Afgørelse i sag 1525/2020/MIG om, hvordan Europa-Kommissionen behandlede en begæring om aktindsigt i dokumenter vedrørende møder mellem sin formand og industrirepræsentanter, herunder en virksomhed, der udvikler en vaccine mod covid-19

Afgørelse
Sag 1525/2020/MIG - **Indledt den** 22/09/2020 - **Afgørelse af** 19/03/2021 - **Involverede institutioner** Europa-Kommissionen (Ikke grund til yderligere undersøgelser) | Europa-Kommissionen (Delvist opnået løsning) |

Sagen vedrørte en begæring om aktindsigt i alle dokumenter i forbindelse med fem videokonferencer, som formanden for Europa-Kommissionen holdt med industrirepræsentanter i foråret 2020, herunder et møde med en producent af biologiske lægemidler, der var ved at udvikle en vaccine mod covid-19. Klageren havde betænkeligheder ved, at Kommissionen ikke havde fundet alle dokumenter frem, der var omfattet af hans begæring, og at den kun havde indrømmet ham indsigt i en del af ét af de tolv dokumenter, den fandt frem, nemlig en præsentation udarbejdet af den pågældende producent af biologiske lægemidler.

I forbindelse med Ombudsmandens undersøgelse identificerede Kommissionen tre yderligere dokumenter, som den indrømmede omfattende indsigt i. Selv om Ombudsmanden beklagede, at Kommissionen ikke i første omgang havde identificeret disse dokumenter som værende omfattet af klagerens begæring, anser hun nu spørgsmålet for at være løst.

Efter at have gennemgået den pågældende præsentation, fandt Ombudsmanden, at der er en overordnet offentlig interesse i offentliggørelsen og foreslog som en løsning, at Kommissionen indrømmede mere omfattende aktindsigt. Kommissionen accepterede ikke denne løsning, idet den hævdede, at den relevante information var kommercielt følsom, at den pågældende virksomhed gjorde indsigelse mod offentliggørelsen, og at der ikke var nogen væsentlig offentlig interesse.

Ombudsmanden beklagede Kommissionens afgørelse. Hun erkendte dog, at det var usandsynligt, at Kommissionen ville videregive informationen i betragtning af virksomhedens indsigelse. Hun anerkendte også, at Kommissionen siden har gjort mere for at informere om forhandlingerne med vaccineproducenter. Ombudsmanden afsluttede sagen og opfordrede Kommissionen til at sørge for, at gennemsigtighedskrav indgår i igangværende og fremtidige forhandlinger med virksomheder, hvor vigtige offentlige interesser står på spil.

Background to the complaint

1. In line with its proactive transparency policy, the European Commission regularly publishes information about meetings held by Commissioners, including the Commission President, with organisations and self-employed individuals. [1]

2. Between March and May 2020, the Commission President held five videoconferences with representatives from different private companies. Two of these, one with a biopharmaceutical company and one with the CEOs of several automotive companies, took place in March. The other three took place in April. By the beginning of May, only those videoconferences held in March had been included in the President's public calendar [2] .

3. On 5 May 2020, the complainant, an investigative journalist, asked the Commission to give him public access [3] to all documents related to the videoconferences held between the Commission President and organisations or self-employed individuals. The complainant specified that this included the two videoconferences that had taken place in March 2020, *"but also any other videoconferences with companies that have not been made public yet"* .

4. After being asked by the Commission for clarification, the complainant reiterated that he was seeking public access to documents related to the two videoconferences that had been published in the President's public calendar but also to any other videoconference(s) that may not yet have been included in the President's public calendar.

5. On 19 June 2020, the Commission informed the complainant that it had limited the scope of his access request to documents related to the two videoconferences that had taken place in March 2020. It sent the complainant two press releases related to those videoconferences. Regarding the meeting with the pharmaceutical company, the Commission also gave the complainant access to parts of a presentation that was given by the company during the meeting. To justify its decision to withhold the remainder of the presentation, the Commission invoked an exception under the EU's rules on public access to documents (Regulation 1049/2001), stating that disclosure could undermine the commercial interests of the company. [4] Regarding the meeting with the CEOs, the Commission also disclosed parts of eight documents and denied access to one document.

6. The complainant was satisfied with the access obtained to the documents linked to the videoconference with the CEOs. However, regarding the videoconference with the biopharmaceutical company, the complainant, on 25 June 2020, asked the Commission to review its decision (by making a so-called 'confirmatory application').

7. On 17 July 2020, the Commission extended the time limit for its reply by 15 working days, that is, until 7 August 2020.

8. When the Commission did not reply to the complainant within the extended time limit, he send a reminder on 14 August 2020.

9. On 17 August 2020, the Commission responded that the delay was due to ongoing internal

and third party consultations. It apologised to the complainant and assured him that it was doing its utmost to provide him with a final reply as soon as possible.

10. As he had not yet received a confirmatory reply from the Commission in September 2020, the complainant turned to the Ombudsman.
The inquiry
11. The Ombudsman opened an inquiry into the complainant's position that the Commission

a) wrongly refused access to parts of the presentation,

b) failed to identify all documents related to the videoconference with the biopharmaceutical company,

c) failed to identify any documents related to the videoconferences that the Commission President held with organisations in April 2020, and

d) did not reply to the request for review within the prescribed time limit.

12. In the course of the inquiry, the Ombudsman reviewed the presentation at issue in the complainant's request for public access. The Ombudsman also asked the Commission to check its records again, with a view to identifying additional documents falling under the request (see points b and c above) and asked it to reply to the complaint. When the Commission did not reply, the Ombudsman made a proposal for a solution (see below).

13. On 11 November 2020, the Commission issued a decision on the complainant's request for review. On 18 February 2021, the Ombudsman received the Commission's reply to her proposal for a solution and, subsequently, the complainant's comments thereon.
Refusal of public access

Arguments presented

14. Concerning the refusal to disclose parts of the presentation at issue, the Commission relied on the exception under Regulation 1049/2001 for the protection of commercial interests [5] . Specifically, it said that the presentation contained information on the commercial activities of the biopharmaceutical company, for example, information on market shares, planned investments, and research priorities. This information was sensitive and its disclosure could therefore undermine the company's commercial interests.

15. The complainant pointed to the press release on the meeting [6] , according to which the Commission had offered the company up to EUR 80 million of financial support to scale up the development and production of a vaccine against COVID-19. The complainant argued that, while it is in the public interest that a vaccine is developed, there are limited financial resources that the Commission and the European Investment Bank can deploy. It is therefore in the public interest that these resources are used to support those companies that have the highest chances to succeed in developing a vaccine. Thus, the complainant considered that there is an overriding public interest in disclosing the presentation. In his

view, access to the presentation could enable the public to assess why the biopharmaceutical company concerned was selected to receive significant public funding for its work on developing a vaccine.

The Ombudsman's proposal for a solution

16. Having reviewed the presentation at issue, the Ombudsman could verify that the redacted parts of this document mainly consist of commercial information that may be sensitive. However, the Ombudsman noted that some information that had been redacted is already in the public domain.

17. In addition, the Ombudsman noted that the principle of transparency is especially important during a crisis of historical dimensions, particularly where the Commission is taking decisions via accelerated or emergency procedures. The Ombudsman shared this view with the Commission already in May 2020 [7] , and welcomed the fact that the Commission has indeed proactively provided the public with important and timely information on the measures it has been taking to fight the pandemic [8] .

18. In this case, not only were the circumstances unprecedented but also the measures taken. The Commission had offered a biopharmaceutical company financial support of a significant amount. The Commission's offer had later led to a loan agreement from the European Investment Bank with the company. In addition, the Commission has concluded an advance purchase agreement with the biopharmaceutical company concerning the COVID-19 vaccine it is developing. [9] This contract will allow for the purchase of more than 400 million doses of the vaccine, if it proves to be safe and effective.

19. The Ombudsman considered that the public has a right to know on what basis the offer was made, and thus, that there would seem to be a very strong argument that there is an overriding public interest in disclosing additional parts of the presentation at issue. The Ombudsman found that, while the public interest in disclosure may not outweigh the interest in protecting the company's intellectual property in its technology and its research, the remaining information that does not constitute intellectual property should be disclosed.

20. The Ombudsman therefore proposed that the Commission should reassess the presentation at issue with a view to providing increased public access.

21. In response, the Commission [10] reiterated that the presentation contains commercially sensitive information, such as information on estimated costs, timelines for vaccines development and the company's production facilities. It claimed that this information cannot be disclosed due to the highly competitive context of the development of medicines against COVID-19.

22. The Commission also referred to the EU's vaccines strategy, which aims to promote the swift development and production of vaccines against COVID-19. It argued that disclosing the information at issue would undermine the company's trust in the negotiations with the EU

and thus the goal of making available safe and effective vaccines, which is in the highest public interest.

23. The Commission added that it had not been able to identify an overriding public interest that would justify disclosing the presentation.

24. The complainant expressed disappointment that the Commission did not agree that there is an overriding public interest in granting increased access to the presentation. He pointed to a public statement [11] made by the EU Commissioner for Health and Food Safety advocating for as much transparency as possible in the context of the vaccine negotiations, and took the view that the Commission had failed to ensure the greatest transparency possible in this case.

The Ombudsman's assessment after the proposal for a solution

25. The Ombudsman regrets that the Commission did not accept the proposed solution to give increased access to the presentation at issue. While it is true that it is in the highest public interest that safe and effective vaccines are developed, they will only be effective in achieving public health goals if the public can trust that the vaccines offered to them are indeed safe and effective [12] . It is therefore of utmost importance that the negotiations with manufacturers are carried out as transparently as possible. Secrecy surrounding the negotiations could create space for mistrust and speculation, and might undermine these goals.

26. The Ombudsman therefore welcomes that the Commission has acknowledged the pressing need for transparency in the negotiations. [13]

27. The Ombudsman also welcomes that the Commission has, in the meantime, made public considerable parts of several advance purchase agreements concluded with manufacturers, including the agreement with the company at issue [14] .

28. The Ombudsman understands that the Commission has published the redacted versions of those contracts in agreement with the companies concerned, and that it is currently consulting with other vaccines manufacturers with a view to providing wide access to the agreements concluded with them [15] .

29. The Commission stated that the company at issue in this complaint objects to any further disclosure of the information at issue in this case, and that it therefore maintains its decision to withhold access. The Ombudsman regrets this decision, for the reasons outlined above.

30. However, the Ombudsman considers that there is little likelihood the Commission will agree to disclose the information in the face of the company’s objection. Bearing in mind that the Commission has since made greater efforts towards providing information on the negotiations with vaccines manufacturers [16] , the Ombudsman finds that further inquiries

are not justified into the Commission's refusal to give wider access to the presentation at issue. That having been said, the Ombudsman urges the Commission to see to it that transparency requirements form part of ongoing and future negotiations with companies where important public interests are at stake.
Scope of the access request

Arguments presented

31. Regarding the meeting with the biopharmaceutical company, the complainant expressed doubts that there were only two related documents, namely the presentation and a press release that was published after the meeting. Given that the Commission offered the company financial support of up to EUR 80 million, the complainant considered that the Commission must have based this decision on additional information. In particular, the complainant suggested that there must be other documents, such as preparatory documents (for example, briefings drawn up for the President), which the Commission should have identified as falling within the scope of his access request.

32. In addition, the complainant considered that the Commission had failed to identify documents concerning the videoconferences held by the Commission President in April 2020. The complainant said that he had asked for documents related to *all* videoconferences. Following an update of the President's public calendar, it is clear that there had been other videoconferences during the relevant period. The Commission should have included those videoconferences in its search.

33. The Commission said that the President's public calendar had been updated after the complainant had made his request for public access. Given that the complainant could therefore now see which videoconferences had taken place in April 2020, it had limited its search to documents related to the two videoconferences explicitly referred to in the complainant's access request.

The Ombudsman's proposal for a solution

Documents identified by the Commission concerning the meeting with the biopharmaceutical company

34. The Ombudsman noted that the financial support offered by the Commission to the company during the meeting was significant. The Ombudsman therefore considered the complainant's argument, that the Commission surely based this offer also on information other than that exchanged during the meeting, to be reasonable.

35. The Ombudsman therefore proposed that the Commission should search its records again with a view to identifying possible additional documents related to the videoconference held by the Commission President with the biopharmaceutical company on 16 March 2020.

36. The Commission replied that it had now confirmed to the complainant that no other documents related to the videoconference in question existed.

Exclusion of the April videoconferences from the access request

37. Concerning the April videoconferences, the Ombudsman noted that, according to the EU's rules on public access to documents [17] , requests for public access have to be made in a sufficiently precise manner, that is, in a manner that enables the institution concerned to identify the documents to which access is sought. [18]

38. In this case, the complainant made his request for access on 5 May, seeking to obtain access to all documents related to the videoconferences held by the Commission President with organisations and self-employed individuals. The complainant specified that this included the two videoconferences that had taken place in March but also any other videoconference that had yet to be published.

39. The complainant explained that he knew from past experience that the President's public calendar is not updated in real time. However, he wanted his request to cover also any videoconference that had taken place but not yet been published in the calendar.

40. The Ombudsman considers that the complainant formulated his access request as precisely as he could have at the time, given the President's April meetings had not been published in the calendar when he made the request.

41. The Ombudsman also considers that it was clear from the complainant's statements that his access request concerned *all* videoconferences held between the beginning of March (when the President started to hold meetings with organisations via videoconference) and the date of the request (5 May).

42. The Ombudsman therefore proposed that the Commission should

- **search its records again with a view to identifying possible documents related to the videoconferences held by the Commission President with organisations in April 2020, and**

- **provide the complainant with public access to any additional document the Commission identifies in the context of this proposal for a solution, where it deems disclosure to be justified under Regulation 1049/2001.**

43. The Commission replied that it had identified three documents related to the videoconferences in question and that it had given the complainant wide access to those documents, redacting only the personal data contained therein.

44. The complainant was satisfied with how the Commission had subsequently dealt with this aspect of his access request, but dissatisfied that the Commission did not acknowledge that it had made a mistake initially, when it had excluded the videoconferences in question

from its search.

The Ombudsman's assessment after the proposal for a solution

45. The Ombudsman considers that the complainant's original request was sufficiently clear, and regrets that it took her intervention to induce the Commission to deal with the request in its entirety.

46. However, the Ombudsman welcomes the Commission's positive response to her proposal that it search its records again, both to verify whether all documents related to the meeting with the biopharmaceutical company had been identified, and to include in the scope of the complainant's access request also the videoconferences that took place in April 2020.

47. The Ombudsman also notes that the Commission gave the complainant wide partial access to the additional documents it identified and that the complainant appears to be satisfied with the access obtained.

48. While urging the Commission to avoid issues like that identified in paragraph 45, the Ombudsman considers this aspect of the complaint to be settled.
Delay in dealing with the complainant's request for review

The Ombudsman's assessment

49. The EU's rules on public access to documents require EU institutions to deal with requests for public access promptly, that is, within 15 working days. [19] The same time limit applies to requests for review in relation to a decision refusing public access. [20] This time limit can be extended once by 15 working days. [21]

50. This maximum time limit of 30 working days applies to all review procedures, including where the institution has to consult third parties from whom the documents at issue originate.

51. The Ombudsman notes that the extended time limit for the Commission's reply to the complainant's request for review in this case expired on 7 August 2020. The Commission's confirmatory decision was issued only on 11 November 2020, and thus with a delay of three months.

52. While acknowledging the challenging situation faced by the EU institutions since the start of the COVID-19 pandemic, the Ombudsman regrets the delay not only prior to but also during this inquiry.

53. The Ombudsman will not make a formal finding of maladministration or a recommendation in this case, as this would serve no practical purpose, given that the delay

can no longer be rectified. However, she is monitoring these delays across the range of public access cases she is dealing with against the Commission to determine whether further action is required.

Conclusions

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

No further inquiries are justified into the Commission's refusal to give increased access to the presentation at issue.

By identifying and granting wide access to three additional documents related to the videoconferences the Commission President held in April 2020, the Commission has settled this aspect of the complaint.

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

Emily O'Reilly European Ombudsman

Strasbourg, 19/03/2021

[1] See https://ec.europa.eu/commission/commissioners/2019-2024_en , the relevant meetings can be found under 'Transparency' of each Commissioner's respective webpage.

[2] See http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=c8e208ad-7dc2-4a97-acc9-859463 .

[3] Under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN .

[4] In accordance with Article 4(2), first indent of Regulation 1049/2001.

[5] In accordance with Article 4(2), first indent of Regulation 1049/2001.

[6] https://ec.europa.eu/commission/presscorner/detail/en/IP_20_474 .

[7] See also the European Ombudsman's letter to the President of the European Commission concerning transparency of the EU COVID-19 crisis response dated 20 April 2020, available at:

https://www.ombudsman.europa.eu/en/correspondence/en/127057 .

[8] See https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en .

[9] See https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2136 .

[10] The full text of the Commission's reply to the Ombudsman's proposal for a solution is available at:

https://www.ombudsman.europa.eu/en/correspondence/en/138353 .

[11] See https://twitter.com/SKyriakidesEU/status/1348608633278521344 .

[12] The Commission itself stated: *"Transparency and accountability are important to help build the trust of European citizens and to make sure that they can rely on the effectiveness and safety of the vaccines purchased at the EU level."* See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_302 .

[13] See also the Commission's reply to joint complaints 85/2021/MIG and 86/2021/MIG, point III, available at: https://www.ombudsman.europa.eu/en/correspondence/en/138352 , where the Commission acknowledged the strong need for transparency in the negotiation process.

[14] See https://ec.europa.eu/info/sites/info/files/curevac_-_redacted_advance_purchase_agreement_0.pdf .

[15] See footnote 13.

[16] See also a list of 365 documents concerning the Commission's vaccines negotiations: https://www.asktheeu.org/en/request/8562/response/30558/attach/2/List%20of%20Documents%20Gest .

[17] Regulation 1049/2001.

[18] Article 6(1) of Regulation 1049/2001.

[19] In accordance with Article 7(1) of Regulation 1049/2001.

[20] In accordance with Article 8(1) of Regulation 1049/2001.

[21] In accordance with Article 8(2) of Regulation 1049/2001.