

## **Decision in case 1802/2019/EWM on the European Commission's refusal to provide access to a letter to Germany in an infringement procedure for non-respect of the Nitrates Directive**

Decision

**Case 1802/2019/EWM - Opened on 09/10/2019 - Decision on 28/11/2019 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned the refusal of the European Commission to grant the complainant public access to a document in an ongoing infringement procedure. The procedure concerns the implementation of the European Court of Justice's judgment finding that Germany had infringed the Nitrates Directive.

Following an inspection of the documents, the Ombudsman confirmed that the infringement procedure was still ongoing and that the Commission's refusal was legally justified.

The Ombudsman thus concluded that there was no maladministration on the part of the Commission and closed the case.

### **Background to the complaint**

1. This case concerns a request for public access to a document related to an infringement procedure.
2. In 2013, the European Commission initiated infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU) against Germany for failure to fulfil its obligations under the Nitrates Directive. [1] In that context, in 2016, the Commission brought the case before the European Court of Justice. On 21 June 2018, the Court found that Germany had failed to fulfil its obligations under the Nitrates Directive. [2]
3. Following the judgment, the Commission and the German authorities undertook negotiations as regards the implementation of this judgment.
4. A German newspaper reported on 21 May 2019 that the European Commission had sent a letter to the German Federal Ministry for Agriculture and to the German Federal Ministry for the



Environment cautioning them that Germany would be referred to the European Court of Justice again unless Germany tightened its rules on the use of fertilisers.

5. The complainant, a German resident, requested the Commission to give him access to the letter referred to in the newspaper article.

6. The Commission identified the document as a letter dated 15 May 2019. It refused to grant access to that letter. After his confirmatory application was refused, the complainant turned to the Ombudsman on 27 September 2019.

## The inquiry

7. The Ombudsman opened an inquiry into the Commission's refusal to grant access to the requested document. In the course of the inquiry, the Ombudsman inspected a copy of the document.

## Arguments examined by the Ombudsman

8. The Commission argued, in its decisions refusing access to the letter, that the letter of 15 May 2019 was part of ongoing negotiations between the Commission and the German authorities on how to implement the judgment of the European Court of Justice. The Commission explained that it considered the progress made by the German authorities in implementing the judgment to be insufficient and that it had therefore transmitted to Germany a letter of formal notice on 25 July 2019 in accordance with Article 260 TFEU. Such a letter of formal notice is the first stage in the pre-litigation procedure in which the Commission leads a dialogue with the Member State to enable the latter to comply with the judgment of the European Court of Justice in the procedure under Article 258 TFEU.

9. The Commission stated that EU law recognises the existence of a general presumption that disclosure of documents in an ongoing infringement procedure would undermine the protection of the purpose of inspections, investigations and audits. [3] It considered that although this case law was developed in the context of infringement proceedings under Article 258 TFEU, it also applies to proceedings under Article 260.

10. The Commission explained that public disclosure of the letter could negatively affect the dialogue between the European Commission and Germany for which the climate of cooperation and mutual trust is essential. Public disclosure at this stage of the proceedings would essentially deprive the German authorities of their legitimate expectation of loyal cooperation by the Commission in the framework of infringement proceedings. The Commission considered that disclosure would also prevent it from deciding on its position free from external influence and risk undermining the dialogue with the Member State concerned.

11. The complainant considered that the Commission should disclose this letter. He argued that



based on publicly available information, the letter does not appear to relate to the infringement procedure itself, but only contains the information that such an infringement procedure will be initiated unless Germany complies with the Nitrates Directive.

**12.** The complainant further explained that he had also asked the recipients of the letter, namely the two German federal ministries concerned, for access to the letter. He stated that both ministries refused to grant access to the letter due to the protection of international relations. He stated that the Federal Ministry for the Environment had consulted the Commission, but the Commission had refused to release the document at this stage.

## The Ombudsman's assessment

**13.** This case concerns an infringement procedure that is taking place after the European Court of Justice had found that a Member State had infringed EU law. [4] This procedure aims at bringing the Member State concerned to comply with the Nitrates Directive, in line with the judgment of the European Court of Justice. It consists of two stages, an administrative pre-litigation stage and a judicial stage, again before the Court of Justice. One of the aims of the pre-litigation stage is to give the Member State concerned the chance to comply with the Directive amicably. If this objective is achieved the Commission will close the case. Such an outcome is in the public interest because it means that the Directive will be properly implemented by the Member State concerned without the need to bring the issue to court again (which would be time-consuming and costly for all parties).

**14.** In order to achieve such amicable settlements, it is necessary to foster and maintain a degree of mutual trust. The EU courts have ruled that public access to documents related to an infringement procedure that is still ongoing at the time of the request for access can undermine the necessary 'climate of mutual trust' between the Commission and the Member State. [5] The EU courts have therefore recognised that there is a general presumption that public access to the documents relating to an infringement procedure during the pre-litigation stage thereof jeopardises the achievement of the objectives of that procedure. [6]

**15.** In this case, the Ombudsman has confirmed through an inspection that the document requested by the complainant relates to an ongoing infringement procedure. It can therefore be presumed that disclosing the requested document would in principle undermine the protection of the purpose of the infringement procedure. [7]

**16.** Even if a general presumption applies, a complainant still has the right to have the requested document disclosed if there is a public interest greater than the reasons justifying the refusal to disclose. However, only particular circumstances that make the principle of transparency especially pressing can constitute an overriding public interest. [8]

**17.** The complainant argues that various newspapers have already covered the most important aspects of the letter at issue. The Ombudsman considers that the fact that some of the information contained in the document concerned may already be in the public domain does not



constitute an exceptional or pressing circumstance that would justify overriding the general presumption of non-disclosure at the present time.

18. The Ombudsman notes that the complainant can make a new access to documents request once the infringement procedure in question is closed.

## Conclusion

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

**There was no maladministration by the European Commission in refusing public access to the requested document.**

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

Fergal Ó Regan

Head of Inquiries - Unit 2

Strasbourg, 28/11/2019

[1] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources:  
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01991L0676-20081211&from=EN> [Link].

[2] Judgment of the European Court of Justice of 21 June 2018 in Case C-543/16, [Commission v Germany](#) [Link], EU:C:2018:481.

[3] Judgment of the Court of Justice of 14 November 2013 in joined cases C-514/11 P and C-605/11 P [LPN and Republic of Finland v European Commission](#) [Link], ECLI:EU:C:2013:738, paragraphs 55, 65-68 and judgment of the General Court of 11 December 2001 in case

T-191/99, [Petrie and Others v Commission](#) [Link], ECLI:EU:T:2001:284, paragraph 68.

[4] See Article 260(2) of the Treaty on the Functioning of the EU:  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT> [Link].



[5] Judgment in LPN and Republic of Finland v European Commission, cited above, paragraphs 65-68.

[6] Judgment in LPN and Republic of Finland v European Commission, cited above, paragraph 70.

[7] According to Article 4(2), third indent, of Regulation No 1049/2001.

[8] Judgment of the European Court of Justice of 21 September 2010 in Case C-514/07, [Sweden and others v API and Commission \[Link\]](#), EU:C:2010:541, paragraph 156.