

Decision in case 253/2021/MIG on the time taken by the European Commission to deal with a request for public access to a document concerning the transport of breeding cattle to non-EU countries

Decision

Case 253/2021/MIG - Opened on 11/02/2021 - Decision on 19/03/2021 - Institution concerned European Commission (No maladministration found) |

The case concerned a request for public access to a list containing information, originating from Member State authorities, on the transport of live cattle from Germany to countries outside the EU. The European Commission decided to extend the time limit of 15 working days for its reply to the request, which the complainant deemed not to be justified.

The Ombudsman found that it was reasonable for the Commission to consider the case to be 'exceptional' due to a parallel ongoing procedure on a similar request from the complainant. In that case, the Commission was about to overrule the German authorities' objections to disclosing a document, and wanted to wait to find out if the German authorities would challenge that decision in court. The Commission was also waiting for comments from the German authorities on the request in this case. The Ombudsman therefore concluded that the Commission was justified in extending the time limit for its reply.

However, the Ombudsman also found that the Commission should have provided the complainant with more information to explain why it extended the time limit. While she refrained from making a formal finding of maladministration, the Ombudsman closed the inquiry urging the Commission to reply to the complainant's access request without further delay.

Background to the complaint

1. The complainant, a journalist representing a German public TV station, is investigating the transport of live animals from the EU to non-EU countries.
2. On 28 December 2020, the complainant asked the Commission to give him public access [1] to information on this subject, which is recorded in its TRACES [2] database. This was the third time he made such a request. [3] In particular, the complainant requested a list of data on the exports of breeding cattle from Germany to non-EU countries, covering the year 2020. He



wanted a list that indicated the respective local authority responsible, the number of transports that took place, the number of cattle exported, and the destination countries of those transports.

3. On 25 January 2021, the Commission informed the complainant that it would not be able to reply to his request within the prescribed time limit, set out in the EU's rules on public access to documents (Regulation 1049/2011). The Commission therefore extended the deadline to 16 February 2021.

4. On the next day, the complainant objected to this extension, asking the Commission to reply to his access request by 29 January 2021.

5. When he did not receive a reply from the Commission, the complainant turned to the Ombudsman on 30 January 2021.

6. On 10 February 2021, the complainant informed the Ombudsman that he had still not received any reply from the Commission, neither to his complaint about the extension of the time limit nor to his access request.

The inquiry

7. The Ombudsman opened an inquiry into the complainant's position that the Commission was not justified in extending the applicable time limit to reply to his request for public access.

8. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. The Ombudsman's inquiry team also inspected correspondence between the Commission and the German authorities from which the information at issue in the request originates [4] .

Arguments presented to the Ombudsman

9. The complainant was concerned that the legal requirements for an extension of the time limit in question by 15 working days are not fulfilled.

10. He considered that the case is not "exceptional" [5] given that he has previously made two access requests for similar documents pertaining to earlier periods, and that his access request does not concern "a very long document" or "a very large number of documents". Rather, the list he is seeking access to is easily retrievable from the Commission's TRACES database.

11. The complainant also contended that the reasons for the extension provided by the Commission, namely that "[a]n extended time limit is needed as the documents requested originate from third parties which have been consulted" , are not sufficiently detailed.



12. The Commission replied that the information recorded in the TRACES database originates from the German authorities. As Member States may request that documents originating from them are not disclosed by the EU institutions, the Commission consulted the German authorities. Given that the German authorities did not reply before the expiry of the prescribed time limit (26 January 2021), the Commission had to extend that time limit. The Commission also took the view that it had provided sufficient reasons to the complainant for the extension of the time limit.

13. In addition, the Commission argued that this case is exceptional, in that, the complainant has previously made a similar access request concerning a different period, which the Commission had still been dealing with when extending the time limit. In that case, the German authorities objected to the disclosure of parts of the requested list but, on 11 February 2021, the Commission decided to overrule the German authorities' objection and to give the complainant unrestricted access to the requested list. However, the Commission had to wait to find out if the German authorities would appeal this decision before it could eventually disclose the list at issue to the complainant. The Commission concluded that it would, therefore, not have been appropriate to reply to the complainant's access request before it was in a position properly to assess the implications of its decision on his previous similar request.

14. The complainant contended that the Commission's comments are incoherent. When extending the time limit, the Commission had not made it clear that it was still awaiting the German authorities' response.

15. The complainant added that the Commission has, in the meantime, extended the time limit again, so that he has still not received a reply. He considered that how the Commission is dealing with his access request is against the spirit of Regulation 1049/2001. Given that the Commission has taken a final decision on his second access request in February, the complainant said he does not understand why the Commission has not - at the very least - disclosed a redacted version of the requested list, as it did in the context of the two similar access requests he had made.

The Ombudsman's assessment

16. The EU's rules on public access to documents require EU institutions assessing a request for access to a document originating from a third party to consult the third party concerned, unless it is obvious that the document can be disclosed. [6] If that third party is an EU Member State authority, it can request that the document not be disclosed. [7]

17. In light of these rules and given that the EU institutions have to assess each request for public access to documents individually, the Ombudsman considers that it was reasonable for the Commission to consult the German authorities in this case.

18. However, even where it is necessary to consult a third party, the EU institution is nevertheless obliged to adhere to the prescribed time limit of 15 working days. [8] Whilst this



time limit can be extended once, this is possible in exceptional circumstances only. [9]

19. The Ombudsman does not consider that the fact that the document at issue originates from a third party in itself constitutes an exceptional circumstance. This is clear from EU case law, according to which Member States that are being consulted in the context of an access procedure must engage in genuine dialogue with the institution *“without delay”*, *“while paying attention in particular to the need to enable the institution to adopt a position within the [applicable] time-limits”*. [10]

20. However, in the course of the inquiry, the Commission clarified that it considers this case to be exceptional given the circumstance of a similar access request by the complainant, which was still ongoing when it extended the time limit in this case, and in relation to which it has overruled the Member State’s objections to disclosure. In addition, the Commission explained that there has been a delay in the Member State’s response.

21. Having reviewed the correspondence between the Commission and the German authorities, the Ombudsman considers that it was reasonable for the Commission to await the response of the German authorities. This was delayed by a few working days only (it was received by the Commission one working day after the expiry of the 15 working day time limit). The German authorities already responded to the Commission in relation to the complainant’s previous access requests. Furthermore, at the time of the extension of the time limit, it was also foreseeable that the response would be provided shortly. The Ombudsman therefore considers that the Commission was justified in extending the time limit.

22. However, the Commission did not outline to the complainant this reasoning. It merely informed him that the documents originated with a Member State, which it had consulted. Based on this explanation, the complainant was not in a position to understand why the Commission considered that the extension of the applicable time limit was necessary. Consequently, he could not ascertain whether the extension of the time limit was justified, and therefore concluded that it was not.

23. The Ombudsman understands that, at the time, the Commission may not have wished to disclose to the complainant that it intended to overrule the German authorities’ objections in the procedure on his previous access request. However, the Commission could have informed the complainant about the delay in the German authorities’ response and about when it was expecting to receive it.

24. The Ombudsman also notes that the Commission did not reply to the complainant’s complaint about the extension of the time limit. The Ombudsman regrets that the Commission did not use this opportunity to provide the complainant with additional explanations and thus missed the chance to resolve his complaint at an early stage.

25. In light of the above, the Ombudsman finds that the Commission failed to provide the complainant with sufficient reasons for extending the time limit, as required by the applicable rules [11]. However, the Ombudsman refrains from making a formal finding of



maladministration or a recommendation in this case, as this would serve no practical purpose, given that the extended time limit has already expired.

26. However, the Ombudsman notes with concern the considerable delay that occurred in relation to the processing of the complainant's previous access request [12], as well as the fact that the Commission has failed to reply to the complainant's access request in this case within the extended time limit, which expired on 16 February 2021.

27. The Ombudsman understands that delays may occur due to the challenging circumstances resulting from the COVID-19 pandemic. However, she notes that this access request is the third attempt by the complainant to obtain timely information from the Commission related to his work as a journalist. Given that the German authorities did not take court action in relation to the Commission's decision to disclose the document under the previous access request and that the document at issue in that case has been fully disclosed in the meantime, the Ombudsman urges the Commission to swiftly reply to the complainant's access request at issue in this case.

Conclusion

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

There was no maladministration by the Commission in considering that the access request constituted an 'exceptional case' within the meaning of Regulation 1049/2001. However, the Ombudsman notes with concern that the extended time limit has expired and that the Commission has still not taken a decision. She urges the Commission to reply to the complainant's request for public access immediately.

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

Emily O'Reilly European Ombudsman

Strasbourg, 19/03/2021

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

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

[2] TRACES is an online platform that allows for the exchange of data/documents with a view to obtaining the certification that is required for the importation/exportation/intra-EU trade of animals, animal products, food and feed, and plants. For more information, see:

https://ec.europa.eu/food/animals/traces_en [Link].



[3] The Commission's refusal of a similar request previously made by the complainant was subject to the Ombudsman's inquiry 73/2021/MIG, see:

<https://www.ombudsman.europa.eu/en/decision/en/138911> [Link].

[4] In accordance with Article 4(4) and (5) of Regulation 1049/2001, the Commission was therefore required to consult the German authorities concerning the request.

[5] Within the meaning of Article 7(3) of Regulation 1049/2001.

[6] In accordance with Article 4(4) of Regulation 1049/2001.

[7] In accordance with Article 4(5) of Regulation 1049/2001.

[8] In accordance with Article 7(1) of Regulation 1049/2001.

[9] In accordance with Article 7(3) of Regulation 1049/2001.

[10] See, for example, judgment of the Court (Grand Chamber) of 18 December 2007, *Sweden v Commission*, C-64/05 P, paragraph 86:

<http://curia.europa.eu/juris/showPdf.jsf?docid=71934&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1> [Link].

[11] In accordance with Article 7(3) of Regulation 1049/2001.

[12] See the Ombudsman's inquiry into complaint 73/2021/MIG, footnote 3.