of the Ombudsman office also comprises to produce comprehensive documentation of individual cases and reporting which also includes proposals for improving administrative procedures or the legislative framework for business, the number of staff and the organisational structure of the Ombudsman office will be more elaborated than in cases where the Ombudsman office's role is more strictly confined to facilitate the flow of information between an individual business and the government administration. It is understood that this sound correlation between format and function is of crucial importance as it is a key feature of an Ombudsman institution to offer a chance for resolving individual, often very specific and untypical cases when the other institutions (administration and judiciary) fail to do so. In turn, this also means that the Ombudsman institution must reserve the right to carefully examine each case that is brought to their attention and to reject or readdress cases when other institutions are in a more appropriate position to deal with such cases. An Ombudsman institution in the countries covered in this study is only *a complementary institution* to compensate for individual failures of the government administration. It is not the appropriate instance *to replace* a generally poor-performing (under-resourced; arbitrary; or corruption-affected and therefore biased and irrationally acting) administration and / or judiciary. Equally, is the Ombudsman institution not an appropriate instance to 'bail out' businesses in case of emergency, or to revise court decisions.

Similarly, the powers held by the Ombudsman (office) to enforce their recommendations and / or to exert their right to obtain all kind of information from government institutions (and, thereby, from individual civil servants at all levels) is in the majority of cases not based on a legislation which would give the Ombudsman institution superior powers. Only the European Ombudsman is established by what could be seen as somewhat equal to a 'European Constitution'. It is rather a combination of a clearly described role and mandate of the Ombudsman on the one hand, and the existence, and general acceptance, of instruments of holding government to account on the other, which is what gives the Ombudsmen Institutions their de-facto power in the countries that were studied. In other, more practical, terms said this means that a government official may feel tempted to provide incomplete, delayed or otherwise poor-quality information to a citizen or business. He or she will, however, most likely not wish to give similarly poor-quality information in response to an enquiry from the Ombudsman office. The public official will be aware of the powers of the Ombudsman office to collect the relevant information from higher-level officials (hence, the public official's superiors) and also of the mandate of the Ombudsman to report about the outcome of its enquiries to the public. It is understood that in countries where the Ombudsman institute is not (yet) a well-enough accepted institution, and where instruments to hold government (incl. individual public officials) to account are not sufficiently developed, these relatively limited powers may render the Ombudsman Institution de-facto ineffective and that therefore a much stronger mandate would need to be enshrined in the legislative framework and a few exemplary cases might need to be executed by the Ombudsman and accompanied by comprehensive media coverage and, possibly also by the political leadership / Head of Government in order to 'earn a strong reputation' for the Ombudsman Institution.

The Ombudsman Institutions covered in this study all appear to enjoy a legal framework that provides them with sufficient resources to perform their work effectively. The Ombudsman offices can determine their own budgetary needs - which is to be justified by the amount of work that falls upon the office - and this budgetary request is not to be contested by other government agencies. Whilst there may be arrangements in place where the physical infrastructure of the Ombudsman office is

shared with other government agencies, there do not appear to be any cases where the expertise used by the Ombudsman for executing their work would need to be sought at other organisations, regardless of whether such externally provided expertise be rendered on a remunerated, or on a voluntary (pro-bono) basis. Ombudsman institutions need to pay the highest attention to make sure their work - and the results of it - is seen as completely independent and keeping all work in-house is an important element of maintaining this status. The approach used by the Business Ombudsman of the Russian Federation is a different one where obtaining legal expertise input from high-qualified legal experts on a pro-bono basis is an important element. This may well be an appropriate approach if otherwise the required resources cannot be mobilised. In order to safeguard the independence of the Ombudsman's findings and recommendations it is recommended to:

- (i) Make sure that there is always a consultative process applied and that the opinion of several legal experts is obtained.
- (ii) Secondly, it might be advisable to provide for a legal framework (or a Code of Conduct which the Business Ombudsman can draw up themselves) which defines rules and procedures for the work of such expert hearings. Such a statute should cover aspects like a minimum number of external experts to be included; the selection process and notification period for inviting experts on a pro-bono basis to any such hearings; any regulation for financial or in-kind compensations rendered (e.g., for travel and per-diem costs); and the modalities of using and amending the collective expert opinion by the Ombudsman for his ultimate conclusion.

Next to the work done by the Ombudsman institutions to solve the individual cases, and the resources deployed for this purpose, it is notable that the work to promote the Ombudsman Institute as a means for dispute resolution that is available to everyone affected is given high importance. Some Ombudsman offices operate a department for this purpose themselves, as for instance, the European Ombudsman, which also provides very detailed documentation of its cases - cf. the case study in the Annex. Even where there are no considerable numbers of staff employed for this purpose inside the Ombudsman office, the information about the possibility to address a case to the Ombudsman is to be shared by the government organisations, and the Ombudsman office may follow up whether the complainant has been informed about his right to refer to the Ombudsman by the respective government institution. The lesson that can be learned from this observation is that the mere existence of an Ombudsman institution, and a widely shared acceptance of this institution as a credible and reputable means for executing 'checks and balances' vis-a-vis those who are in a stronger position is a crucial factor for the effectiveness of the Ombudsman institution. The Ombudsman institution is recommended to take this into consideration when planning the use of its resources and to make sure sufficient resources are allocated to promote its role, its officially granted status, and its powers.

4.2 Recommendations to further develop the Business Ombudsman in the Russian Federation

When considering that the tasks that lie ahead of the Business Ombudsman of the Russian Federation are in many respects not to be compared with the tasks emerging from a substantially different overall business climate in the countries covered in this study, it appears justified to recommend the principles of realistic resource-planning; safeguarding the Ombudsman's independence; and the promotion of an overall system of accountability of government with the Ombudsman's office, as crucial principles to ensure the Ombudsman can work effectively.

Currently, the activity of the Federal Business Ombudsman's Office seems fully corresponding to its goals and objectives. It aims not just to respond to complaints received, but more importantly to eliminate causes leading to the violation of the rights of entrepreneurs..

The recommendations below are largely based on the discussion during an expert level workshop which took place in Moscow on 17 December 2013, and the input from the two consultants who worked on the drafting of this Technical paper. They take into consideration potential problems that

may arise and have negative impact on the effectiveness of Business Ombudsman but also provide for ways to further strengthen the institution.

1. The Business Ombudsmen at the Federal and Regional levels should search for ways to increase the resources, on the one hand, and at the same time work to ensure the reduction of the number of violations of the rights of entrepreneurs, on the other. The resources available to the Federal Business Ombudsman at the current stage are not sufficient to cope with an increased workload and excessive flow of complaints relating to the violation of the rights of entrepreneurs;
2. Resources could be increased, for example, by providing a possibility to business associations to implement certain functions relating protection of the rights of entrepreneurs. Associations can pass complaints from entrepreneurs addressed thereto, to the Ombudsman to take action, while doing most of the work on complaints themselves upon agreement with the Ombudsman. Thus complaints could be considered in an accelerated procedure;
3. In order to reduce the number of violations of the rights of entrepreneurs, the Ombudsman must contribute to the efforts aimed to increasing the rule of law and ensuring that there is a decrease in the risks of abuse of power by officials. For this purpose it may be beneficial to ensure the enforcement of disciplinary measures against such officials;
4. Further define the admissibility criteria for requests lodged with the Business Ombudsman Institutions; This additional clarification would enable the Business Ombudsman institution would decrease the case load while at the same time providing for a more efficient use of the resources available to the Ombudsman;
5. Extend powers of the Federal Business Ombudsmen to examine not only complaints filed by individuals and companies but also by business communities in order to solve systemic problems and protect entrepreneurs' that do not want to file claims on their own due to various reasons;
6. Identify enforcement mechanisms and instruments that would enable the Federal Ombudsman to exercise the control of federal and regional bodies in the area of the entrepreneur's rights protection, as stipulated by the Law on Federal Ombudsman for Protection of Entrepreneurs Rights;
7. International cooperation is a valuable source of knowledge and information that has an important influence on the Ombudsmen's outlook, and helps to introduce high values and institutional standards in their work. The knowledge of the world's and national best practices in protecting the rights of employers and countering corruption will significantly assess the level of competence of the Ombudsman;
8. Strengthening cooperation with the regional expert community is very valuable, considering the high level of expertise of some distinguished regional universities and expert organizations. Such cooperation will ensure high professionalism in considering complaints and applications relating to serious systemic problems and providing effective responses.
9. Encouraging entrepreneurs to improve their understanding of legislation in place for protection of their rights to ensure that they reject corruption. is also an important part of the activities of the Ombudsman;
10. The Business Ombudsman should use the broad access to the media, to actively promote the fight against corruption and support the efforts of the business community in this regard. Conduct regular and systemic monitoring of the activities of the Regional Ombudsmen, and on the basis of the monitoring reports publish annual rating/ranking of the government bodies at the Federal and regional level regarding their observance of entrepreneurs' rights. Such rating would serve as an assessments of the level of the enforcement of the law and the respect for entrepreneurs rights;
11. There is a need for continuous training of the Regional Ombudsmen including training for the support staff; currently there is no formal training programme for the Regional Ombudsmen and the personnel in their offices. Based on an assessment of the training needs it turns that in addition to training regarding their activities the regional Ombudsmen would also benefit from training on the basic anti-corruption concepts;
12. Make efforts to further increase the interaction of Business Associations with the Business Ombudsmen; this is particularly important at the regional level. This cooperation with the regional offices of the largest business associations may be very useful for the regional ombudsmen as these associations may greatly contribute to the identification of various

typologies of infringement of entrepreneurs rights. Furthermore in cooperation with legal associations the Business Associations may serve as a great resource for reviewing of applications by various entrepreneurs, as is the case at the Federal Level;

13. Make efforts to further expand the pro bono assistance to the Regional Ombudsmen; In this regard, the study of international experience of «pro bono» legal aid and its widespread use for the support of the Business Ombudsman would be particularly valuable, especially for the Ombudsmen working at the regional level.

5 APPENDIX 1: MODEL FORMS

5.1 Complaint Forms used by Ombudsmen in CoE Member States and/or other international practices

EU Ombudsman:

Complaints can be submitted online, or on a downloadable form which can be returned by mail, or fax. The website of the EU Ombudsman has a dedicated page for the complaint forms which is reasonable easy to detect for direct access to the complaint form used by the EU Ombudsman please follow the link below:

<https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

The form provides space for describing the problem, earlier efforts to settle the issue, and also suggestions which the complainant may have towards the administration concerned to improve the situation.

United States:

The National Ombudsman of the U.S. Small business Administration also accepts complaints when brought to their attention by e-mail / online submission, or by ordinary mail or fax.

For the original version, please refer to the file downloadable from:

<http://www.sba.gov/sites/default/files/files/Comment%20Form%20%28Fillable%29.pdf>

France:

Very much similar to the U.S. National Ombudsman, complaints can be addressed to the attention of the Médiateur by completing an online form and attaching relevant documentary proof, or by mailing the information to the office of the Médiateur.

The information required using either form, comprises:

- A description of the problem,
- The references of the relevant service / department,
- Copies of previous correspondence with the administration concerned,
- Contact details of the complainant.

The online form can be found easily on the website of the Médiateur. Its direct URL is:

<http://www.economie.gouv.fr/mediateur/demande-mediation/personnes-morales>

Other countries:

The Business Ombudsmen of Georgia, as well as those offered by the regional chambers of commerce in Spain do not require or offer more than a simple contact form on their website which provides for a short description of the case and the contact details be forwarded to the Ombudsman. The Ombudsman will then liaise with the complainant.

The contact forms can be assessed on the respective Ombudsman's websites. The direct URL are given in the table below:

Georgia	http://www.businessombudsman.ge/index.php?action=page&p_id=35&lang=eng
Spain	
- La Rioja region	http://sie.fer.es/defensor.php
- Catalunya	http://www.foment.com/que-hacemos/Paginas/defensor-del-empresario.aspx

The U.K. Adjudicator's office does not provide a specific format, and they will accept complaints submitted in writing only, no e-mail or online contact is possible.

**5.2 Complaint Forms used by Business Ombudsmen in the Russian Federation
(Federal and Regional Level)**

**STANDARD FORM OF COMPLAINT TO
OMBUDSMAN FOR ENTREPRENEURS' RIGHTS**

**COMPLAINT
(form required)**

First complaint	Secondary complaint
-----------------	---------------------

Information about the complainer

1.* In whose interest is a complaint (Who has suffered?)
 a) individual entrepreneur b) organization c) business owner

2.* The full official name of the organization or the name of an individual entrepreneur:

3.* TIN (tax individual number) of the organization / individual entrepreneur:

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

4.* **PSRN/ PSRNIE** (Primary state registration number / primary state registration number of the individual entrepreneur):

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

5.* Place, where the violation occurred, on which the complaint is filed)

Post index _____ Federal state
 City
 Address
 Telephone

6. Specify the sphere of economic activity _____

INFORMATION ABOUT THE COMPLAINER

1.* Name of complainer:

2.* Name of the document confirming the identity of the applicant: _____

3.* Details of the document confirming the identity of the applicant:

4.* Coordinates for feedback:
 Telephone _____ E-mail
 Post index _____ Federal state
 City
 Address

5.* I confirm that I have read (a) and have no objection to processing, storage and provision of personal data necessary for state and municipal services:

Yes

6.* I bear full responsibility for the accuracy and completeness of the information:

Yes

Status (category) of complainer

1.* Who is the complainer (select):

- | | | |
|--|-------------------------------------|--|
| a) the affected individual entrepreneur | c) the owner of the affected entity | d) the executive body of the affected entity (specifically what) |
| b) the representative of individual entrepreneur | g) a representative of the owner | e) a representative of the executive body |

2. The type of representative (select):

- | | |
|---------------------------------------|-----------------------------------|
| a) relative | b) co-owner |
| c) a representative of a legal entity | g) any other legal representative |

3. Documents confirming the representation:

4. The reason why applicant can't complain himself: _____

INFORMATION ABOUT VIOLATION

1. In what sphere of activity and relationships violation occurred:

- | | | | | |
|-------------------|----------------------------------|------------------|-------------------------------|--------------------|
| 1) construction | 2) trading | 3) agriculture | 4) manufacturing | 5) services |
| 6) taxation | 7) technical regulation | 8) ecology law | 9) registering property | 10) land relations |
| 11) antitrust law | 12) intellectual property rights | 13) customs laws | 14) small and medium business | |
| 15) other | | | | |

2.* Name of authority (full name):

3. Name and title of the person in charge of the violation: _____

4.* Regions of violation:

5.* Address of the authority violated by the law:

Post index _____ Federal state
City
Address
Telephone

6.* Date / time of the violation:³⁸

7.* What actions violated your rights (select):

- 1) Criminal prosecution 2) raiding and corruption 3) violations during inspections 4) violation in public services
- 5) Violation during procurement 6) acts of natural monopolies 7) violation at the disposition of property
- 8) violations related to inadequate legislation 9) gaps in regulation 10) illegal acts 11) requirements, violating the rights of entrepreneurs
- 12) other

8. * The nature of the persecution:

- a) administrative complaint b) criminal proceedings

ACTION APPEALS

1. * Stage of appeal:

- a) before the judgment b) in the course of the trial c) after the judgment

Attention! In the case of non-criminal prosecution before going to the Commissioner for Entrepreneurs' Rights must complete the pre-trial or judicial review!

2. Pre-trial appeal to the executive branch (in reverse chronological order):

	The names of the authorities	Name of applicant	An official that made a refusal	Date of decision	Decision (number)
1					
2					

2. Course of the trials (in reverse chronological order):

	The judicial authorities that issued negative decisions	Name of the complainer	Judge	Date of decision	Decision (number)
1					
2					
3					

4. Information on other decisions and judgments: _____

38 The exact date or time interval. For administrative violations - not exceeding 3 years

5. Specify the sphere of economic regulation, in which the violation occurred (notifying laws and acts):

TEXT OF COMPLAINT

A summary of violations, indicating the grounds on which the person filing the complaint disagrees with the decision, the actions of the authority or official

LIST OF DOCUMENTS ATTACHED

1. Required documents:

- Responses of authorities, acts, decisions, letters, which led to the violation of your rights
- Appeal to the authorities, procedures for pre-trial appeal and response (if you used a pre-trial appeal)
- Appeals to the Court, copies of decisions (if judicial complaint's used)

2. Additional documents:

- The position of public organization on the content of the case (if any)

Date _____ Signature _____ Name of the complainer _____

(for references in printed form)

6 APPENDIX 2: CASE STUDIES

6.1 Practical examples of the steps taken by business Ombudsman Institutions

6.1.1 European Ombudsman - Compensation to an unsuccessful tenderer

The European Ombudsman deals with many contractual disputes concerning both the process of award and subsequent performance and payment. When the Ombudsman brings a problem to the attention of the EU institutions and bodies, they work constructively to put things right, often agreeing to pay compensation or interest if appropriate. This is one example of a case of conflict during the evaluation of a public procurement tender. Remarkable is also the level of detail made available for this case.

Summary of the decision on complaint 3000/2009/JF (confidential) against the European Commission

The complainant, an engineering and environmental consultancy company based in Brussels, submitted a bid in response to an invitation to tender issued by the European Commission. Its bid was not selected. It then turned to the European Ombudsman, alleging, in sum, that the Commission's explanations for rejecting its bid were not convincing. The complainant requested that its bid be reassessed, or, if this was no longer possible, that it be granted appropriate compensation.

The Commission explained that, although the complainant's bid was slightly lower than that of the only other bidder to reach the award stage (the 'successful tenderer'), it did not represent the best value for money. In addition, the complainant had proposed a budget that did not appear to be sufficient to allow it successfully to perform the tasks, namely the organisation of a number of seminars on green public procurement. Indeed, the complainant's budget raised doubts as to whether it had understood those tasks at all. The successful tenderer duly identified the venues where the seminars would take place and proposed a budget compatible with their organisation.

The Ombudsman's inquiry revealed that, in accordance with the applicable rules, the formal decision regarding the Member States where the seminars would take place had to be made by the Commission at a later stage. However, in practice, those Member States were already known both to the Commission and to the successful tenderer, but not to the complainant. In light of the fact that the Commission did not inform the complainant about where the seminars would take place, the Ombudsman found that the Commission failed to ensure equal treatment of tenderers and that this undermined the complainant's chances of succeeding in the tender process. He therefore proposed a friendly solution to the Commission to the effect that it should compensate the complainant for the expenses it incurred in order to participate in the tender process. As a result, the Commission paid the complainant over EUR 10 000. The case was thus settled.

Detailed description of the decision on complaint 3000/2009/JF (confidential) against the European Commission³⁹

Case: 3000/2009/JF (This complaint was treated as confidential. This document has therefore been anonymised)

Opened on 03 Mar 2010 - Decision on 26 Jul 2012

³⁹ <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/11804/html.bookmark>

Institution(s) concerned: European Commission

Field(s) of law: Environment, consumers and health protection

Types of maladministration alleged – (i) breach of, or (ii) breach of duties relating to: Lawfulness (incorrect application of substantive and/or procedural rules) [Article 4 ECGAB]

Subject matter(s): Award of tenders or grants

The background to the complaint

1. The complainant is an environmental engineering and consultancy company which presented a bid to the Commission's Directorate-General Environment (the 'Commission') in response to an invitation to tender concerning procurement procedure "*Organisation of awareness raising events in Member States and provision of 'Training of Trainers' [the 'TOT'] on Green public procurement [the 'GPP']*" (the 'Procurement Procedure').
2. On 2 June 2009, the Commission requested the complainant to provide it with some explanations concerning its offer. The Commission explained that the complainant had mentioned in its technical proposal that it would arrange and reimburse the travel and the accommodation expenses of the participants taking part in the three-day TOT seminar. However, the complainant's financial offer provided for a budget of EUR 20 060 for "*travel/missions*", which, usually, would also cover the travel costs and the mission budget of the experts to the various one-day dissemination workshops that would be organised in 10 Member States of the European Union (the 'EU'). The Commission thus invited the complainant to provide more details as regards the proposed budget. In particular, it invited the complainant to explain how it would split its budget between travel and accommodation expenses of the TOT seminar participants, and the expenses incurred by the experts attending the various workshops. It asked whether it could assume that the complainant's budget proposal covered the organisation of the TOT seminar.
3. On the same day, the complainant replied that its financial offer covered the TOT workshop's organisation costs. It explained that the "*travel/missions*" item of its financial offer, totalling an estimated EUR 20 060, covered the travel and *per diem* costs of the experts/assistants participating in the TOT workshop, as well as those participating in the dissemination workshops to be held in 10 Member States of the EU. The sum of EUR 14 000, which represented the accommodation and travel costs of the TOT seminar participants, was entered under the "*Venue hire and workshop organisation*" item of the offer.
4. On 29 July 2009, the Commission informed the complainant that its bid was not selected. The complainant's bid failed to represent the best case of value for money, in accordance with the Procurement Procedure award criteria, namely "*Understanding*", "*Methodology*", and "*Project Management and Availability*".
5. The Commission explained that, as regards "*Understanding*", the complainant showed a good understanding of the objectives of the contract and of the GPP policy and legal framework. However, there had been a "*slight misunderstanding*" regarding the GPP "*training toolkit*". The Commission also expressed doubts as to whether the financial offer could indeed cover the travel and accommodation costs of the TOT participants and the national workshops' experts. Furthermore, the complainant's offer was silent on the financing of the practical organisation of the TOT, namely, the identification and rental of a suitable venue and the catering services. The complainant would appear to have assumed that the Commission or third parties would be the responsible entities in this respect and did not submit any request for clarifications in this matter. The complainant's reply to the Commission's request for clarifications did not dispel the Commission's doubts in this regard. The figures mentioned by the complainant would appear to be based on the assumption that the workshops would be carried out solely in "*10 new Member*

States" of the EU. In light of the foregoing, the Commission assessed the complainant's compliance with this criterion, awarding the complainant the minimum of the 18 points to pass out of a maximum of 30 points.

6. In respect of "*Methodology*", the Commission took the view that the complainant had proposed a very clear and unambiguous methodology for the TOT seminar and workshops, with detailed programmes for both events. The programme relating to the TOT seminar was very comprehensive and provided for highly inclusive training techniques, making use of concrete examples. Nevertheless, the programme could have been a bit heavy for the proposed three days. As regards the workshops, the complainant had proposed to make use of trained national experts and a suitable draft agenda. The Commission assessed the complainant's compliance with this criterion, giving it a score of 35 points (minimum to pass - 24 points) out of a total of 40 points.
7. As regards "*Project Management and Availability*", the Commission found that the complainant had proposed a very clear distribution of tasks between the project manager and the various project experts and described the level of effort/input of each one. However, the timetable was not very detailed and there were no concrete dates proposed for the TOT seminar or the subsequent workshops. The experts and assistants responsible for the workshops were referred to as "*external resources*", as they were not the complainant's permanent staff. The complainant intended to hire them as temporary staff and they would work as members of the project team. The experts' estimated salaries amounted to 30-50% of the contract's total budget. The Commission assessed the complainant's compliance with this criterion and gave it a score of 22 points (minimum to pass - 18 points) out of a maximum of 30 points.
8. The Commission concluded its assessment by explaining that the complainant could request additional information on the above-mentioned points in writing. The Commission could reply with information concerning the successful tenderer. However, certain details could not be disclosed. The Commission would not sign the contract with the successful tenderer until 14 days had passed since the letter of 29 July 2009 had been sent to the complainant. The complainant could lodge an appeal, within a two month period, to the General Court of the European Union against the decision awarding the contract.
9. On 17 September 2009, the complainant replied that the Commission did not comply with the Specifications of the Procurement Procedure (the '*Specifications*'). In particular, the Commission could not have used the complainant's financial offer to assess the technical sufficiency of its bid. The "*Understanding*" criterion determined the "*technical quality*" of the bid. The Commission should have thus used that criterion to assess the technical sufficiency of the complainant's bid and not its financial offer.
10. The complainant further commented on the Commission's assessment of the "*Project Management and Availability*" criterion. Based on its previous experience in organising LIFE+ workshops in the 27 Member States of the EU, the complainant proposed a reasonable project management monthly timetable. The Specifications did not provide for any dates for the award of the contract or for the implementation of tasks. Unless there were bidders who benefitted from privileged information, no bidder could have proposed concrete dates for the TOT seminar or the dissemination workshops. The lack of a detailed timetable was therefore a positive feature of the complainant's bid: it was consistent with the Specifications and showed that the complainant had no access to privileged and/or confidential information. By highlighting the lack of a detailed timetable as a weakness, the Commission contradicted the Specifications.
11. In the complainant's view, the Commission had also acted unfairly. It disregarded its clarifications and did not request any further explanations. The complainant had provided the Commission with

the requested budget breakdown and confirmed that its financial offer covered the organisation of the TOT seminar. The complainant was convinced that its "*straightforward confirmation*" was therefore clear. The Commission's opinion that the above reply was not reassuring enough to remove all its doubts was, therefore, in the complainant's view, unjustified, biased and prompted an unfair evaluation.

12. The complainant further challenged the Commission's conclusions, which it considered to be flawed. The Commission did not decide on the number of countries it wished to cover and therefore it was up to the complainant to select and propose an indicative number of countries. The complainant did not state that its financial offer assumed that the workshops would take place in 10 new EU Member States. Its financial offer was based on its experience in organising LIFE+ workshops in the 27 EU Member States. To estimate the venue and catering costs, the complainant took into account the actual market prices in the 27 Member States. The conclusion that its figures appeared to be based on the assumption that the workshops would be carried out solely in "*the 10 new Member States of the EU*" was not based on any factual information. Such a conclusion was therefore unjustified, invalid and flawed. In any case, if the Commission experienced doubts in that respect, it should have requested further clarifications from the complainant.
13. The complainant concluded its letter of 17 September 2009 by taking the view that all the points referred to above demonstrate that the Commission's evaluation of its bid was biased and unfair. The Commission should therefore proceed to re-evaluate the bid.
14. On 9 November 2009, the Commission replied that the Procurement Procedure's Evaluation Committee (the 'Evaluation Committee') had evaluated all tenderers in an identical and non-discriminatory manner. Although contact with tenderers is generally limited to exceptional circumstances, having experienced some doubts, the Evaluation Committee decided to clarify whether the complainant had understood all the issues involved and the nature of the work to be undertaken, as specified in the award criteria.
15. The Commission explained further that, once the evaluation was completed, the Authorising Officer requested an opinion from the Environment Advice Committee ('EAC'). EAC ensures that the Directorate-General (DG) Environment's public procurement and grant award practices comply with the principles of transparency, proportionality, equal treatment and non-discrimination. It also examines the procedures leading to the selection of a contractor/beneficiary. It further checks that the procedures adopted are consistent with the rules and provisions of the Financial Regulation and the Implementing Rules.
16. The Evaluation Committee found that the budget breakdown illustrated how the complainant understood the descriptions of the tasks set out in the technical description. In its budget, the complainant failed to enter estimated costs directly related to the three-day TOT seminar. The Evaluation Committee thus had doubts whether the proposed efforts and works for that particular assignment could be carried out and if it had been clearly understood by the complainant at all. It did not use the complainant's financial offer to assess its technical sufficiency under the "Understanding" criterion, but only to clarify further if the complainant had understood all of the issues involved and the nature of the work to be undertaken.
17. As regards the "Project Management and Availability" criterion, the Commission explained that the quality of a project and an adequate timetable are essential features of project management. It is important to know when and how all proposed issues and tasks will be conducted. The complainant did not mention a monthly timetable. It simply reproduced the "Deliverables" table from the contract's Technical Description and added two pieces of information as regards the

schedule for the TOT seminar and the national workshops. This shortcoming was penalised in accordance with the Specifications. The Evaluation Committee complied with the Specifications.

18. The Commission further denied that it had acted unfairly. It stated in this regard that the complainant's offer was silent as to the financing of the practical organisation of the TOT seminar and that this had caused doubts about the full understanding of the tasks and the financial implications of carrying them out. The complainant's reply that the participants' accommodation and travel costs would be covered by the item "venue hire and workshop organisation", at an estimated cost of EUR 14 000, was not reassuring because the Commission understood that these costs would amount to EUR 42 900. They would cover the organisation of both tasks, namely, the three-day TOT seminar and the 10 one-day workshops in the Member States. The Evaluation Committee found that the complainant underestimated those costs.
19. With regard to the above point, the Commission emphasised that the complainant had declared that it did not set any budget for the organisation of the TOT seminar. The Commission therefore asked the complainant to clarify whether it could assume that the organisation of the TOT seminar would be covered under its budget proposal. The contents of the complainant's proposal and of its confirmation letter, sent in reply to the above question, contradicted each other. It is the bidder's task to provide clear and comprehensive financial proposals and the Commission may ask for further clarifications. The Commission did ask for clarifications and received a reply. However, doubts about the complainant's ability to carry out the tasks in question remained.
20. Similarly, the Commission denied that the conclusion it had reached was flawed. It emphasised that the complainant had been under the assumption that "*10 Member States*" corresponded to 10 out of the 12 last countries to join the EU. On the basis of this assumption, combined with the figures quoted by the complainant, it appeared to the Evaluation Committee that the workshops would be carried out in 10 of the new Member States of the EU.
21. On 3 December 2009, the complainant turned to the Ombudsman.

The subject matter of the inquiry

22. The complainant alleged that the Commission's explanations were not sufficient to prove that it assessed its bid in a fair and unbiased fashion.
23. The complainant claimed that the Commission should reassess its tender and award it the contract or, if this was no longer possible, the Commission should provide some form of compensation.

The inquiry

24. On 3 March 2010, the Ombudsman forwarded the complaint to the President of the Commission for an opinion.
25. On 6 May 2010, the Ombudsman received the Commission's opinion, which he forwarded to the complainant with an invitation to make observations. The Ombudsman received the complainant's observations on 30 June 2010.
26. On 14 February 2011, the Ombudsman forwarded the complainant's observations to the Commission, asking it to provide additional comments on a number of questions.
27. The Commission replied on 15 April 2011. The Ombudsman forwarded the Commission's reply to the complainant for its observations.

28. On 26 May 2011, the complainant informed the Ombudsman that it did not wish to make any observations and that it expected the Ombudsman to make a decision based on the information it had already provided and the Commission's reply to the Ombudsman's above questions.
29. After a careful analysis of the Commission's replies, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. He therefore proposed a friendly solution to the complaint, in accordance with Article 3(5) of his Statute.
30. On 28 February 2012, the Ombudsman received the Commission's reply, which he forwarded to the complainant with an invitation to make observations. He received no observations in reply to the above invitation. On 7 June 2012, the Ombudsman received further information from the Commission. On 2 July 2012, the Ombudsman's services contacted the complainant by telephone and were informed that the case could now be closed.

The Ombudsman's analysis and conclusions

A. Allegation of insufficient explanations to prove a fair and unbiased assessment and related claim

Arguments presented to the Ombudsman

31. In its complaint, the complainant reiterated the arguments it submitted in its correspondence with the Commission (summarised in points 9 to 13 above).
32. In its opinion, the Commission, in summary, also referred to specific elements of its correspondence with the complainant:
33. It emphasised that the Evaluation Committee had expressed doubts as to whether the proposed efforts and work could be carried out and if the tasks had been clearly understood at all. Analysing budget breakdown in order to assess proper understanding of the tasks to be performed did not contradict the Specifications.
34. It further underlined that the complainant did not present a detailed timetable and that the "*Deliverables*" table provided failed properly to consider the feasibility of the organisation of the TOT and the national workshops.
35. Additionally, the Commission explained that it did not consider it necessary to request further information as regards the Member States where the workshops would be held because "the information available clearly confirmed an intention by [the complainant] to hold the majority of the workshops in the new Member States, which was consistent with the figures quoted." It was the responsibility of the complainant to provide as much information as deemed necessary in relation to how it calculated its budget and as regards the assumptions that could underpin that calculation, if any.
36. The Commission also stated that it had, in the meantime, offered the contract to the bidder who submitted the most cost-effective bid (the 'successful bidder'). Whilst the complainant's offer of EUR 195 013 was awarded 75 points out of 100, corresponding to a ratio of EUR 2 600.2 per point, the successful bidder's offer of EUR 199 816 obtained 87 points out of 100, corresponding to a ratio of EUR 2 292.7 per point. The Evaluation Committee concluded that the successful bidder had "*[d]emonstrated: - an excellent understanding of the objectives and challenges of the proposed contract and of the EU GPP Policy as a whole; - a very complete, detailed and convincing methodology for achieving these objectives, including additional effort regarding the organisation of the TOT seminar; - a good project management, a clear timetable for the*

organisation of the TOT and workshops and a clear subdivision of tasks involved; [and] - best value for money."

37. The Commission concluded its opinion by stating that the Specifications, the call of the Procurement Procedure, and the correspondence exchanged, taken together, clearly demonstrated why the complainant's bid was rejected. The Evaluation Committee applied strict award criteria, which had been double-checked internally by the evaluators and by the EAC. Moreover, the Authorising Officer, having verified every single step of the selection and award procedures, found no mistakes. The Commission conducted its evaluation in accordance with the applicable rules. It assessed the complainant's bid in full compliance with the principles of equal treatment and non-discrimination. A procurement procedure must ensure that a competition is fair and the successful bidder was the one who made the most cost effective bid.
38. In its observations, the complainant reiterated its previous arguments and stated that the Commission had not explained why its clarifications of 2 June 2009 were insufficient.
39. The complainant further emphasised that its offer of EUR 195 013 was approximately EUR 4 800 less than that of the successful bidder. This meant that its bid could not have been considered as underestimated. The complainant based the above offer on actual market prices and on its experience in organising the LIFE+ workshops in the 27 EU Member States when estimating venue rentals and catering costs.
40. Finally, the complainant reiterated that it has never claimed that the workshops would be in 10 "new" EU Member States. It referred to the wording in its offer that:
"[a]ccording to the Tender Specifications, the seminar will be a three-day event with at least two selected participants from at least 10 selected Member States. We understand that the EC will decide these countries at a later stage; we know that most of the EU12 countries (last member states to join the Union in 2004 and 2007) have almost no or little GPP experience and we suspect that most of the selected countries will be in the EU12."

The Ombudsman's preliminary assessment leading to a friendly solution proposal

The legal background: the Specifications

41. "*Part 1: Technical description*" of the Specifications provided in point "3. *Content/Description of the tasks*" for a "*Task 1: Conduct the [TOT] seminar on the practical use of GPP criteria for the national public procurement officials from at least 10 Member States*".
This meant that "[t]he Contractor [would] provide expert assistance to the selected group of experts from at least 10 EU Member States (countries to be decided at a later stage by the EC services) to build their capacity for actual implementation of the GPP criteria into the tender documents... For each Member State covered, the contractor should select at least two participants to the three (3) days seminar." (emphasis added)
42. The Specifications further provided for a "*Task 2: Organisation of dissemination workshops in at least 10 of the EU-27 Member States*".
The Contractor was therefore required to "[o]rganise in at least 10 Member States... at least a one-full-day workshop aimed at 80-100 participants..."
43. Point "6. *Content of the tender*" required tenderers to submit three proposals; namely, a financial proposal, an administrative proposal, and a technical proposal.

44. "Part 3: Assessment and award of a contract" of the Specifications provided for the following "3. Award Criteria":

"Award criteria 1 - Understanding (max points: 30)

This criterion serves to assess whether the tenderer has understood all of the issues involved, as well as the nature of the work to be undertaken and the content of the final products.

Award criteria 2 - Methodology (max points: 40)

This criterion assesses the suitability and strength of the proposal as measured against the requirements of the specification in terms of the technical content, completeness, originality of ideas (where appropriate) and proposed effort.

Award criteria 3 - Project management and availability (max points: 30)

This criterion relates to the quality of project planning, the organisation of the team with a view to managing a project of this nature and the availability of the resources for the completion of the contractual tasks.

Since assessment of the tenders will be based on the quality of the proposed services, tenders should elaborate on all points addressed by these specifications in order to score as many points as possible. The mere repetition of mandatory requirements set out in these specifications, without going into details or without giving any added value, will only result in a very low score. In addition, if certain essential points of these specifications are not expressly covered by the tender, the Commission may decide to give a zero mark for the relevant award criteria."

45. As regards point "5. Budget", of a maximum of EUR 200 000, the Specifications provided that:

"[h]aving examined the tenders from a technical point of view, the evaluation committee will proceed considering which is the economically most advantageous offer taking into account only those tenders that have obtained at least 65 out of the 100 points that are available for the technical quality of the bid. The evaluation committee will then proceed with the financial comparison of the tenders retained for further consideration according to the ranking procedure." (emphasis added)

46. Finally, point "6. Ranking of the tenders and award of the contract" clarified that:

"[t]he bid offering the best value for money will be chosen, provided that the minimum number of points cited above is achieved. Best value for money will be calculated as follows: ... - All bids that have passed the individual levels and score 65 or higher are deemed to be technically sufficient. Then the price is divided by the total number of points awarded to obtain the price-quality ratio. The award of the contract will be made in accordance with the lowest ratio."

The assessment of the complaint against the above legal background

47. It is settled case-law that the contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. The review on the part of the General Court of the EU must be limited to verifying that there has been no serious and manifest error of assessment. The Ombudsman applies the same standard when dealing with complaints relating to tenders which have been submitted to him. His review thus involves assessing whether: (i) the Institution fulfilled the essential procedural requirement of stating reasons for the rejection of a given bid; and (ii) those reasons are acceptable in light of the applicable tender specifications. In the present case the complainant

challenged those reasons which, in its view, suggested that the assessment of its tender was unfair and biased.

48. At the outset, the Ombudsman noted that the Commission complied with its procedural obligation to state reasons for the rejection of the complainant's bid: it, first, explained why it rejected its tender and, later, in the context of the present inquiry, provided explanations as regards the successful bidder.
49. Notwithstanding the above, in a situation where (i) apart from the successful bidder, the complainant is the only other tenderer admitted to the award stage; (ii) there is only a difference of 12 points between the assessment of the successful bidder and that of the complainant; and (iii) the successful bidder's financial proposal is only EUR 4 803 higher than that of the complainant's, the Commission's reasons for the rejection of the complainant's bid could not be considered to have been entirely satisfactory.
50. Indeed, in a situation such as the above, the Evaluation Committee should have clearly and unequivocally established the reasons for its assessment of the complainant's bid. It should have avoided suppositions and concentrated only on concrete and established facts. However, the Evaluation Committee failed to do so. Instead, it awarded the complainant the minimum score of 18 points to pass out of a maximum 30 points for the criterion "*Understanding*", citing vague grounds, based mostly on appearances and/or impressions.
51. In its opinion, the Commission gave a further explanation as regards the reasons why the above-mentioned minimum score was given. The explanation was based on two arguments: (i) the Evaluation Committee had expressed doubts as to whether the complainant's financial offer could cover the travel and the accommodation costs of those participating in the TOT seminar and the national workshops; and (ii) the complainant failed to provide information as to the identification and the financing of a suitable venue to rent. It also failed to provide information concerning the catering services to be used for the TOT seminar.
52. The Ombudsman considered the Commission's explanations insufficient and decided to ask a number of specific questions in this regard. One of these questions concerned the Evaluation Committee's assessment of the complainant's financial offer against the provisions of the Specifications.
53. In view of the Commission's reply to that question, the Ombudsman concluded that the finding, emphasised by the Commission in its opinion, that the complainant's overall budget was underestimated, resulted from the Evaluation Committee's analysis of the amounts the complainant allocated to the different tasks. However, such an analysis, even if correct, did not help to clarify why the Commission found that the complainant's **overall** budget of EUR 195 013 was underestimated. The successful bidder's budget of EUR 199 816 was **only** EUR 4 803 higher than that of the complainant.
54. Bearing the above points in mind, the Ombudsman compared the number of the events involved (1 TOT seminar + 10 dissemination workshops in an equal number of Member States), the number of participants in each seminar (at least 20 in the TOT seminar and between 80 and 100 in the dissemination workshops) and the Commission's overall proposed funding (of EUR 200 000) with the complainant's proposed overall budget. This comparison did not immediately clarify the Commission's justification for the rejection of the complainant's bid, whereby it asserted that the Evaluation Committee was "*doubtful* whether the [complainant's] *financial offer* [which was less than EUR 5 000 lower than that of the successful bidder] *could really cover the proposed effort and work*".

55. The Ombudsman therefore asked the Commission to give a better explanation for its above conclusion[14]. In its reply, while it acknowledged that the complainant's budget was not much lower than that of the successful bidder, the Commission again emphasised the Evaluation Committee's opinion that the complainant did not allocate sufficient financial resources to an essential part of the contract, that is, the organisation of the TOT seminar. In the Commission's words, "*[t]he silence on the financing of the practical organisation of the TOT seminar was relevant for assessing the bid.*"
56. As regards this justification, the Ombudsman noted that, according to the complainant, its budget did cover the organisation of the TOT seminar. The complainant had already made a statement in its correspondence with the Evaluation Committee. However, this was insufficient to dispel the Evaluation Committee's doubts as to the complainant's ability to perform, or even to understand, the activities proposed.. The Evaluation Committee thus concluded that the budget allocated to the TOT seminar was underestimated.
57. In this respect, the Ombudsman noted the Evaluation Committee's references to the complainant's choice of the countries where the seminars would be taking place. According to the Commission, the complainant had assumed that the seminars would be carried out solely in the 10 Member States that joined the EU in 2004 and 2007. The complainant argued that it had not assumed this.
58. At the outset, the Ombudsman was not convinced that "*suspect[ing] that most of the 10 selected countries will be in the EU12*" was confirmation enough that the complainant indeed "*assumed*" that the dissemination workshops would be carried out in those Member States. In any event, although it was reasonable to assume that the organisational costs of any such events could be relatively lower in those countries than in the remaining Member States of the EU, the Specifications did not appear to provide for any limitation as regards the countries where the dissemination workshops could be organised. Finally, and most importantly, in light of the Specifications' provision that the "*countries [were still] to be decided at a later stage by the EC services*" (emphasis added), the Ombudsman could not understand why any "*suspicion*", as regards a decision that was still to be taken, was of any relevance at all.
59. In its letter opening further inquiries into the complaint, the Ombudsman asked the Commission to explain whether, when it assessed the complainant's bid, it had already taken the above decision, and whether it informed the complainant and/or other tenderers of that decision.
60. The Commission replied explaining that 20 EU Member States lagged behind the seven Member States with the most advanced GPP policies. The contract relating to the Procurement Procedure under the present case was the second of two contracts addressing 10 EU Member States each. The first set of 10 countries "*was chosen*" under the first of the above contracts, in April 2009, that is, after the publication of the second contract relating to the Procurement Procedure under the present case (March 2009), but before the deadline for submitting tenders. "*Thus, it was clear for the Commission that the 10 Member States to be covered by the 2nd training wave would be those not covered by the 1st wave.*" Neither of the choices were communicated to the complainant, as, according to the Commission "*[t]his had no relevance for the decision of the Evaluation Committee ('countries to be decided... by the EC services', not the bidder).*"
61. The Ombudsman understood from the Commission's above reply that, when the complainant submitted its bid, the decision relating to the choice of countries under the Procurement Procedure had been, in practice, already taken. This appeared to go against the Specifications, which clearly informed tenderers that, at the time they were submitting their tenders, the "*[c]ountries [were still] to be decided at a later stage by the EC services*" (emphasis added).
62. The Ombudsman noted in this respect that the Commission did not inform the complainant about the contents of the above decision.

63. On the other hand, in reply to the Ombudsman's further question relating to the successful bidder, the Commission suggested that the latter knew about the above decision. The Commission stated the following:

"[t]he *successful tenderer* did name the Member States in which it proposed to hold the workshops, as it was awarded the first contract referred to above and used this information to propose a list of Member States... As regards the TOT seminar, it foresaw to hold it in [the city] *where the successful tenderer has its training centre*. It also gave dates for the holding of the workshops without specifying the countries where they should be held..." (emphasis added).

64. It was therefore clear that, when the complainant and the successful bidder applied to the Procurement Procedure, according to the present case, the latter had a comparative advantage over the former because it had already been involved in the organisation of the TOT seminar and the dissemination workshops in the first set of 10 Member States where training had previously taken place and was, therefore, fully aware of the remaining 10 Member States where the second round of training would take place. While it had been "*[c]lear for the Commission that the 10 Member States to be covered by the 2nd training wave would be those not covered by the 1st wave*", the complainant had obviously not been informed which of those countries were covered. Thus, the complainant assumed that the countries would be, in accordance with the Specifications, decided at a later stage. This implied that the Commission failed to guarantee a fair competition between the tenderers.

65. Indeed, knowing where the relevant workshops were going to be held, the successful bidder could have proposed a budget more suitable to the performance of the tasks under the Procurement Procedure. Even if the successful bidder did not, as argued by the Commission, explicitly mention the Member States where the workshops would be held, it was still in an ideal position to research the market prices in those Member States properly and create a suitable budget based on that information. In a situation where only two bidders remain, the slightest budgetary difference may play a decisive role. Whilst the complainant would have had to base its budget on an indicative list of "*assumed*" Member States, or, as it argued, on the market prices in the 27 EU Member States, the successful bidder could have taken into consideration the prices practiced in the very Member States where the workshops were intended to take place. The Ombudsman considered that, in the above circumstances, the complainant was, in practice, deprived of information which was essential in order to allow it to compete for the most cost-effective bid. The Ombudsman added that this was information which the successful bidder had and the Commission did not share with the complainant.

66. Not having been informed that the decision concerning the Member States had been already taken, it was probable that the complainant trusted the provision of the Specifications, according to which the Commission would decide on its choice of Member States at a later stage. Therefore, it was unfair that the complainant was required to provide information closely linked with the Member States where the dissemination seminars would be held. Such requirements, the Ombudsman noted, had an impact on the criterion "*Project management and availability*", which the Evaluation Committee assessed at 22 out of a maximum of 30 points. Similarly, it was surprising that the Commission expected the complainant to be able to identify further in its proposal the venue and the catering service of the TOT seminar. The Ombudsman considered that the above matter also merited particular attention.

67. The Ombudsman thus asked the Commission, in the context of his further inquiries into the complaint, to provide a better explanation for the above expectation[20]. The Commission replied that even without knowing the exact venue, it was possible to give indications in relation to the costs associated with the practical organisation of the TOT event. According to the Commission, the venue for the TOT seminar could have been chosen without knowing which 10 Member States had been selected "as participants ha[d] to travel to the place of the training from their home countries". In any case, the fact that "the complainant had confirmed an intention to hold the majority of the workshops in the new Member States", was not decisive for the assessment of its bid. Regardless of the choice of countries, a timetable was required for the assessment of the bids. Careful project planning is an essential feature of project management. Such precise planning must necessarily include an indication of the estimated time to be allotted to the proposed tasks, their preparation, implementation and follow-up. This was, moreover, a separate issue to the choice of the countries. "Even though the specific countries were not known yet, it would have been possible to include for example indications on from when to when the different elements of the TOT seminar and the workshops would be prepared etc."
68. The Ombudsman found the above statements surprising. He could understand that, as a matter of principle, not going into detail or not giving added value, or even failing to present an appropriate timetable, may result in a tenderer obtaining a low score. However, it remained unclear how the complainant could, in such circumstances, propose adequate travel and accommodation costs for participants of the TOT seminar when it was not informed of the very decision concerning the choice of those participants' "home countries". The very same reasoning could be applied to the "implementation" of the tasks in the 10 subsequent workshops. In the Ombudsman's view, the very choice of the relevant Member States had, contrary to the Commission's opinion, indeed played a fundamental role as it had an impact on the level of competition between the successful bidder and the complainant.
69. Indeed, in light of the fact that the complainant was the only other bidder to make it to the award phase, being fully aware of the countries which would fall under the second set of training put the successful bidder in a better position than the complainant, as it allowed it to propose realistic costs and timetables in relation to the workshops, as well as the travel costs of those participating in the TOT seminar. The complainant was left to either "assume" which were the 10 Member States where the workshops would be organised or from where the participants come from, or to base its calculations on the average market prices practiced in the whole of the EU. Nevertheless, while it was aware of the choice of the Member States which would have necessarily been the subject of the second training session, the Commission failed to ensure that the complainant was made duly aware of that choice in the same way as the successful bidder was informed of that choice. Therefore, the Commission placed the complainant in a less advantageous position than the successful bidder.
70. The complainant's initial allegation to the Ombudsman was that the explanations the Commission had given so far were insufficient to prove that it assessed the complainant's bid in a fair and unbiased fashion. The Ombudsman found the Commission's explanations provided during the inquiry, in reply to the above allegation, to be unconvincing. These explanations themselves suggested that (i) the successful bidder had an unjustified advantage over the complainant in the tender process; (ii) the Commission knew of this advantage; (iii) the Commission failed to take steps to ensure equal treatment; and (iv) as a result, the complainant's chances of succeeding in

the Procurement Procedure were seriously undermined. The Ombudsman therefore made a provisional finding of maladministration by the Commission.

71. When the Ombudsman makes a finding of maladministration, his Statute requires him to seek, as far as possible, a friendly solution to eliminate the maladministration, and simultaneously satisfy the complainant. The complainant claimed that the Commission should reassess its tender and award it the contract or, if this is no longer possible, provide it with compensation. The Ombudsman noted that the successful bidder had already been selected and awarded the contract and, therefore, reassessing the complainant's tender was no longer appropriate.
72. The complainant's alternative claim for compensation had necessarily to be understood as relating to its loss of profit and the costs incurred as a result of the submission of its tender. As regards the former, the Ombudsman pointed out that the complainant did not demonstrate that, had the Commission handled the Procurement Procedure properly, the complainant would definitely have been selected. Indeed, even if it was true that the complainant was the only other tenderer to make it to the award phase, it was still not certain that, had the Commission handled the Procurement Procedure properly, it would have necessarily preferred the complainant to the successful bidder. The Commission could have still selected the successful bidder even if it had informed the complainant about the Member States where the Procurement Procedure's activities were intended to be carried out and/or from which Member States the participants come from. Therefore the complainant's alleged damage related to the loss of profit was neither real nor certain. As regards the costs associated with the submission of the complainant's tender, the Ombudsman considered that, in the light of the relevant case-law, they could be compensated and the Commission could communicate directly with the complainant with a view to determining their exact amount.
73. In light of the foregoing, the Ombudsman made a proposal for a friendly solution, in accordance with Article 3(5) of his Statute. The proposal was as follows:

"[t]aking into account the Ombudsman's findings, the Commission could properly analyse all relevant evidence that the complainant may wish to submit to it directly in relation to the charges and expenses it incurred as a result of its participation in the tender."

The arguments presented to the Ombudsman after his friendly solution proposal

74. The Commission replied that it decided to accept the Ombudsman's proposal for a friendly solution. On 13 February 2012, it contacted the complainant directly with a view to obtaining evidence of the charges and expenses it had incurred as a result of its participation in the tender process.
75. The Ombudsman forwarded the Commission's above-mentioned reply to the complainant with an invitation to submit observations before 30 April 2012. The complainant did not reply.
76. Later, in June 2012, the Commission informed the Ombudsman that it had analysed the evidence provided by the complainant and considered the overall amount to be substantiated. As a result, it paid the complainant EUR 10 160.61.
77. The Ombudsman's services contacted the complainant by telephone and were informed that the case could now be closed.

The Ombudsman's assessment after his friendly solution proposal

78. The Ombudsman welcomes the Commission's acceptance of his proposal for a friendly solution and the fact that it reached an agreement with the complainant following direct contacts with it. He considers that the Commission has settled the complaint.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Ombudsman welcomes the Commission's acceptance of his proposal for a friendly solution and the fact that it reached an agreement with the complainant following direct contacts with it. He considers that the Commission has settled the complaint.

The complainant and the President of the Commission will be informed of this decision.

P. Nikiforos Diamandouros
Done in Strasbourg on 26 July 2012

6.1.2 *The U.K. Adjudicator's office - Misleading advice and failure to act by the Insolvency Service*⁴⁰

Mr J had been made bankrupt in early 1999 and had a personal pension which formed part of his estate. Mr J complained that The Insolvency Service (IS) had misled him about when they would realise his pension policy.

The IS wrote to Mr J in September 2004, and they confirmed that they would realise his pension policy and the first five years of annuities. They also explained that once this had been done they would have no further interest in the pension policy and any further annuities would be paid directly to Mr J by the pension company. This was the standard way of dealing with pensions of this nature. If the pension policy had been realised in 2004, Mr J would have begun to receive annuities in 2009.

However, the pension policy was not realised in 2004, and The IS were unable to give a reason as to why this was not done.

Mr J said that he was unhappy that The IS did not realise his pension policy in 2004 and because of the delay, he would not receive any annuities until 2014 at the earliest, five years later than he had been led to believe.

Outcome

The Adjudicator substantially upheld this complaint.

In recognition of this error, The IS agreed to give up the five years of annuity payments that they would normally collect from the pension policy and offered monetary compensation (redress) for their poor handling.

They also took appropriate steps to realise the pension policy which means that Mr J will now start to receive annuities, the position he would have been in if this had been done in 2004.

Redress payments are not direct compensation. In the Adjudicator's view, no amount of money can ever directly compensate Mr J for the worry and distress that he suffered as a result of the way that his case was handled. However, she views such payments as a clear acknowledgement by The IS of the distress they caused.

The Adjudicator felt the compensation offered by The IS, as a result of Mr J's complaint, was reasonable and she did not recommend the amount be increased.

Learning

Mistakes or delays need to be minimised, or where they do arise, addressed quickly to avoid causing worry, distress and financial hardship to the individual.

⁴⁰ <http://www.adjudicatoroffice.gov.uk/casestud.htm#10>

6.1.3 The U.K. Adjudicator's office - Claim for interest and agents fees⁴¹

The Valuation Office Agency⁴² had previously acknowledged that a mistake was made in the compilation of the 2000 Rating List and that, as a result of duplicated entries, Mr I was overcharged business rates by £40,205.

The VOA accepted that they had made a mistake and settled this aspect of Mr I's complaint before the case came to the Adjudicator.

However, the VOA did not agree that they should pay interest on the amount refunded to Mr I; neither should his agent's fees be met. The VOA felt there were opportunities for Mr I to mitigate the losses by carefully examining his rate demands and that he should have realised that he was being charged twice for his business.

Furthermore, there had been opportunities for Mr I to appeal against the duplicated entries during the lifetime of the Rating List.

Mr I was unhappy with the VOA's decision and his agent asked the Adjudicator to review it.

Outcome

The Adjudicator substantially upheld this complaint.

The Adjudicator decided that the VOA's acceptance of responsibility for the mistake should also take into account the interest and professional fees incurred by Mr I in bringing his complaint. The overriding principle of the VOA's Code of Practice, "Putting things right for you" is to restore taxpayers and ratepayers to the position they would have been in, had the mistake not occurred.

The VOA code does not mention payments of interest on refunded business rates payments. Usually, these are the responsibility of the local Billing Authority (BA) as there is scope, within the Non-Domestic Rating Legislation, to make payments of interest on refunds which are the result of reductions in rateable values.

However, the duplicated entry in the 2000 Rating List could not be amended or deleted: leaving no vehicle for the BA to consider a claim for interest.

The Adjudicator did not accept that the interest should be paid at the 8% level being claimed by Mr I. Instead she recommended that the interest should be calculated using the prevailing rates applied by legislation so that Mr I would be no better or worse off than if he had received the refund directly from the BA. The VOA agreed to pay the interest.

The Adjudicator also recommended that the VOA considered the claim for professional fees. The code of practice says that a complainant "...can claim any reasonable costs which you can show you have incurred" as a result of a mistake or unreasonable delay caused directly by the VOA. On reflection, the VOA also agreed to refund Mr I's agent fees.

Learning

The Adjudicator emphasised the need for consistency in complaint handling and felt that the VOA had not applied the code of practice appropriately.

⁴¹ <http://www.adjudicatorsoffice.gov.uk/casestud.htm#9>

⁴² The U.K. government agency to carry out valuation of real estate used for, e.g. setting rates for inheritance tax, capital gains tax

6.1.4 *The U.S. Office of the National Ombudsman*

Requests for assistance dealing with agency rules, inspections, citations, and penalties are one of the more frequent types of calls to the National Ombudsman from small businesses for aid. Often a single rule impedes a company's forward progress, and/or citations with accompanying penalties threaten to cripple operations.

Case

A businessman wrote that the Food Safety Inspection Service (FSIS) of the U. S. Department of Agriculture furnishes 40 hours of plant inspection weekly at no cost to the company for the meat items it produces and furthermore that FSIS does not charge for label approvals it sends to Washington. But the businessman's company was recently charged for a quarterly Agricultural Marketing Service (AMS) audit and complained that because it was never charged for the plant inspection and label approval it should not be charged for the AMS audit.

Outcome

The Department of Agriculture explained it does not receive appropriated funds for administering the CN Labeling Program and thus is obligated to recover the costs of its services. Nevertheless the agency department reviewed the complainant's situation to see if the costs of conducting future reviews could be reduced. It concluded it could reduce travel cost significantly by using local staff. The agency also said it could not waive the entire cost of the commenter's bill but agreed to reduce the bill's travel portion. [case taken from the Ombudsman's 2011 Report to Congress]

6.1.5 Practical examples of the steps taken by business Ombudsman Institutions in the Russian Federation

Since the establishment thereof, the Ombudsmen at the Federal and regional levels received over 4,5 thousand complaints. The interference of the Ombudsman stopped violations of the entrepreneurs' rights in the process of the investigation of criminal cases, and in the course of administrative proceedings.

Some cases from the Presidential and regional Ombudsmen practice are described below.

- 1) Entrepreneur S. Bobilev was convicted for fraud for 9 years of imprisonment. The Ombudsman participated in court proceedings and the judge convinced by B. Titov's position changed the sentence, the activity of S. Bobilev was recognized as entrepreneurial. This led to punishment reduction to 5 years and 6 months.
- 2) Entrepreneur R. Telkov was a drapery manufacturer and he was accused of copyright violation (the pattern on his tissues were considered to be similar to those of another firm). Despite the fact that the prosecutor (a rare event) was against such accusation, the judge on the 17 January 2012 decided to arrest R. Telkov. One year later – on 17 January 2013 with the account of the position of the Presidential Ombudsman, the Moscow City Court changed the measure of restraint: the entrepreneur was released from jail on bail.
- 3) Entrepreneur N. Erastov was charged that in the period from 1 July 2009 to 31 March 2012 as director of "Zinc Coating" he was producing metal strips with the use of galvanizing baths of molten zinc bath and hydrochloric acid without a license (he was obliged to have such a license). The public ombudsman found that the criminal case didn't have sufficient grounds, there was no objective evidence of a crime: the whole case was a result of misinterpretation. After the Ombudsman's appeal to the General Prosecutor of the Russian Federation the criminal case against N. Erastov was closed for lack of evidence, the forfeiture of his property was canceled.

The Ombudsman organized the mediation procedure in the litigation between the owners of the USSR trademarks (it happens that the trademarks registered in the times of USSR now belong to different states and companies and the law doesn't solve such collisions).

In Penza region during the unscheduled sanitary audit were found some infringements in the enterprise: the company activities were banned till the pending trial. The Penza Ombudsman gave recommendations to entrepreneur for minimizing the list of alleged violations. In addition, the Ombudsman appealed to the Prosecutor's Office: as the result, the Prosecutor revealed violations during the audit; the head of the supervisory body received a warning.

The Ombudsman's Expert Board made some proposals for the reform of the judicial systems, the amendments to the criminal code.

The most significant initiative of the Ombudsman was the Entrepreneurs' amnesty, supported by the President of the Russian Federation. According to the Resolution of the State Duma of the Federal Assembly of the Russian Federation of 02.07.2013, N 2559-6 «On Amnesty», the persons accused and convicted for economic crimes should be released, provided they compensate all the damage inflicted to the victims.

The Ombudsman controls the amnesty progress in the bodies investigating crimes (the Interior Ministry, Investigative Committee under the Office of the Prosecutor General, the Federal Security Service of the Russian Federation), penitentiary and prison inspections (Federal Penitentiary Service), and the courts.

The Entrepreneurs amnesty lead to the closure of criminal cases and a relief from punishment of 1,408 accused and convicted persons (by 26.11.2013).