



Decision on the European Commission's refusal to provide public access to the annex to a letter sent by the French Minister of the Interior to the European Commissioner for Jobs and Social Rights concerning volunteer firefighters in France (case 1291/2021/DL)

Decision

Case 1291/2021/DL - Opened on 23/07/2021 - Decision on 08/09/2021 - Institution concerned European Commission (No maladministration found) |

The case concerned the refusal by the European Commission to disclose an annex to a letter concerning volunteer firefighters in France.

The Commission refused access to the document arguing that disclosure could undermine the protection of ongoing court proceedings and legal advice.

The Ombudsman's inquiry team examined the document and found that the Commission's refusal to disclose the document was justified and in line with the EU rules on public access to documents. The Ombudsman thus closed the inquiry finding no maladministration.

Background to the complaint

1. In February 2018, in a case concerning a volunteer firefighter in Belgium (hereafter: '*the Matzak judgment*'), the Court of Justice of the European Union issued a judgment on the interpretation of the terms 'working time' and 'rest periods', as stipulated in the EU Directive on the organisation of working time. [1]
2. On 10 September 2020, the French Minister of the Interior wrote to the European Commissioner for Jobs and Social rights concerning the impact of the *Matzak judgment* [2] on the status of volunteer firefighters in France. In his opinion, it could not be inferred from this judgment that French volunteer firefighters should be classified as 'workers' within the meaning of the EU Directive on the organisation of working time. To support his statement, the Minister attached a document that pinpointed "*the profound differences*" of the French volunteering regime when compared with the Belgian one at issue in the judgment (hereafter: 'the annex'). He asked the Commissioner for his opinion on the matter.
3. In October 2020, the European Commissioner replied. He had examined the regime applicable to volunteer firefighters in France. He noted that the judgment does not imply that any volunteer firefighter must automatically be regarded as a 'worker'. On the contrary, each individual case must be examined on the basis of its own characteristics and by the



national courts, taking into account the criteria developed by the Court of Justice.

4. The complainant, a French trade union, wished to have access to the letter of 10 September 2020, together with its annex, sent by the French Minister of the Interior to the Commissioner.

5. Consequently, between November 2020 and April 2021, the complainant wrote several times to the French national authorities asking them to provide access to the letter concerned. While the French authorities disclosed the letter, they refused access to the annex.

6. The complainant then asked the European Commission, in February 2021, for public access to the annex. [3]

7. In March 2021, the Commission issued its initial decision. [4] After consulting the author of the document, namely the French national authorities, and having carried out its own assessment of the document under the EU rules on public access to documents, the Commission refused access based on the need to protect court proceedings and legal advice [5].

8. The complainant then asked the Commission to review its decision (making what is known as a 'confirmatory application').

9. In June 2021, the Commission confirmed its decision to refuse access.

10. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman in July 2021.

The inquiry

11. The Ombudsman opened an inquiry into the Commission's refusal to provide public access to the annex of the letter of 10 September 2020.

12. In the course of the inquiry, the Ombudsman's inquiry team inspected the annex to which access was refused.

Arguments presented to the Ombudsman

13. The **complainant** argues that, even though the issues set out in the document are central to many ongoing court proceedings and litigation, it needs access to the annex to understand and monitor the commitment by the French Minister of the Interior in the context of EU legislation. The complainant clarifies that it is not involved in any court proceeding on the issue.

14. The complainant also sets out in detail why it is dissatisfied with the position set out by the French Minister.



15. The **Commission** says that it consulted the author of the annex, the French authorities, to obtain their view on its disclosure. [6] The authorities objected twice to its disclosure. They explained that the document contains a legal opinion, which consists of confidential information, such as the position of the French Minister of the Interior concerning a number of court proceedings pending before the French courts [7] . Moreover, several elements of the document relate to two cases pending before the Court of Justice of the EU which have a direct link with the *Matzak Judgment* . [8] Disclosure of the annex could thus enable the parties to these proceedings to view the French authorities' arguments in advance of the adversarial debate and thus create an imbalance.

16. The Commission says that, in line with the EU rules on public access to documents, it is under an obligation to verify whether the explanations given by a Member State appear to be, at first sight , well founded. [9] The Commission concluded that the reasons put forward justified the refusal to disclose the annex in question.

17. The Commission also carried out its own assessment and considered that disclosure could harm both court proceedings and legal advice. [10]

18. As regards the protection of court proceedings, the Commission agrees with the French authorities that the annex contains a legal analysis used in several pending court cases in France, to which French public bodies are parties, as well as in the context of two preliminary rulings before the Court of Justice of the EU. Disclosure would undermine the principle of *equality of arms in pending court proceedings* , as it would reveal the legal position of the French authorities on issues pending before the courts. [11] The Commission also says that the argument that the complainant itself was not involved in these proceedings is irrelevant, as documents that are disclosed under the EU rules on public access are available to the public.

19. As regards the protection of legal advice, the Commission states that disclosure would undermine the legal opinion on the issue of the legal regime applicable to the activity of French volunteer firefighters. This opinion was communicated confidentially to the Commission in order to inform it of a very complex and sensitive issue currently under discussion. The risk of undermining the interest protected by the legal advice is reasonably foreseeable and not purely hypothetical.

20. Lastly, the Commission says that the general statement that access is needed since "*a trade union needs to carry out its monitoring functions* " cannot be considered an overriding public interest in disclosure. Moreover, partial access could not be granted.

The Ombudsman's assessment

21. The Ombudsman notes that the Commission consulted the French authorities to obtain their views on disclosure of the annex, in line with the EU rules on public access to documents [12] . The latter opposed disclosure twice and provided extensive explanations as to why its release could undermine ongoing court proceedings.



22. According to EU case law [13] , it is not for the institution to carry out an exhaustive assessment of the Member State's decision to oppose disclosure by carrying out an audit, which goes beyond verifying the mere existence of a statement of reasons referring to the exceptions under the EU rules on public access to documents. Rather, the institution shall conduct a careful examination to check whether the explanations given by the Member State to oppose the disclosure appear to it, at first sight, well founded. [14]

23. The Ombudsman finds that the Commission carefully examined the explanations provided by the French authorities and was justified in concluding that the reasoning given by the French authorities was, at first sight, well founded. Moreover, the Ombudsman welcomes the fact that the Commission set out extensively its own reasoning as to why it considered the document could not be disclosed.

24. Having inspected the annex, the Ombudsman's inquiry team confirms that it contains the views of the French authorities on the matter of the legal regime applicable to the activity of volunteer firefighters in France. As indicated by the Commission, it concerns issues that are under judicial review before an administrative court in France and that are subject to two preliminary rulings before the Court of Justice of the EU.

25. In this regard, the Ombudsman notes that the exception related to ongoing court proceedings also applies to documents which have not been drawn up in the context of specific court proceedings. In particular, the integrity of proceedings and the equality of arms between the parties could also be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party which is closely connected to the legal aspects of proceedings. [15]

26. The Ombudsman therefore finds the Commission's reasoning that disclosure could undermine ongoing court proceedings to be justified and in line with EU case law.

27. The Ombudsman also considers that the general referral to the complainant's monitoring functions is not sufficient to constitute an overriding public interest in disclosure. Moreover, having inspected the annex, it is clear that no meaningful partial access can be granted.

28. Thus, there was no maladministration by the Commission in refusing access to the annex concerned.

Conclusions

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

There was no maladministration by the European Commission.

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

Rosita Hickey Director of Inquiries



Strasbourg, 08/09/2021

[1] Directive 2003/88/EC concerning certain aspects of the organisation of working time, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088> .

[2] Judgment of the Court of 21 February 2018, *Ville de Nivelles v Rudy Matzak*, Case C-518/15, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-518/15> .

[3] In line with Article 6 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32001R1049> .

[4] It identified one document as falling within the scope of the request, namely « *Les sapeurs-pompiers volontaires français* », annexé à la lettre du 10 septembre 2020 de M. Gérald Darmanin, Ministre de l'Intérieur, au Commissaire Nicolas Schmit, relative à la situation des sapeurs-pompiers volontaires français au regard de la directive 2003/88/CE sur le temps de travail, réf. Ares(2020)5015526.

[5] Article 4(2), second indent, of Regulation 1049/2001.

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

[7] Such as case K. TBAIBI v SDMIS, No 2001495 and case Remy A.SDIS of Ain No. 1807900.

[8] Judgment of the Court of 9 March 202, *RJ v Stadt Offenbach am Main*, C-580/19 and Reference for a preliminary ruling from the Labour Court of Ireland of 20 May 2020 , *MG v Dublin City Council* , C-214/20 .

[9] See *inter alia*, the judgment of 6 February 2020, *Compania de Tranvias de la Coruna v Commission* , T-485/18, paragraph 70; judgment of 5 April 2017, *France v Commission*, T-344/15, paragraph 54, and the judgment of 21 November 2018, *Stichting Greenpeace Nederland and PAN Europe v Commission*, T-545/11 RENV, paragraph 44.

[10] Article 4(2), second indent, of Regulation 1049/2001.

[11] Judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, paragraph 88.

[12] Article 4(4) of Regulation 1049/2001.

[13] Judgment of 6 February 2020, *Compania de Tranvias de la Coruna v Commission* , T-485/18, paragraph 69.

[14] *Ibid*, paragraph 70.



[15] Judgment of the General Court of 15 September 2016 in case T-18/15, *Philip Morris v Commission*, paragraph 65.