

Decision in case 925/2019/MIG on the European Commission's refusal to grant public access to documents concerning the EU assessment of high-risk third countries in the context of the EU anti-money laundering/countering terrorist financing regime

Decision

Case 925/2019/MIG - Opened on 28/05/2019 - Decision on 17/07/2019 - Institution concerned European Commission (No maladministration found) |

The case concerned a request for public access to documents drawn up by the European Commission assessing the risk of money laundering and terrorist financing in 54 third countries. The Commission refused to make public the documents arguing that disclosure would undermine international relations, public security and the financial, monetary or economic policy of the EU.

The Ombudsman inspected the documents at issue and found that the Commission was justified in refusing access to the documents. She thus closed the inquiry finding no maladministration.

Background to the complaint

1. Money laundering, terrorism financing and organised crime pose a threat to the security of Member States and EU citizens, as well as to the financial system and the internal market. The EU has set up an anti-money laundering and counter terrorist financing (AML/CTF) regime. In this context, Member States entrusted the Commission with identifying countries, which have strategic deficiencies in their AML/CTF regime. To this end, the Commission assesses the risk of money laundering and terrorist financing in third countries and adopts delegated acts [1] listing the high-risk third countries it identifies. [2]

2. Parliament has a right to oppose the adoption of delegated acts (see footnote 1). The complainant, a Member of the European Parliament, has, in this context, had sight of documents drawn up by the Commission assessing the risk of money laundering and terrorist financing in 54 third countries (after signing a declaration that he would not disclose their content). In February 2019, he requested the Commission to grant him public access [3] to these documents (which he referred to as “*assessments (“country fiches”) of all 54 priority*



countries in the scope of the EU assessment on high-risk third countries under Directive (EU) 2015/849 with regard to strategic deficiencies in their AML/CFT regimes ”.)

3. The Commission refused to grant him public access to all 54 documents.
4. In March 2019, the complainant requested a review of the Commission’s decision to deny public access to the documents (he made a so-called ‘confirmatory application’).
5. The Commission extended the deadline for giving its response to 16 May 2019. However, it did not respond within the extended deadline.
6. On 22 May 2019, the complainant turned to the Ombudsman.

The inquiry

7. The Ombudsman opened an inquiry into the Commission’s refusal of public access to the 54 documents in question. Her inquiry team inspected the requested documents.
8. 8. The Ombudsman gave the Commission the opportunity to adopt an explicit decision on the complainant’s confirmatory application, which the Commission did. That decision was that access could not be granted.

Arguments presented to the Ombudsman

9. The Commission, when refusing access to the documents, relied on the exceptions aimed at protecting international relations, public security and the financial, monetary or economic policy of the EU or a Member State. [4] It argued that the documents contain sensitive information regarding the assessment of third countries, specifically the context, risk profile and level of deficiencies relating to their AML/CFT regimes, and the reasons why the Commission selected a country for the high-risk list. This information, it said, has not been shared with the third countries concerned. The publication of the documents might thus be perceived, by them, as a violation of their right to be heard and would have a negative diplomatic impact.
10. Moreover, the Commission stated, some of the information contained in the documents originated from third countries and international organisations. The disclosure of the documents would therefore undermine the relationship of trust with these parties and lead to an unwillingness on their part to share further information.
11. In addition, it said, the information contained in the documents could be exploited by criminals or terrorists, who could take advantage of existing deficiencies and shortcomings in the AML/CFT regimes of the third countries concerned before mitigating measures are put in place.



12. The Commission also argued that the disclosure of the requested documents would undermine its decision-making processes [5] . The Commission stated that it had drafted a delegated act listing the 54 countries identified on the basis of the assessments to which the complainant is seeking public access. The draft delegated act did not receive the necessary support during the legislative procedure and, therefore, did not enter into force. The Commission was thus invited to propose a new draft list of high-risk third countries. For this purpose, the Commission stated, it was updating the 54 assessments in question. It therefore took the view that disclosure, at this stage, would reveal preliminary views of policy options, which are still under consideration, thereby undermining its decision-making processes.

13. The exception for the protection of decision-making processes applies unless there is an overriding public interest. In this regard, the Commission said that it had not identified any such interest. Even if there was an overriding public interest, it argued, it would in any way not outweigh the harm that disclosure would cause to its decision-making.

14. Finally, the Commission stated that all 54 requested documents are covered in their entirety by the exceptions mentioned. Public disclosure of *any part* of the documents could therefore endanger the interests protected.

15. The complainant objected to the Commission's view that disclosure of the documents could undermine international relations saying that most of the third party evaluations on which the Commission's analysis is based are already in the public domain. It should therefore be possible for the Commission to grant at least partial access to its assessments.

16. As regards decision-making, the complainant argued that the Commission's decision-making process at issue, namely the adoption of a delegated act, had ended when the Commission's draft act was rejected during the legislative procedure. Thus, he said, the decision is no longer pending, which means that the Commission's decision-making processes cannot be undermined by the disclosure of the documents.

17. In addition, the complainant stated that there is an overriding public interest in disclosure that trumps the exception for the protection of decision-making. Specifically, it is in the public interest that entities, such as credit and financial institutions, that have a duty to identify, manage and mitigate the risk of money laundering and terrorist financing (so-called 'obliged entities' [6]), have as much information as possible. Disclosure of the Commission's assessments would enable these entities to apply the required risk-based approach, to warn public authorities of possible threats, or to terminate business relationships if warranted.

The Ombudsman's assessment

18. Having inspected the requested documents, the Ombudsman takes the view, based on the content, that the Commission was justified in relying on the exceptions for the protection of international relations, public security and the financial, monetary or economic policy of the EU or a Member State. In particular, while it is true that some of the evaluations on which the



Commission's own risk assessment is based on already public information, the 54 requested documents are not simply a compilation of third party evaluations. A significant amount of each of the documents constitutes the Commission's own analysis and assessment. In addition, the release of the documents would disclose which sources the Commission relied upon for its assessment (and which it did not), the conclusions it drew and how the Commission summarised some of the information it received.

19. Disclosure of this information would be likely to undermine international relations, especially since the Commission has not yet communicated its assessment to the third countries it has identified as high-risk countries. These countries have therefore not had the opportunity to make comments and/or to take mitigating measures to improve their AML/CTF regimes and, as a result, their risk level and their rating. Given that this implies the Commission considers there to be deficiencies and shortcomings in the relevant regimes that have yet to be addressed, disclosure of the documents could also likely undermine public security and, potentially, the EU's and/or Member States' financial, monetary or economic policy.

20. In the light of the inspection of the documents, the Ombudsman takes the view that it was reasonable for the Commission to apply the above exceptions to *all 54 documents in their entirety*. The documents contain sensitive information throughout. It was therefore appropriate for the Commission to conclude that granting partial access was not feasible.

21. Whilst the Ombudsman notes that the complainant has already had a degree of access to the documents, in his official role as an MEP, the test for public access is very different and the interests covered by the exceptions invoked by the Commission in this case themselves protect significant public interests on behalf of EU citizens.

22. The above exceptions are mandatory, which means they cannot be overridden by any other public interest. Therefore, the complainant's arguments regarding an overriding public interest in disclosure cannot be taken into account in this case.

23. Given that the exceptions could reasonably be applied to all 54 documents in their entirety, it was not necessary for the Commission to rely on the need to protect its decision-making processes. Nevertheless, the Ombudsman notes that the decision-making process in this instance is not in fact at an end, because the Commission has been asked to produce a new draft list of high-risk countries and it is clear that the assessments already made will have some relevance in that context.

24. Finally, and in any event, based on the inspection of the content of the requested documents, the Ombudsman considers that the public interest, in this case, is best served by their *not* being disclosed at the present time.

Conclusion

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



There was no maladministration by the Commission in refusing public access to the requested documents.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 17/07/2019

[1] Delegated acts are legally binding acts that enable the Commission to supplement or amend non-essential parts of EU legislative acts, for example, in order to define detailed measures. The Commission adopts a delegated act. If Parliament and Council have no objections to the act, it enters into force.

[2] For more information on the EU Policy on High-Risk Third Countries see:

<https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing> [Link].

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[4] Under Article 4(1)(a) of Regulation 1049/2001.

[5] Under Article 4(3) paragraph 1 of Regulation 1049/2001.

[6] See Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN> [Link].