

Decision in case 1352/2018/LM on the European Commission's refusal to grant access to the file of the EU PILOT procedure 8847/16/EMPL.

Decision

Case 1352/2018/LM - **Opened on** 19/09/2018 - **Decision on** 19/09/2018 - **Institution concerned** European Commission (No maladministration found) |

The complaint to the European Commission

1. On 20 May 2018, the complainant asked the European Commission for access to the file of an ongoing EU-Pilot procedure [1] (8847/16/EMPL) against Italy. In particular, he asked to have access to all the letters exchanged by the Commission and Italy (hereinafter, "the requested documents"). The procedure in question concerned Italy's compliance with a number of provisions of Directive 89/391/EEC on measures to improve safety and health at work [2] .
2. On 20 June 2018, the Commission replied to the complainant and refused to grant access to the documents in question. In doing so, it made reference to an exception set out in the EU's rules on public access to documents (Regulation 1049/2001) by which access to documents can be refused for "the protection of the purpose of inspections, investigations and audits" [3] .
3. On 22 June 2018, the complainant asked the Commission to review its decision (by making a so-called 'confirmatory application', as set out under Regulation 1049/2001). He argued that the Commission could not rely on that exception because it closed his complaint on 17 May 2018.

The Commission's response to the complainant

4. The Commission replied on 19 July 2018 confirming its previous decision. The Commission stated that the outcome of an EU Pilot procedure could be the opening of formal infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union. According to a settled case law, the Commission can rely on a general presumption that disclosure of the documents concerning an infringement procedure during its pre-litigation stage would in principle undermine the protection of the purpose of investigations [4] .
5. Furthermore, as the Commission was in contact with Italian authorities, there was a real risk



that the disclosure of the documents could jeopardise this ongoing dialogue. The Commission referred to the recent judgement *Spirlea* [5], according to which it is necessary “*in an EU Pilot procedure for there to be an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 TFEU, which would be likely to lead to the dispute being brought before the Court*”. The Commission also argued that the complainant did not put forward any element to show that there is overriding public interest in disclosure of the requested documents.

6. Dissatisfied with this response, the complainant turned to the Ombudsman on 26 July 2018.

7. On 14 August 2018, the Commission communicated to the complainant that it has closed the EU Pilot procedure 8847/16/EMPL and that the closure of the procedure in the system took a certain amount of time. In the complainant's view, this shows that the Commission was not entitled to rely on the above mentioned exception.

The European Ombudsman's findings

8. The Ombudsman considers the Commission's arguments to refuse disclosure of the requested documents entirely reasonable and convincing. As the EU Pilot procedure 8847/16/EMPL was ongoing at the time of the request, the Ombudsman accepts that a general presumption of confidentiality was applicable to the requested documents while that procedure is on-going. The complainant did not put forward any element to overturn the general presumption that the disclosure of the documents would undermine the protection of the purpose of investigations.

9. As the Commission has in the meantime closed the EU Pilot procedure 8847/16/EMPL, the complainant can file a new request for access to the file of the procedure.

10. In light of the above, there does not appear to be any maladministration by the Commission in not disclosing the requested documents whilst the EU Pilot procedure 8847/16/EMPL was ongoing [6].

Fergal Ó Regan Coordination of Public Interest Inquiries - Unit 2

Strasbourg, 19/09/2018

[1] More information on EU Pilot can be found at http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm



[Link]

[2] Article 8(2), Article 9(1), letters c) and d), Article 10(3), letter b) and Article 11(2), letters a) and c) of Directive 89/931/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1–8.

[3] Article 4(2), third indent, of Regulation (EC) 1049/2001 regarding public access to European Parliament,

Council and Commission documents, OJ L 145, 31.5.2001, p.43.

[4] See in this respect judgment of the Court of 14 November 2013 in Joined Cases C-514/11 P and C-605/11 P, *LPN and Republic of Finland v European Commission* , ECLI:EU:C:2013:738, paras 65, 66 and 68.

[5] Judgement of the Court of 25 September 2014 in case T-306/12, *Spirlea v. Commission* , ECLI:EU:T:2014:816, para 57.

[6] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the [Decision of the European Ombudsman adopting Implementing Provisions](#) [Link]

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