

## **Draft recommendation of the European Ombudsman in his inquiry into complaint 422/2011/AN against the European Commission**

Recommendation

**Case 422/2011/AN - Opened on 23/03/2011 - Recommendation on 02/08/2012 - Decision on 24/01/2013 - Institution concerned** European Commission ( No further inquiries justified )

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Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### **The background to the complaint**

1. The complainant is a PhD researcher in European Union law. On 11 June 2010, pursuant to Regulation 1049/2001 [2] , he requested the Commission to grant him access to several documents dating from the years 1980 to 1992 which related to a number of issues that the complainant dealt with in the framework of his PhD research. Among other documents, which are not concerned by the Ombudsman's investigation into the present case, the complainant requested the disclosure of documents which were in the Commission's possession and which had been produced in the framework of judicial proceedings before the Court of Justice in cases C-279/80 [3] , C-113/89 [4] and joined cases C-62/81 and C-63/81 [5] (preliminary rulings).

2. On 18 June 2010, the Commission transferred the complainant's request to its Legal Service.

3. On 30 September 2010, the Commission extended the deadline for replying to the complainant's request by 15 working days, stating, on the one hand, that it had to deal with the complainant's request in light of the recent judgment of the Court of Justice in joined cases C-514/07P, C-528/07P and C-532/07P [6] (the 'API' judgment') and, on the other, that it had recently received numerous requests for access to documents.

4. On 20 October 2010, the Commission granted the complainant access to some of the requested documents, but refused to disclose the written pleadings submitted to the Court by Member States that intervened in the above cases (the 'third parties' written pleadings').

5. The Commission considered that third parties' written pleadings did not fall within the scope



of Regulation 1049/2001, inasmuch as Article 15(3) TFEU specifically provides that the Court of Justice is subject to the provisions of that Article only when it acts in its administrative capacity. Moreover, according to the *API* judgment, the public does not have a right to access documents submitted to the Court in the framework of judicial proceedings. The Commission added that only its own submissions to the Court were subject to Regulation 1049/2001 and these were released, while disclosure of third parties' submissions would contradict the purposes of Article 15 TFEU and of the Court's Rules of Procedure.

6. On 20 October 2010, the complainant submitted a confirmatory application. He challenged the Commission's position and stated that, in fact, Article 15(3) TFEU should only be understood as discharging the Court of the obligation to handle requests for access to documents, but not as excluding all documents that "*have passed through the Court*" from the Article's scope of application. If Article 15 TFEU were to be interpreted as the Commission suggested, then there would be no reason for the Commission to disclose its own pleadings, as it did. Moreover, the Commission's interpretation of the *API* judgment was erroneous.

7. On 7 December 2010, the Commission confirmed its decision not to grant the complainant access to the refused judicial documents, on the basis of the same arguments. The Commission also considered that according to the Court's Statute [7] and the Instructions to the Registrar, procedural documents are communicated only to the parties to the proceedings and, in exceptional cases and with the due authorisation of the President of the Court, to third parties who demonstrate a legitimate interest. Therefore, the Commission considered that the public does not have a right of access to the procedural documents submitted to the Court.

8. Moreover, according to recitals 2 and 10 of the Preamble to Regulation 1049/2001, the objective of that Regulation is to enable citizens "*to participate more closely in the decision-making process*" and to "*bring about greater openness in the work of the institutions*". In the Commission's view, neither of these two objectives was served by the disclosure of the documents requested by the complainant, which referred to judicial proceedings and which it only held in its capacity as a party to those proceedings.

9. The complainant turned to the European Ombudsman on 16 February 2011.

## **The subject matter of the inquiry**

10. The Ombudsman opened an inquiry into the following allegation and claim.

### **Allegation:**

The Commission wrongly failed to grant the complainant access to the documents submitted to the Court by third parties in case 279/80 *Alfred John Webb*, joined cases 62/81 and 63/81 *Seco, Desquenne & Giral* and case C-113/89 *Rush Portuguesa*.



## Claim:

The Commission should grant the complainant access to those documents.

## The inquiry

11. The Ombudsman opened his inquiry into the present complaint on 23 March 2011, by requesting the President of the Commission to submit an opinion on the allegation and claim mentioned in paragraph 10. On 26 May 2011, the Commission requested a deferment of the deadline to submit its opinion. It eventually submitted the opinion on 22 June 2011.

12. The Ombudsman forwarded the Commission's opinion to the complainant and invited him to make observations on it. The complainant did so on 4 July 2011.

13. The Ombudsman conducted further inquiries into the complaint by asking the Commission, on 16 September 2011, to reply to a number of additional questions.

14. The Commission replied on 19 December 2011. The complainant provided his comments on the Commission's reply on 28 February 2012.

## The Ombudsman's analysis and conclusions

### A. Allegation of wrong denial of access to the relevant documents and related claim

#### Arguments presented to the Ombudsman

15. In his complaint, the complainant emphasised that Regulation 1049/2001 refers both to documents drafted and to documents received by the institutions. Therefore, since the Commission had received the contested documents, it was irrelevant whether or not the Court was subject to transparency obligations. The complainant believed that, in fact, the Commission was seeking to avoid following the procedure of third party consultation foreseen by paragraphs (4) to (6) of Article 4 of the Regulation.

16. In its opinion, the Commission reiterated its views and stated that access to Court documents is governed by the Statute of the Court of Justice, the Rules of Procedure of the different courts and the Instructions to the Registrar. Article 20 of the Statute provides for the "*communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support*". Pursuant to the Rules of Procedure of the Court of



Justice (Article 16(5)), the General Court (Article 24) and the Civil Service Tribunal (Article 20(4)), only the parties to the proceedings can obtain copies of procedural documents. Moreover, paragraph 8 of Article 5 of the Instructions to the Registrar states that "[n]o third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President of the General Court or, where the case is still pending, of the President of the formation of the Court that is hearing the case, after the parties have been heard." In the Commission's view, this means that the documents which form part of judicial proceedings are not available to third parties for thirty years, after which the archives of the Court become public.

**17.** In his observations, the complainant submitted that the Commission's opinion was unsatisfactory and repetitive. The Commission was in fact trying to dissuade the complainant from requesting access to the relevant documents. Besides, two of the cases concerned by his requests were already 30 years old. Moreover, Article 15(3) TFEU only discharges the Court from the procedural obligations relating to access to its own documents, but does not exclude these documents as such from disclosure. In any case, the Commission is not the Court and is fully subject to Regulation 1049/2001 as regards the documents in its possession, whatever their origin.

**18.** In his further inquiries, the Ombudsman requested the Commission to reply to the following questions:

"1. The Commission states that the undisclosed documents in question are excluded from the field of application of Regulation 1049/2001. However, the Commission has dealt with the complainant's request concerning them under Regulation 1049/2001. Could the Commission please explain this inconsistency?

2. Has the Commission consulted the Court of Justice or the authors of the undisclosed documents concerning the possibility to grant the complainant access to them?

3. Could the Commission reconsider its position that court documents are excluded from the scope of Regulation 1049/2001 on the basis of the following considerations:

(a) Regulation 1049/2001 establishes that it is applicable to all documents held by the institutions, without excepting court documents; and

(b) In [the *API* judgment] the Court clearly held that access to the Commission's pleadings, which are court documents, should be assessed under that Regulation?

4. Could the Commission reconsider its position that it cannot grant the complainant access to the undisclosed documents on the basis of the following considerations:

(a) Articles 1 and 2 of Council Regulation 1700/2003 [8] provide that 'each institution ... shall establish its historical archives and open them to the public ... after the expiry of a period of 30 years starting from the date of the creation of the document' as regards "documents of



*whatever type and in whatever medium which have originated in or been received by one of the institutions';*

(b) Article 4(7) of Regulation 1049/2001 stipulates that the exceptions provided in Article 4(1) to (3) may apply for a maximum period of 30 years; and

(c) The undisclosed documents concerning case 279/80 *Alfred John Webb* and joined cases 62/81 and 63/81 *Seco, Desquenne & Giral* are or will, in the very near future, be 30 years old?"

**19.** In its reply, the Commission stated that it handled the complainant's request for access to documents in accordance with the procedure foreseen in Regulation 1049/2001 because the complainant made his request pursuant to that legal instrument. This did not contradict the Commission's position that the said Regulation was not applicable to the documents in question. Moreover, the Commission did not consult the Court or the authors of the relevant pleadings in order to deal with the complainant's request because Regulation 1049/2001 was not applicable.

**20.** The Commission emphasised that Article 3(a) *in fine* of Regulation 1049/2001 establishes a condition, namely, that the documents in the institution's possession should fall within the institution's sphere of responsibility ("*relèvent de la compétence de l'institution*", in the original reply). This was not the case with regard to the documents the complainant requested. Besides, in the *API* judgment, the Court of Justice clearly stated that the pleadings submitted by the institutions to the Court are "*more a part of the judicial activities of the Court than of the administrative activities of the Commission*". In any event, Regulation 1049/2001 cannot derogate from Article 15(3) TFEU. If the Commission disclosed the relevant documents, it would contravene the provisions of the TFEU and of the Court's Statute.

**21.** As regards the relevant documents concerning court cases which are more than 30 years old, the Commission stated that its Historical Archives Service had already informed the complainant that he could access the files in its possession.

**22.** In his comments on the Commission's reply, in addition to the arguments already put forward at previous stages of the procedure, the complainant rebutted the Commission's statement that the documents in its possession only fall under Regulation 1049/2001 if they fall within its own sphere of responsibility. Article 3(a) of the Regulation refers in fact to documents "*concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*". Following-up on the Court's judicial activities is a matter related to the activities falling within the Commission's sphere of responsibility. It is, indeed, the Commission's responsibility to ensure the application of EU law and, for this reason, it must follow the Court's work. The Commission must also promote developments in EU law, and many of its legislative proposals are based on the case-law. Besides, the relevant documents served as a basis, in full or in part, for the Commission's own pleadings to the Court in the cases concerned. Finally, the fact that the Commission dedicates time and resources to storing the relevant documents proves that their content relates, closely or not, to activities falling within its sphere of responsibility.



23. The complainant denied the relevance of the Commission's references to the Rules of Procedure of the three EU courts, inasmuch as they are only applicable to the documents held by them. Once the relevant documents are in the Commission's possession, they fall under Regulation 1049/2001. The *API* judgment recognised that the institutions' documents related to closed judicial proceedings are subject to transparency.

24. Finally, the complainant refused the Commission's offer to consult its Historical Archives, which it should have made when he submitted his request and was still in Brussels. The complainant was not willing to travel to Brussels and considered that, in order to rectify its erroneous refusal to disclose the relevant documents, the Commission should provide them to him in PDF format by e-mail.

## The Ombudsman's assessment

25. The Ombudsman first notes that the purpose of Regulation 1049/2001 is to "*give the fullest effect to the right of public access to documents and to lay down the general principles and limits on such access*" [9]. Access should be granted "*to **all documents** held by an institution, that is to say, documents **drawn up or received** by it and in its possession, in **all areas of activity** of the European Union*" [10] (emphasis added).

26. It is therefore clear that Regulation 1049/2001 defines the term "*document*" broadly, without excluding any category of documents, such as documents concerning court cases. Moreover, it lays down the principle that the origin or the author of a document is irrelevant to its scope of application. In the Ombudsman's view, this is not contrary to Article 15(3) TFEU, since Regulation 1049/2001 does not apply to the Court acting in its judicial capacity.

27. Therefore, both the wording and the spirit of Regulation 1049/2001 require that, if a document is in the Commission's possession, Regulation 1049/2001 applies and access or refusal of access to such document must follow the rules set out therein. This applies to court documents as well as to any other document. Suffice it to recall that, in the *API* judgment, the Court clearly held that access to the Commission's pleadings, **which are court documents**, should be assessed in light of that Regulation.

28. The Ombudsman, therefore, finds it surprising and regrettable that, in the present case, the Commission has adopted the position that Regulation 1049/2001 is not applicable to third parties' pleadings to the Court which are in the Commission's possession. This position is inconsistent with the principles on which Regulation 1049/2001 is based and with the express wording of that Regulation, as noted above.

29. As regards the Commission's arguments concerning the Court's Rules of Procedure, the Ombudsman points out that in paragraph 100 of the *API* judgment, the Court held that access to pleadings submitted to it would call into question "*the system of procedural rules **governing the court proceedings** before the EU Courts*" (emphasis added). The Ombudsman agrees with



the complainant's interpretation that the Court clearly referred to ongoing proceedings during which, indeed, the Court's internal rules foresee that copies of procedural documents should only be served on the parties. As previously mentioned, the documents which the complainant requested do not concern ongoing proceedings.

**30.** However, although court documents are not excluded from the application of Regulation 1049/2001, their content and nature must be taken into account when deciding upon disclosure, as the Court held in the *API* judgment. In this regard, the Court ruled that both Regulation 1049/2001 and Article 15(3) TFEU [11] pursue the same objective, namely to ensure that access to documents does not undermine the protection of judicial proceedings [12]. It also considered [13] that there is a "*general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending*" (emphasis added). If proceedings are already closed, however, "*there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court ...*" [14]. The documents here in question concern three cases that were closed long before the complainant submitted his request for access. Their disclosure could not, therefore, jeopardise any judicial proceedings.

**31.** The Ombudsman therefore concludes that Regulation 1049/2001 was fully applicable to the complainant's request for access to documents, and, when assessing that request, the Commission should have followed the procedure established in that Regulation. This included the Commission's obligation, pursuant to Article 4(4) of the Regulation, to consult the Court concerning the disclosure of the documents, inasmuch as it received them from the Court and they were, as such, 'court documents'. It also meant that, in the event that access was granted, it should have been in a format that corresponded to "*the applicant's preference*", if available, as foreseen in Article 10(1) of the Regulation.

**32.** The Commission's failure to assess the complainant's request for access to documents on the basis of Regulation 1049/2001 and, in the event that access was granted, to provide him with a PDF version of all the disclosed documents, as he requested, constituted an instance of maladministration. In view of the position adopted by the Commission in the present case, the Ombudsman considers that there is no reasonable prospect of achieving a friendly solution. The Ombudsman will, therefore, make a draft recommendation below.

## B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the European Commission:

**The European Commission should assess the complainant's request for access to documents on the basis of Regulation 1049/2001. In so doing, the Commission should (i) if necessary, consult the Court as regards the disclosure of the requested documents, pursuant to Article 4(4) of the Regulation, and (ii) in the event that access is granted,**





**disclose the documents in the format preferred by the complainant, if available, pursuant to Article 10(1) of the Regulation.**

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 October 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 2 August 2012

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] 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 L145, p. 43.

[3] Case 279/80 *Alfred John Webb* [1981] ECR 3305.

[4] Case C-113/89 *Rush Portuguesa Ltd v Office national d'immigration* [1990] ECR I-1417.

[5] Joined cases 62/81 and 63/81 *Seco and Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223.

[6] Joined cases C-514/07P *Sweden and API v Commission* , C-528/07P *API v Commission* and C-532/07P *Commission v API* [2010] ECR I-8533.

[7] Article 20(2): "*The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.* "

[8] Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, OJ 2003 L 243, p. 1.

[9] Recital 4.

[10] Article 1(3).





[11] Former Article 255 EC.

[12] See paragraph 84 of the *API* judgment in which the Court held: "[t]hus, it follows both from Article 255 EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings".

[13] Paragraph 94.

[14] Paragraph 131.