Ευρωπαίος Διαμεσολαβητής

Απόφαση στην υπόθεση 1959/2014/MDC σχετικά με την άρνηση της Ευρωπαϊκής Επιτροπής να επιτρέψει την πρόσβαση του κοινού στα έντυπα αξιολόγησης και κατακύρωσης σχετικά με τις αιτήσεις χορήγησης συγχρηματοδότησης για μηχανισμούς που χρησιμοποιούνται κατά την επεξεργασία των καταστάσεων ονομάτων επιβατών

Απόφαση
Υπόθεση 1959/2014/MDC - **Εκκίνηση έρευνας στις** 13/01/2015 - **Σύσταση σχετικά με** 20/12/2016 - **Απόφαση στις** 13/07/2017 - **Εμπλεκόμενο θεσμικό όργανο** Ευρωπαϊκή Επιτροπή (Υποθέσεις στις οποίες διαπιστώθηκε κρούσμα κακοδιοίκησης) |

Η υπόθεση αφορούσε την άρνηση της Ευρωπαϊκής Επιτροπής να επιτρέψει την πρόσβαση του κοινού στα έντυπα αξιολόγησης που έχουν καταρτιστεί για την αξιολόγηση των αιτήσεων που υποβάλλονται από τα κράτη μέλη με σκοπό τη συγχρηματοδότηση από την Επιτροπή των εθνικών συστημάτων επεξεργασίας δεδομένων όπως περιλαμβάνονται στις καταστάσεις με ονόματα επιβατών (PNR **[1]**). Η αναφορά υποβλήθηκε από βουλευτή του Ευρωπαϊκού Κοινοβουλίου.

Για την άρνηση της πρόσβασης στα αιτηθέντα έντυπα αξιολόγησης, η Επιτροπή βασίστηκε σε απόφαση του Γενικού Δικαστηρίου, στην οποία αναγνωρίστηκε η ανάγκη τήρησης της εμπιστευτικότητας των εργασιών των επιτροπών αξιολόγησης σε διαδικασίες προσκλήσεων υποβολής προσφορών. Στην εν λόγω υπόθεση, το Δικαστήριο αποφάσισε ότι η δημοσιοποίηση των γνωμών των μελών της επιτροπής αξιολόγησης θα έθιγε την ανεξαρτησία τους και, ως εκ τούτου, θα υπονόμευε σοβαρά τη διαδικασία λήψης αποφάσεων του οικείου οργάνου. Ωστόσο, κατά την άποψη του ενδιαφερόμενου, η εν λόγω απόφαση δεν ισχύει για διαδικασίες αξιολόγησης αιτήσεων χρηματοδότησης που υποβάλλονται από τα κράτη μέλη.

Η Διαμεσολαβήτρια διερεύνησε το ζήτημα και έκρινε ότι η απόφαση της Επιτροπής να αρνηθεί την πρόσβαση στα αιτηθέντα έγγραφα δεν ήταν αιτιολογημένη. Επιπλέον, συμφώνησε με την άποψη ότι υπήρχε υπέρτερο δημόσιο συμφέρον που υπαγόρευε τη δημοσιοποίηση των αιτηθέντων εγγράφων. Συνεπώς, η Διαμεσολαβήτρια συνέστησε στην Επιτροπή να δημοσιοποιήσει τα αιτηθέντα έγγραφα (συμφώνησε ωστόσο ότι τα ονόματα των αξιολογητών θα μπορούσαν να παραλειφθούν).

Η Επιτροπή αρνήθηκε να αποδεχτεί τη σύσταση της Διαμεσολαβήτριας χωρίς να παρουσιαστεί πειστική αιτιολόγηση για τη θέση της. Ως εκ τούτου, η Διαμεσολαβήτρια περάτωσε την υπόθεση

διαπιστώνοντας κακοδιοίκηση.

[1] Τα δεδομένα που περιέχονται σε καταστάσεις ονομάτων επιβατών (PNR) είναι πληροφορίες τις οποίες παρέχουν οι επιβάτες κατά την κράτηση και έκδοση εισιτηρίων και κατά τον έλεγχο επιβίβασης σε πτήσεις, καθώς και πληροφορίες που συλλέγονται από αερομεταφορείς για οικείους εμπορικούς σκοπούς. Τα δεδομένα περιλαμβάνουν διάφορα είδη πληροφοριών όπως την ημερομηνία ταξιδίου, το δρομολόγιο, τα στοιχεία εισιτηρίου, τα στοιχεία επικοινωνίας, τον ταξιδιωτικό πράκτορα μέσω του οποίου πραγματοποιήθηκε η κράτηση της πτήσης, τα μέσα πληρωμής που χρησιμοποιήθηκαν, τον αριθμό θέσης και πληροφορίες σχετικά με τις αποσκευές. Τα δεδομένα αποθηκεύονται στις βάσεις δεδομένων κρατήσεων και ελέγχου αναχωρήσεων των αεροπορικών εταιρειών.

The background

1. On 26 March 2014, the complainant, who is a Member of the European Parliament, requested public access to " *all Commission documents in which the application of Member States for co-funding by the Commission for setting up Passenger Information Units for the processing of passenger name record (PNR) data are assessed.* " The complainant specifically requested documents containing information on "[t] *he allocation of points relating to the respective award criteria and the specific motivation for the allocation of points.* "

2. The Commission granted partial access to the 'Final report of the ISEC Evaluation Committee - 2012 Targeted Call for Proposals on PNR' and its five annexes. It denied access to the award evaluation forms for each project (which had been completed by at least one internal and one external expert). It refused access to these forms because, it argued, disclosure would seriously undermine the Commission's decision-making process [2] .

3. The complainant appealed the Commission's decision (by submitting what is known as a 'confirmatory application') but the Commission confirmed its refusal to disclose the award evaluation forms [3] .

4. The Commission stated that the forms were filled out by experts who carried out detailed assessments of the proposals of Member States for co-funding. The Prevention of and Fight against Crime (ISEC) Evaluation Committee then used these assessments during its deliberations on the funding proposals. The Committee expressed its definitive view on whether or not to recommend a proposal for funding to the Commission in the Final Report, which the Commission had disclosed to the complainant. The Commission considered that disclosing the award evaluation forms would seriously undermine the effectiveness of the Committee's work and the Commission's decision-making process.

5. The Commission based its position on the General Court's ruling in Case *Sviluppo Globale*

GEIE v European Commission (hereinafter, " *Sviluppo* ") [4] in which the General Court recognised the importance of confidentiality of the evaluation committees' proceedings. The Court ruled that disclosure of the opinions of the members of an evaluation committee in a tender procedure would compromise their independence, even after the evaluation committee had taken a decision. The Commission argued that, by analogy, this argument must also apply to the opinions of the experts, which form part of the basis for the opinions of the evaluation committee. The Commission did not identify any overriding public interest in the disclosure of the requested documents.

6. Since she was not satisfied with the Commission's response, the complainant lodged a complaint with the Ombudsman in November 2014. The complainant's concern was that **the Commission had wrongly denied access to the award evaluation forms.** The complainant put forward the following arguments: (i) the Commission's arguments for withholding the documents from public scrutiny are not convincing, and (ii) there is public interest in knowing how the Commission assessed Member States' applications. According to the complainant, the way the Commission evaluated the proposals has directly influenced policy making in the Member States with a potentially serious impact on the fundamental rights and privacy of citizens.

7. Since the Ombudsman was not convinced by the Commission's reasoning for denying access to the requested documents, she made a recommendation in December 2016 to the Commission that it release the requested documents (with some redactions due to reasons of data protection) [5] .

Refusal to grant access to the award evaluation forms

The Ombudsman's recommendation

8. The Ombudman considered that the Commission misinterpreted the meaning and the scope of the *Sviluppo* case-law. In order to refuse access, the Commission should have demonstrated that it is reasonably foreseeable that pressure would be put on the Commission's evaluators if their individual assessments were released. The Ombudsman gave a number of reasons for her view that in the case under consideration, it was not reasonably foreseeable that such pressure would be exerted on the evaluators [6] .

9. With regard to the question whether evaluators might be led to exercise restraint in their evaluations if they feared that their individual (positive or negative) views might be revealed in the future, after the procedures have definitively ended, the Ombudsman considered that this can easily be dealt with by simply redacting the names of the evaluators (whilst releasing the evaluations).

10. Finally, the Ombudsman considered that there was, in any event, an overriding public interest in disclosure of the documents. This was because, as the complainant had argued, the

public has an interest in participating in a legislative process (on the adoption of the PNR Directive [7]) and the disclosure of the documents at issue would have served to enhance its ability to participate in that process. The Ombudsman recognised that the complainant raised this argument after the Commission had refused access to the documents and whilst the Ombudsman's inquiry was underway. She therefore could not criticise the Commission for not having taken this argument into account when refusing access to the documents in question. However, the Ombudsman invited the Commission to take this additional argument into consideration when replying to the Ombudsman's recommendation.

11. In light of all the foregoing, the Ombudsman found that the Commission was wrong not to disclose the requested documents and made the following recommendation to the Commission:

" **The Commission should release the requested documents taking into account the redactions proposed for reasons of data protection.** "

12. In its opinion on the Ombudsman's recommendation, the Commission maintained its position. It disagreed with the Ombudsman's conclusion that the Commission misinterprets the meaning and scope of the *Sviluppo* case-law. It considered that, although the *Sviluppo* case concerned procurement procedures, it applied by analogy to calls for proposals, as the risks involved are similar.

13. The Commission also maintained its view that, at the relevant time, it had correctly invoked and applied the exception relating to the protection of the decision-making process.

14. The Commission added that, " *as regards the Ombudsman's recommendation that the Commission services take into account possible changes in the factual and/or legal circumstances that occurred since the adoption of the EU PNR Directive in April 2016, the Commission respectfully recalls that, in accordance with the case law of the EU Court, a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime .*"

15. The Commission concluded that its decision not to grant access to the requested documents did not amount to maladministration. It invited the complainant to submit a new request for access to documents in light of the new circumstances.

16. In her comments on the Commission's opinion, the complainant stated that the Commission had not presented any new arguments that could justify withholding disclosure of the requested documents. She concurred with the views expressed by the Ombudsman in the recommendation and with the Ombudsman's conclusions. She added that the Commission cannot simply dismiss the Ombudsman's request to take into consideration, in the context of an inquiry, additional arguments as to why the documents should be released, by referring to the right of citizens to make a new request for access. The complainant asked the Ombudsman to decide that the Commission should disclose the requested documents.

The Ombudsman's assessment after the recommendation

17. The Ombudsman notes that her recommendation was based on the fact that the Commission did not, **when it originally refused access to the documents** , properly justify why an exception to access should apply to the documents. The Commission, basing itself on an erroneous and overly extensive reading of the *Sviluppo* judgment, wrongly considered that a general presumption of non-disclosure existed in circumstances where no such general presumption could exist (see paragraphs 21 - 52 of the Ombudsman's recommendation). The Ombudsman still considers that this failure of the Commission to justify why the documents could not be disclosed constitutes maladministration.

18. The Ombudsman underlines that this finding of maladministration exists **irrespective of whether the obligation to disclose the documents could be further reinforced by an overriding public interest in disclosure** .

19. The Ombudsman indeed agrees that the Commission could not have taken into account the complainant's **new arguments** relating to an overriding public interest in disclosure **when it originally refused to grant access to the documents** . However, there would be no justification for not taking due account of those new arguments, relating to an overriding public interest in disclosure, **when responding to the Ombudsman's recommendation.** The Ombudsman uses this opportunity to stress again that her procedures are not analogous to court proceedings, where the **only issue under consideration** (in an access to documents case) would be whether **the institution's original decision refusing access was valid** . In contrast, the Ombudsman is perfectly entitled to ask an institution also to take into consideration, when responding to a recommendation of the Ombudsman, new arguments as to why a document should be released, such as arguments relating to an **overriding public interest in disclosure** . **By doing so, and therefore, by taking the passage of time into consideration instead of insisting on a bureaucratic and legalistic approach, which can dishearten citizens, the Commission would demonstrate a higher level of citizen awareness and citizen friendliness.**

Conclusion

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

The Commission's refusal to release the requested documents (with the names of the evaluators redacted) constitutes maladministration.

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

Emily O'Reilly

[1] Passenger Name Record (PNR) data is information provided by passengers during the reservation and booking of tickets and when checking in on flights, as well as collected by air carriers for their own commercial purposes. It contains several different types of information, such as travel dates, travel itinerary, ticket information, contact details, travel agent through which the flight was booked, means of payment used, seat number and baggage information. The data is stored in the airlines' reservation and departure control databases.

[2] The institutions' decision-making process is protected by Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[3] The Commission relied on the second subparagraph of Article 4(3) of Regulation 1049/2001, which reads as follows: "[a] *ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure* ."

[4] Judgment of the General Court of 22 May 2012, *Sviluppo Globale GEIE v European Commission* , T-6/10, ECLI:EU:T:2012:245.

[5] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's recommendation available at:
https://www.ombudsman.europa.eu/cases/recommendation.faces/en/74249/html.bookmark [Σύνδεσμος]

[6] The Ombudsman stated that, in contrast with competing private bidders in a tender procedure, in this case, the Member States were not competing with each other and had no incentive to lobby to reduce the scores of other Member States. In any event, even if Member States might have obtained some advantage in having their scores improved, a derogation by an EU institution from the fundamental right of public access to documents can never be justified based on the (alleged) prospect that a Member State will act illegally. Moreover, the Commission did not provide any evidence or argumentation that **undue** pressure would be exerted on the evaluators from sources other than Member States. Finally, once the decision-making process has definitively ended (and is not subject to review or court procedures), it is difficult to envisage how the evaluation process could be affected by undue external pressure.

[7] This directive has now been adopted: Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [Σύνδεσμος], OJ 2016 L 119, p. 132.