Decision of the European Ombudsman closing his inquiry into complaint 297/2010/(ELB)GG against the European Commission

Decision
Case 297/2010/GG - **Opened on** 08/03/2010 - **Decision on** 26/09/2011 - **Institution concerned** European Commission (No further inquiries justified) |

The complainant, a Brussels-based lawyer, asked the European Commission for access to its manual of procedure for handling competition cases under Articles 101 and 102 of the Treaty on the Functioning of the European Union (the "Antitrust ManProc"). This request was based on Regulation 1049/2001 on public access to European Parliament, Council and Commission documents.

The Commission rejected the request. It argued that disclosure would be highly detrimental to its decision-making process and would also undermine the purpose of its inspections and investigations in the area concerned. The Commission submitted that the Antitrust ManProc contained sensitive internal information and guidance on the investigative procedure and techniques in antitrust investigations. However, it also explained that it was currently selecting and adapting excerpts of the documentation on its proceedings in antitrust cases, with a view to publishing them on its website in the form of 'Best Practices'. The information thus published would correspond to the kind of partial access that could be granted to the Antitrust ManProc.

The complainant was not satisfied by this approach and turned to the Ombudsman, who opened an inquiry.

After having received the Commission's opinion and the complainant's observations thereon, the Ombudsman inspected the Antitrust ManProc.

On the basis of the information thus obtained, the Ombudsman concluded that the Commission was entitled to refuse to disclose certain parts of the Antitrust ManProc but that this was not the case as regards the document in its entirety. He therefore made a proposal for a friendly solution, calling on the Commission to grant partial access to the modules (the most important part of the Antitrust ManProc) and to confer with the complainant informally in order to find a fair solution as regards access to the other documents which formed part of the Antitrust ManProc.

The Commission welcomed the Ombudsman's proposal and took steps with a view to implementing it. It emerged from the information provided by the Commission that the latter was

in the process of preparing a version of the Antitrust ManProc that would be disclosed to the public and that it was foreseen that this document would be available in October 2011 or shortly thereafter. It further emerged that the complainant was in agreement with the proposed approach.

In these circumstances, the Ombudsman considered that there were no grounds to further pursue his inquiry at present. He therefore closed the case. The Ombudsman noted, however, that the complainant remained free to turn to him again if he were to come to the conclusion that the version of the Antitrust ManProc which would be made publicly available by the Commission was not satisfactory.

The background to the complaint

1. On 9 September 2009, the complainant, a Brussels-based lawyer, asked the European Commission for access to the internal manual of procedure (the "Antitrust ManProc") of its Directorate-General Competition ("DG COMP") for cases under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1] ("Regulation 1/2003"), and in particular those parts of the manual dealing with the organization of the Commission's files in such cases. This request was based on 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 [2] ("Regulation 1049/2001").

2. On 5 October 2009, DG COMP rejected this request. It pointed out that the Antitrust ManProc contained guidance to its staff on how to handle competition cases. The different chapters of the Antitrust ManProc consisted of modules, checklists, templates, annexes, flowcharts and useful links. According to DG COMP, the Antitrust ManProc was a working document that had been prepared for purely internal purposes. It therefore constituted a preparatory document with regard to the institution's decision-making process on future individual antitrust cases. DG COMP submitted that the disclosure of this document would be highly detrimental to the institution's decision-making process in the field of application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and would affect the Commission's ability to carry out an independent assessment of the facts before it. It further stated that, as any other public administration, the Commission needed a certain 'space to think' with a view to protecting its internal working procedures and decision-making process. According to DG COMP, the exception set out in Article 4(3), first sub-paragraph of Regulation 1049/2001 was thus applicable.

3. DG COMP submitted that disclosure would also undermine the purpose of the Commission's inspections and investigations within the meaning of Article 4(2), third indent of Regulation 1049/2001. It explained that the Antitrust ManProc contained sensitive internal information and guidance on the investigative procedure and techniques in antitrust investigations, including with respect to unannounced inspections pursuant to Articles 20 and 21 of Regulation 1/2003.

DG COMP took the view that disclosure of the Antitrust ManProc would put in the public domain its investigation strategy, which would seriously undermine the future successful conduct of investigations and inspections in the field of antitrust enforcement.

4. DG COMP submitted that no overriding public interest in disclosure was discernible.

5. DG COMP stated that no partial access was possible either, given that the Antitrust ManProc was covered by the above-mentioned exceptions in its entirety.

6. On 9 October 2009, the complainant submitted a confirmatory application for access. He argued that Article 4(3), first sub-paragraph of Regulation 1049/2001 could only apply to a specific case where a decision had not yet been taken. The Antitrust ManProc, which applied generally, could therefore not fall under this provision. The complainant further argued that disclosure of the general methods and procedures used by Commission officials could not undermine the decision-making process in any particular case or its 'strategy' in any particular case. According to the complainant, this was particularly obvious as regards the provisions of the Antitrust ManProc dealing with how the file should be prepared for inspection by the parties concerned. The complainant submitted that DG COMP's reliance on Article 4(2), third indent of Regulation 1049/2001 was also completely unconvincing. He argued that the Antitrust ManProc could not contain 'sensitive internal information', since by definition it did not deal with specific cases.

7. As regards the question of an overriding interest in disclosure, the complainant pointed out that the very large fines now being imposed by the Commission under Regulation 1/2003 meant that the public interest in this issue was now greater than ever and that concern over the Commission's procedures had increased correspondingly. The fact that essentially the same individuals within the Commission were in practice responsible for the drafting of both the statement of objections and the decision in a given case meant that there was a very great public interest in understanding the practices and procedures by which DG COMP operated. This was even more obvious when one considered that Commission decisions under Regulation 1/2003 were normally adopted by Commissioners, none of whom attended DG COMP's hearings, on the advice of, and on the basis of drafts prepared by, officials whose activities were regulated by the Antitrust ManProc. According to the complainant, there was thus a clear and overwhelming public interest, in these circumstances, in knowing precisely how DG COMP officials are instructed to carry out their duties.

8. The complainant added that he found it difficult to understand why it should be impossible to grant at least partial access.

9. In its reply of 29 October 2009, the Commission's Secretariat-General pointed out that the Antitrust ManProc, unlike in the past, no longer represented a single document but had been re-organised and was "now systemised as an intranet-based structure exclusively. It now includes documents of very different natures responding to internal and purely administrative needs, but also references and links to publicly available documents, such as regulations, notices, published final decisions and court decisions, as well as other documents from other

DG[s] and services and not directly related to the instruction of cases within the meaning of Articles 81 and 82 of the EC Treaty. Moreover, updates of that structure occur on a daily basis." On the basis of Article 6(2) of Regulation 1049/2001, the Commission therefore asked the complainant to clarify whether his request was limited "to the Antitrust ManProc strictu sensu or whether it also includes the above-mentioned documents to which the Chapters of the ManProc contain links. The Commission further asked the complainant to explain what he meant by "... in particular the parts of the manual dealing with the organization of the Commission's files in such cases". It pointed out that the time-limit for handling the confirmatory application would run only from the date on which this complementary information was received.

10. In his reply of 30 October 2009, the complainant pointed out that his request should be understood as limited to the Antitrust ManProc *strictu sensu* . However, if it were to be more convenient for the Commission to grant him access to the Antitrust ManProc electronically, including the links, he would be happy to obtain it in that form. As regards the Commission's further question, the complainant explained that it was not easy for him to be very precise. He pointed out, however, that he presumed that the Antitrust ManProc contained instructions to officials on, for example, how they should arrange and organise the Commission's file on each individual case, on the numbering of the documents received, whether the file should be kept in chronological order or in some other way, how multiple copies of the same document should be treated, how documents received from different companies should be treated, and how copies of bulky published documents or books should be included in the file on each case. The complainant added that by "the file" he meant the file that in due course might need to be made available to some or all of the companies concerned, but also those documents that were not available to them. He noted that he would be grateful if the Commission could confirm his understanding as regards this point.

11. By letter dated 19 November 2009, the Commission informed the complainant that the period for replying to his confirmatory application had to be extended by 15 working days until 14 December 2009.

12. On 14 December 2009, the Commission informed the complainant that his application had led to an internal reflection on information that could be of interest to the public in general and to the legal community in particular. As a result, DG COMP was currently selecting and adapting excerpts of the documentation on its proceedings in antitrust cases, with a view to publishing them on its website in the form of 'Best Practices'. The Commission added that this work required a thorough assessment of roughly five hundred pages of a highly technical nature and was expected to be completed by the end of January 2010. The information that would be posted on the Internet would correspond to the kind of partial access that could be granted to the Antitrust ManProc. The Commission therefore proposed, as a 'fair' solution under Article 6(3) of Regulation 1049/2001, that the handling of the complainant's confirmatory application should be suspended until the publication of the 'Best Practices'.

13. On 15 December 2009, the complainant agreed to wait to see what the Commission would publish, provided that it was published by the end of January 2010. The complainant reserved his right to "continue with the procedure" if what was published did not comply with the

requirements of Regulation 1049/2001.

14. On 16 December 2009, the complainant suggested that the Commission should at least provide him with the table of contents or the index of the Antitrust ManProc, which, in his view, could not be covered by any of the exceptions in Regulation 1049/2001.

15. In a letter sent on 21 January 2010, the Commission informed the complainant that the 'Best Practices' had now been published. [3] It also enclosed the index table of the Antitrust ManProc.

16. On 26 January 2010, the complainant turned to the Ombudsman. In his letter, he pointed out that, with the exception of the table of contents of the Antitrust ManProc, the Commission had not given him any of the documents that he had asked for. The complainant submitted that the only reason that had been suggested for not disclosing them (i.e., that they related to individual cases) was clearly incorrect. He therefore asked the Ombudsman to ensure that the obligations of the Commission under Regulation 1049/2001 are respected.

The subject matter of the inquiry

17. In his complaint, the complainant essentially submitted the following allegation and the following claim:

Allegation:

The Commission failed properly to handle the complainant's request for access to the Antitrust ManProc.

Claim:

The Commission should grant access to the Antitrust ManProc.

The inquiry

18. The present complaint was submitted to the Ombudsman on 26 January 2010.

19. On 8 March 2010, the Ombudsman asked the Commission for an opinion, which was submitted on 4 June 2010. The Ombudsman forwarded the Commission's opinion to the complainant for his observations, which he sent on 8 June 2010.

20. In its opinion, the Commission argued that the complaint was premature. On 15 June 2010, the Ombudsman therefore asked the Commission to provide an opinion on the substance of the

present complaint. The Commission sent its reply on 26 July 2010. This reply was sent to the complainant, who presented his observations on 28 July 2010.

21. On 19 August 2010, the Ombudsman decided that it was necessary to inspect the Antitrust ManProc. This inspection was carried out on 4 October 2010. A copy of the report on the inspection was forwarded to the complainant, who submitted his observations on 12 October 2010.

22. On 28 February 2011, the Ombudsman submitted a proposal for a friendly solution to the Commission. The Commission sent its reply on 6 May 2011. This reply was forwarded to the complainant for his observations, which he sent on 12 May 2011.

23. On 20 May 2011, the Ombudsman asked the Commission for further information concerning its reply. The Commission provided this information on 2 August 2011. The Commission's reply was forwarded to the complainant for his observations, which he sent on 4 August 2011.

The Ombudsman's analysis and conclusions

Preliminary remarks

24. In its first opinion, the Commission took the view that the complaint was premature, as it had not yet taken a final position on the request for access. According to the Commission, it had been agreed that the complainant would decide whether or not to pursue his confirmatory application after it had published the 'Best Practices'. The Commission had therefore expected the complainant to come back to it and, if he wished to pursue his confirmatory application, to indicate which additional information he wished to receive. It added that it was therefore surprised that the complainant had turned to the Ombudsman instead. The Commission suggested that the complainant specify which information that was not covered by the 'Best Practices' he would like to obtain.

25. In his observations on this first opinion, the complainant stressed that the 'Best Practices' were not sufficient and that he wished to be given access to the Antitrust ManProc in its entirety.

26. Given that the complainant had accepted the Commission's proposal, made in its letter of 14 December 2009, to suspend the handling of his confirmatory application until the publication of the 'Best Practices', it could indeed be argued that it would have been useful for him to turn to the Commission again, so as to inform it that he did not consider the said publication to be sufficient to satisfy his request for access, before complaining to the Ombudsman. However, in its letter of 14 December 2009 the Commission had made it clear that the 'Best Practices' would correspond to the kind of partial access that could be granted to the Antitrust ManProc. Furthermore, the Commission's letter of 21 January 2010 referred to the complainant's confirmatory application of 9 October 2009 and expressed the hope that the publication of the

'Best Practices' and the provision of the index table of the Antitrust ManProc would satisfy the complainant's request. Given that this letter did not invite the complainant to comment, the complainant was entitled to consider that it constituted the institution's reply to his confirmatory application.

27. In these circumstances, the Ombudsman took the view that the complainant was not obliged to turn to the Commission again before complaining to him. The assumption that the present complaint was premature was therefore unfounded.

28. In its second opinion, the Commission maintained its position. It argued that there were no grounds to consider its letter of 21 January 2010 as a decision on the confirmatory application, as it did not refuse access to any document. The Commission submitted that it had not pursued the handling of the complainant's confirmatory application, since the complainant had not responded to its letter of 21 January 2010.

29. The Ombudsman is not convinced by these arguments. Seen against the background of the preceding correspondence, it is obvious that the letter of 21 January 2010 implicitly confirmed the Commission's position that no access could be granted to the Antitrust ManProc as such. If this letter had merely been intended to constitute a step in an ongoing discussion with the complainant, one would have expected the Commission to invite the complainant to comment on it and to explain whether his request for access had thus been satisfied. However, and as already mentioned, the letter of 21 January 2010 did not contain any such invitation. Moreover, the Commission's position would be unconvincing even if one were to accept that the complainant needed to react to the letter of 21 January 2010 before the Commission could proceed with the handling of his confirmatory application. In his complaint to the Ombudsman, the complainant made it clear that he was not satisfied by the Commission's letter of 21 January 2010. This complaint was forwarded to the Commission on 8 March 2010. In order to be consistent, the Commission would, on the basis of the position it claims to have taken, have had to decide on the confirmatory application at the very latest at that stage, or contacted the complainant in order to pursue its efforts to find a fair solution under Article 6(3) of Regulation 1049/2001. However, no such steps were taken. It is true that the Ombudsman had by then opened an inquiry into this case. However, this fact does not relieve an institution from its obligations to comply with its obligations under Regulation 1049/2001 if, in the institution's view, its examination of a request for access has not yet been completed.

A. Allegation of failure properly to handle the complainant's request for access and corresponding claim

Arguments presented to the Ombudsman

30. In its original opinion, the Commission pointed out that it had in the meantime published the 'Best Practices'. The Commission submitted that this document constituted a concrete effort by DG COMP to enhance the transparency and predictability of its antitrust procedures. Its main

purpose was to provide guidance for stakeholders and other interested parties on the day-to-day conduct of antitrust proceedings before the Commission. In the Commission's view, the complainant should specify which information, that was not covered by the 'Best Practices', he would still like to see.

31. In his observations, the complainant explained that, given that he had not seen the Antitrust ManProc, it was impossible for him precisely to indicate what information the latter contained that was not in the 'Best Practices'. The complainant surmised, however, that there had to be a great deal of such information. This was clear from a comparison of the 'Best Practices' and the table of contents of the Antitrust ManProc. It was also clear from a comparison of the 'Best Practices' and the entire body of practice of DG COMP. The complainant submitted that the Commission did not now argue that there was any basis in Regulation 1049/2001 for refusing to disclose the Antitrust ManProc to him. He added that when the Commission is asked for access to a given document under Regulation 1049/2001, it is obviously not sufficient for it to provide another entirely different document, written for a different purpose, and to claim that it provided some of the information in another form.

32. By way of illustration, and without limiting his request for access, the complainant noted that the Antitrust ManProc ought to deal with the following subjects:

- instructions on the criteria for determining what information companies may ask to be treated as confidential or business secrets;

- instructions on the conduct of meetings with company representatives and keeping records of telephone conversations with such representatives;

- instructions on social contacts with company representatives;

- instructions on requests to companies for information, and decisions requiring companies to provide information;

- instructions on giving documents submitted by one company to a company with opposing views or interests;

- instructions on when press releases should be issued about individual companies;

- instructions on the use and conduct of the procedures for commitments and settlements by companies;

- instructions on dealing with requests from companies for immunity and leniency, to ensure that companies are treated impartially;

- instructions on the timing of the adoption of decisions by the Commission, so as to ensure that they do not become public when relevant stock exchanges are open (market sensitive cases);

- criteria for deciding which documents are important enough to be sent to national competition authorities;

- instructions for setting up 'Peer review panels' and for consulting the Chief Economist;

- instructions on when interim measures should be considered;

- instructions on when the Commission should submit observations to national courts;

- instructions for ensuring that proposals concerning the amount of suggested fines are not disclosed outside the Commission;

- instructions on the calculation of fines;

- instructions on getting signatures from the Commissioners, and the mandates for delegation of signatures;

- instructions for ensuring that all submissions made to Commissioners other than the Commissioner for Competition, and to DGs other than DG COMP, are placed on the file of DG COMP;

- instructions for ensuring that submissions received after the Hearing Officer has certified in his or her final report that the rights of the defence have been respected, and before the Commission formally adopts the decision, are brought to the attention of the Hearing Officer, so that his or her certificate can be altered if necessary.

33. The complainant added that if, contrary to what one would expect, the Antitrust ManProc did not contain provisions with regard to any of these questions, that omission would also be of great importance and interest. Only disclosure of the entire Antitrust ManProc could allow interested parties to identify such omissions.

34. The complainant concluded by recalling that Regulation 1049/2001 now had to be interpreted and applied subject to the overriding requirements of Article 15 of the TFEU and Articles 41 and 42 of the EU Charter of Fundamental Rights.

35. In its second opinion, the Commission noted that the Antitrust ManProc was an internal website of DG COMP with links to a range of documents containing guidelines, background information, examples of cases, etc. The Commission reiterated its position that the Antitrust ManProc could not be disclosed as such. Making this documentation available would reveal the Commission's investigative strategy in this field of activity. This could be used by undertakings being investigated and by their legal counsel for adapting their behaviour in a way that may render deterrence of infringements of competition law more difficult. However, it was not excluded that parts of the Antitrust ManProc could be made public. This was why the Commission had decided to publish the 'Best Practices'.

36. The Commission noted that it was convinced that the best way forward was to pursue the dialogue with the complainant with a view to finding a 'fair' solution within the meaning of Article 6(3) of Regulation 1049/2001.

37. In his observations, the complainant submitted that the index regarding the contents of the Antitrust ManProc, which had been made available to him, clearly did not allow him to assess whether the 'Best Practices' provided satisfactory access to the Antitrust ManProc. The 'Best Practices' were less than a summary or a paraphrase of a small part of the Antitrust ManProc. Such a substitute was not what Regulation 1049/2001 obliged the Commission to disclose, i.e., the document itself.

38. The complainant submitted that the Commission had not given any explanations for its statement that granting access to the Antitrust ManProc would reveal its "investigative strategy", and it was hard to see how this could be true in relation to any of the parts of the Antitrust ManProc. In any event, this argument would not seem to fall under any of the exceptions to the Commission's duty to make its documents available.

39. The complainant further argued that disclosure of the Antitrust ManProc would have the following effects, among others:

- it would enable companies to see whether the Commission's instructions are being carried out;

- it would enable companies to see whether the Antitrust ManProc fails to ensure due process and respect for the rights of the defence, or whether it provides no rules at all, or allows officials unlimited discretion;

- it would enable companies to see what safeguards there are to ensure, e.g., that the Hearing Officer learns of submissions made to other Commissioners, or after he or she signs the final report and before the Commissioners take their decision;

- it would enable companies to see how far "panels" and the Chief Economist are arranged so as to prevent conflicts of interest;

- it would enable companies to see how far they could rely on assurances given to them, and to see who is responsible for any given step in the procedure.

40. The complainant concluded that, in short, disclosure of the whole Antitrust ManProc would enable companies to see what the officials' duties were, and whether they were carrying them out. This could not possibly involve or affect the "investigative strategy" of the Commission, which by definition must concern particular cases or priorities.

The inspection of the file

41. Having examined the arguments submitted by the complainant and the Commission, the

Ombudsman arrived at the conclusion that it was necessary to inspect the Antitrust ManProc.

42. On the occasion of this inspection, DG COMP's representatives explained that the Antitrust ManProc currently comprised some 40 modules, 22 checklists, 2 300 templates (including translations and archived draft versions of the templates) and 220 annexes (including legislation, notices and other public information). Upon examination, it emerged that the "modules" are what may be called more or less detailed papers on certain subjects. DG COMP's representatives subsequently confirmed that the 'Best Practices' document was drawn up on the basis of these modules.

43. DG COMP's representatives further explained that the Antitrust ManProc was constantly updated, where this was necessary. This could mean that the last revision of a given section had been carried out some time ago, where no need for updates had arisen in the meantime. The examination of the Antitrust ManProc showed that this was indeed the case. It also showed that the Antitrust ManProc contained links to certain documents such as opinions from the Commission's Legal Service on more general issues. DG COMP's representatives explained that these links would be removed once the relevant contents of these documents had been incorporated into the modules.

44. The examination of the Antitrust ManProc further showed that it contained links to information stored elsewhere on DG COMP's intranet, including on merger procedures.

45. DG COMP's representatives stressed that the Antitrust ManProc had been drawn up for internal use and was not accessible to third parties. They confirmed that it was not accessible to DG COMP's trainees either. It also emerged that certain parts are only accessible to certain officials within DG COMP. In addition to that, it emerged from the Antitrust ManProc that certain further information (such as a 'Vademecum for inspections'), which is not included in it, will only be made accessible to officials if and when necessary.

46. The Ombudsman's representative examined a considerable number of the sub-divisions of the Antitrust ManProc. He noted that most of the templates he inspected were indeed what the name suggests, i.e., mere structures without substantive contents that needed to be filled in where the need arises.

47. The Ombudsman's representative asked for and obtained screenshots of the second level of the Antitrust ManProc, that is to say, copies of those pages that open when one clicks on the headings set out in the table of contents that was made available to the complainant. He also asked for and obtained a copy of the module on "requests for information". DG COMP's representatives indicated that these documents should be considered confidential.

48. In his observations on the report on this inspection, the complainant confirmed that his request applied to all the documents covered by the Antitrust ManProc, including all those described as checklists and templates.

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

49. The Ombudsman noted that the Commission did not dispute that Regulation 1049/2001 is applicable to the Antitrust ManProc. It appeared useful to point out that Regulation 1049/2001 concerns access to documents held by an EU institution. The term 'document' is defined in Article 3 lit. a of Regulation 1049/2001 as meaning "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility".

50. The Antitrust ManProc contains a considerable number of documents, that is to say, modules, checklists, templates, annexes, flowcharts and links. According to the information provided by the Commission at the inspection, there were more than 2 500 such component documents. It was therefore essential first of all to ascertain, as precisely as possible, which of these documents were covered by the complainant's request for access.

51. In his letter to DG COMP of 30 October 2009, the complainant indicated that his request was limited to the Antitrust ManProc *strictu sensu* . This meant that the complainant's request for access did not cover those documents that were described, in DG COMP's letter of 29 October 2009, as references and links to publicly available documents, such as regulations, notices, published final decisions and court decisions, as well as documents from other DGs and services and documents that were not directly related to the instruction of cases within the meaning of Articles 101 and 102 of the TFEU. In particular, documents concerning the way in which DG COMP handles state aid cases or mergers were thus not covered by the complainant's request for access. Nor did this request extend to documents which, although relevant for DG COMP's approach to competition cases, are not included in the Antitrust ManProc, such as the 'Vademecum for inspections'.

52. In view of the above, the Ombudsman surmised that most of the links that figure in the boxes on the screenshots of the second level of the Antitrust ManProc, that is to say, copies of those pages that open when one clicks on the headings set out in the table of contents, would not fall under the complainant's request for access.

53. According to DG COMP, the Antitrust ManProc also contained archived draft versions of the templates that are to be used when handling competition cases. Given that the complainant's request for access appeared to be motivated by a wish to acquaint himself with the way DG COMP handles competition cases, the Ombudsman presumed that the complainant was not interested in these archived draft versions either.

54. Even taking into account the above considerations, the fact remained that the complainant's request for access concerned a large number of documents, at least some of which were fairly voluminous. According to the Commission, the modules alone comprised some 500 pages.

55. In his observations on the Commission's second opinion, the complainant noted that the

Commission had not referred to any concrete exception to the right of access when arguing that disclosure of the Antitrust ManProc would reveal its investigative strategy. This statement could be understood as suggesting that the Commission no longer wished to invoke any such exception. The Ombudsman considered that such an assumption would be unfounded. It was clear that the Commission continued to believe that its refusal to grant access to the Antitrust ManProc was justified by the two exceptions to which it referred in its letter of 5 October 2009, that is to say, Article 4(2), third indent and Article 4(3), first sub-paragraph of Regulation 1049/2001.

56. Article 4(2), third indent of Regulation 1049/2001 provides that access to a document shall be refused where disclosure would undermine the protection of "the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure".

57. Article 4(3), first sub-paragraph is worded as follows:

"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

58. The complainant argued that Article 4(3), first sub-paragraph of Regulation 1049/2001 could only apply to a specific case where a decision had not yet been taken. The Antitrust ManProc, which applied generally, could therefore not fall under this provision. The complainant further argued that DG COMP's reliance on Article 4(2), third indent of Regulation 1049/2001 was also completely unconvincing. He argued that the Antitrust ManProc could not contain 'sensitive internal information', since by definition it did not deal with specific cases. As regards the Commission's argument that disclosure of the Antitrust ManProc would disclose its "investigative strategy", the complainant submitted that this was not possible, since that strategy must by definition concern particular cases or priorities.

59. The Ombudsman did not find the complainant's arguments convincing.

60. Article 15(3) of the TFEU provides that "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph." Likewise, Article 42 of the Charter of Fundamental rights of the EU stipulates that "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium." [4]

61. The above provisions were implemented by Regulation 1049/2001, which is intended, as is apparent from its fourth recital and from its Article 1, to give the fullest possible effect to the right of public access to documents held by the EU institutions.

62. However, this right of access is subject to certain limitations set out in Article 4 of Regulation 1049/2001. Since they derogate from the principle of the widest possible public access to documents, the exceptions in Article 4 of Regulation 1049/2001 must be interpreted and applied narrowly. [5] Disclosure can thus only be refused if the institution can show that it could specifically and effectively undermine the interest protected by the relevant exception. [6] Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. [7]

63. Although it was thus clear that a strict standard needs to be applied when examining whether disclosure of a document undermines the purpose of inspections, investigations and audits (Article 4(2), third indent of Regulation 1049/2001) or seriously undermines the institution's decision-making process (Article 4(3), first sub-paragraph), the Ombudsman considered that there was nothing to indicate that this risk could only be relevant if it concerns specific cases. It was true that it will in all likelihood be easier to assess this risk in relation to documents concerning specific cases. However, this did not mean that such a risk cannot exist if a document concerns more than one case or even a multitude of cases. On the contrary, if disclosure of a document would have the said negative consequences not only as regards one specific case but for a multitude of cases, disregarding these consequences for the mere reason that they are not limited to one specific case would, in the Ombudsman's view, deprive the relevant exceptions of their useful effect precisely where this effect is most needed.

64. The handling of a request for access to a manual of procedures, such as the one at issue in the present case, is a classic example of that situation. However, regard indeed needed to be had to the fact that such a document does not concern a specific case but is intended to be used in all such cases handled by an institution. It was therefore particularly important to examine whether disclosure of such a document would specifically and effectively undermine the interest protected by the relevant exception, whether this risk was reasonably foreseeable and whether it was not purely hypothetical.

65. The Commission argued that disclosure of the Antitrust ManProc would be highly detrimental to the institution's decision-making process in the field of application of Articles 101 and 102 of the TFEU and would affect its ability to carry out an independent assessment of the facts before it. It further stated that, as any other public administration, the Commission needed a certain 'space to think' with a view to protecting its internal working procedures and decision-making process. These statements were clearly too general to establish that the exceptions invoked by the Commission applied in the present case.

66. However, the Commission also argued that the Antitrust ManProc contained sensitive internal information and guidance on the investigative procedure and techniques in antitrust investigations, including with respect to unannounced inspections, and that its disclosure would put in the public domain its investigation strategy and thus seriously undermine the successful conduct of future investigations and inspections in the field of antitrust enforcement.

67. The Ombudsman considered this argument to be convincing in principle. Even though the Commission's statement remained general in nature, it gave a sufficiently precise idea of the

kind of information that the Commission had in mind. If disclosure of the Antitrust ManProc were indeed to disclose DG COMP's investigation strategy, this could in fact seriously undermine the success of its mission to enforce, together with national competition authorities and courts, EU competition rules. Contrary to what the complainant submitted, the Ombudsman considered that the term "investigation strategy" did not necessarily focus on a given case, but could also cover DG COMP's approach to competition cases in general.

68. Given that the Commission limited itself to describing, in general terms, the concerns on the basis of which it considered itself entitled to refuse disclosure of the Antitrust ManProc, the Ombudsman did not find it useful to examine the entire contents of this document at this stage of the inquiry. However, the examination of those parts of the Antitrust ManProc that he did consider in detail led him to the conclusion that the exceptions invoked by the Commission could indeed be applicable in the present case.

69. At this stage, the Ombudsman did not consider it necessary further to examine whether disclosure could be refused on the basis of Article 4(2), third indent of Regulation 1049/2001), of Article 4(3), first sub-paragraph or of both provisions. In effect, and whatever provision was applied, it was clear that access could not be refused to the Antitrust ManProc in its entirety.

70. In particular, the Commission's concern that disclosing the Antitrust ManProc would make public its investigation strategy was clearly relevant as regards those parts of the Antitrust ManProc which concern the gathering of information. However, it was not immediately intelligible how the said concern could be relevant as regards those parts of the Antitrust ManProc that dealt with issues relating to file-keeping and access to the file, in which the complainant was particularly interested.

71. It followed from the above that at least partial access could and should have been granted to the Antitrust ManProc. The Commission's view that the Antitrust ManProc was covered by the above-mentioned exceptions in its entirety was clearly unfounded.

72. Before turning to the question of partial access, it was necessary to examine whether there was an overriding public interest in disclosure of the Antitrust ManProc. If such an interest existed, the Commission would of course have to give access to the Antitrust ManProc in its entirety and the issue of partial access would no longer be relevant.

73. The complainant put forward a number of considerations to support his view that there was an overriding public interest in disclosure of the Antitrust ManProc. The Ombudsman agreed that these considerations showed that the public could indeed have an interest in access to the Antitrust ManProc. However, they did not establish that this interest overrode the interests protected by the above-mentioned exceptions in Regulation 1049/2001. For example, it was true that very large fines are now being imposed by the Commission under Regulation 1/2003. However, regard had to be had to the fact that the Commission had published Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003. [8] The Commission had also published a Notice on immunity from fines and reduction of fines in cartel cases. [9] It should further be noted that the EU courts have unlimited jurisdiction to review

decisions imposing fines. [10] It was therefore not clear why the amount of the fines imposed by the Commission should give rise to an overriding public interest in disclosure of the Antitrust ManProc.

74. The Commission argued that the publication of the 'Best Practices' corresponded to the kind of partial access that could be granted to the Antitrust ManProc. The complainant took the view that it was not sufficient, in order to deal with a request for access to a given document under Regulation 1049/2001, to make available another entirely different document, written for a different purpose, and to claim that it provided some of the information in another form. The Ombudsman considered that the publication of the 'Best Practices' could only be relevant in the present context if this document indeed comprised all those parts of the Antitrust ManProc to which access can be given under Regulation 1049/2001. This was manifestly not the case. For example, a comparison of the module on "requests for information" and the relevant parts of the 'Best Practices' showed that the former contained a considerable amount of information that would not appear to be covered by the two above-mentioned exceptions but which was not covered by the latter. In fact, the relevant module covered around ten times as many pages as the relevant parts of the 'Best Practices'. It was noteworthy in this context that the Commission had pointed out that the preparation of the 'Best Practices', which comprise less than 30 pages, required a thorough assessment of roughly 500 pages.

75. In light of the above, the Ombudsman made the preliminary finding that the Commission had failed properly to handle the complainant's request for access to the Antitrust ManProc, and that such failure amounted to an instance of maladministration. He therefore made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman.

76. The Ombudsman considered it useful to offer some guidance as to what the Commission could do in order to bring its approach into conformity with what Regulation 1049/2001 requires. In this context, it appeared useful to distinguish between the modules on the one hand and the other parts of the Antitrust ManProc on the other hand.

77. As regards the modules, the Ombudsman was aware of the fact that examining some 500 pages of documents with a view to establishing what parts can be made accessible would require a considerable amount of work. The Ombudsman was clearly mindful of the need to avoid a disproportionate burden of work. It had to be noted, however, that the modules were to be found on an internal website of DG COMP, that is to say, that they were available in electronic format. Preparing these modules for public access would therefore not require any manual deletions of text on a printed copy, which would be particularly time-consuming.

78. As regards the other documents, in particular the multitude of templates, the Ombudsman agreed with the Commission's view that Article 6(3) of Regulation 1049/2001 was applicable. This provision is worded as follows: "In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution."

79. In order to enable the complainant to help find such a solution, he would however first have to be informed more precisely of what documents (other than the modules) the Antitrust ManProc actually comprises. In the Ombudsman's view, it was only on the basis of such information that the complainant could decide whether his request for access could be limited to certain documents. In the Ombudsman's view, granting the complainant access to the screenshots of the second level of the Antitrust ManProc, that is to say, copies of those pages that open when one clicks on the headings set out in the table of contents, could be a useful starting point, if necessary after having blanked out certain passages that are covered by the above-mentioned exceptions under Regulation 1049/2001.

80. Finally, regard had to be had to the fact that, as the Commission explained, the Antitrust ManProc was constantly updated, where this was necessary. The relevant request for access was made in 2009. The Ombudsman considered that it would nevertheless be in the interest of both parties if the Commission could, when deciding on how far access can be given, base itself on the version of the Antitrust ManProc available at that point in time.

81. On the basis of the above considerations, the Ombudsman made the following proposal for a friendly solution:

"Taking into account the Ombudsman's findings, the Commission could reconsider the complainant's request for access to the Antitrust ManProc with a view to granting partial access. In particular, it could consider (i) granting partial access to the modules and (ii) conferring with the complainant informally in order to find a fair solution as regards access to the other documents which form part of the Antitrust ManProc and which are covered by the complainant's request for access."

The arguments presented to the Ombudsman after his friendly solution proposal

82. In its reply, the Commission stated that it welcomed the Ombudsman's proposal. It confirmed its view that what it considered to be the very wide request made by the complainant could only be handled through a dialogue with a view to finding a fair solution. It added that the Antitrust ManProc, as a 'living' tool that was constantly updated and improved, had undergone significant modifications since the request for access had been made. The dialogue with the complainant could therefore give the latter the opportunity to discuss whether he might prefer having access to the disclosable parts of the current version rather than the 2009 version of the Antitrust Man.

83. The Commission therefore proposed to (i) examine the possibility of granting partial access to the modules and (ii) pursue the dialogue with the complainant as regards defining the exact scope of his application and agree on a schedule for handling his request for access to the documents falling within his request.

84. In his observations on this reply, the complainant submitted that the Commission had now

had plenty of time to "examine the possibility of granting partial access", but had failed to make any specific or meaningful proposal. He added that, whereas the Commission proposed to "pursue the dialogue", there had been no dialogue of any kind. As regards the Commission's proposal to "agree on a schedule", the complainant noted that it had made no suggestions for such a schedule. The complainant stated that it seemed to him that the Commission was merely seeking to delay any solution. He therefore asked the Ombudsman to ensure that the Commission carries out its obligations under Regulation 1049/2001, without allowing any further delay.

85. In view of the above, the Ombudsman asked the Commission to specify (i) when it proposed concretely to examine the possibility of granting partial access to the modules and (ii) when it would contact with the complainant in order to discuss the issue of access to parts of the Antitrust ManProc other than the modules.

86. In its reply, the Commission pointed out that, following the Ombudsman's proposal for a friendly solution, it had started working on producing a publicly disclosable version of the modules of the Antitrust ManProc. This process was already well under way. The Commission added that it had contacted the complainant on 7 June 2011 and that a meeting had been held on 14 June 2011. The complainant had stated that he was not interested in merely technical instructions (such as checklists) but those parts of the Antitrust ManProc that are of general interest to a larger audience. At this meeting, he had also clearly indicated that his interest was in a publication of the Antitrust ManProc by the Commission itself.

87. The Commission noted that the actual disclosure of the Antitrust ManProc was, however, also to be regarded in light of the publication of the final version of the 'Best Practices', which was currently being prepared and which was foreseen to be adopted as a Commission Notice. This Notice was likely to be adopted in October 2011. The Antitrust ManProc would have to be further updated later this year to reflect the changes made in the 'Best Practices'.

88. The Commission pointed out that it would therefore prefer to proceed with a general publication only when the Antitrust ManProc had been brought in line with the final version of the 'Best Practices'. It added that it had contacted the complainant on 27 June 2011 and that the latter had confirmed that he agreed to wait until the publication of the modules of the Antitrust ManProc.

89. The Commission concluded by stating that it proposed to continue its work on establishing a disclosable version of the Antitrust ManProc fully synchronised with the final version of the 'Best Practices', with a view to publishing it at the same time or shortly after the publication of the 'Best Practices', currently foreseen for October 2011. The complainant would promptly be informed when the Antitrust ManProc was published.

90. In his observations, the complainant confirmed that the Commission's reply correctly summarised what was discussed at the meeting on 14 June 2011.

91. The complainant noted that he would however wish to make two comments. First, he had

not been told which parts of the Antitrust ManProc would be disclosed, and which ones would not be disclosed, or what reasons might be suggested for not disclosing those parts. The complainant stressed that he could therefore not say whether the disclosure that the Commission would make would be sufficient to satisfy his complaint. Second, if only those parts of the Antitrust ManProc were to be disclosed that were relevant to the questions discussed in the 'Best Practices', the Commission would clearly not have fulfilled its obligations under Regulation 1049/2001.

The Ombudsman's assessment after his friendly solution proposal

92. The Ombudsman notes that the Commission has welcomed his proposal for a friendly solution and has taken steps with a view to implementing it. It emerges from the information provided by the Commission that the latter is in the process of preparing a version of the Antitrust ManProc that will be disclosed to the public and that it is foreseen that this document will be available in October 2011 or shortly thereafter. It further emerges that the complainant is in agreement with the proposed approach.

93. As the complainant has correctly observed, only after the publicly available version of the Antitrust ManProc has been completed and disclosed will it be possible to ascertain whether the Commission has complied with its duties under Regulation 1049/2001 and thus satisfied the complaint.

94. In these circumstances, the Ombudsman considers that there are no grounds to pursue the present inquiry. The complainant obviously remains free to submit a new complaint if he were to come to the conclusion that the version of the Antitrust ManProc which will be made publicly available by the Commission is not satisfactory.

B. Conclusions

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

There are no grounds for further inquiries into this case at present.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 26 September 2011

[1] OJ 2003 L 1, p. 1.

[2] OJ 2001 L 145, p. 43.

[3] Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, available on DG COMP's website.

[4] The complainant had also referred to Article 41 of the Charter. However, this provision concerns a person's right to have access to his or her file, and not the issue of public access to documents. It was therefore not relevant in the present context.

[5] See, for example, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63 and Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 36.

[6] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 49, and the judgment of 29 June 2010 in Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* , paragraph 53.

[7] Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 54.

[8] OJ 2006 C 210, p. 2.

[9] OJ 2006 C 298, p. 17.

[10] Cf. Article 30 of Regulation 1/2003.