

Recommendation on a refusal by the European Commission to grant public access to the correspondence with Denmark in a state aid file, closed in 2005 and related to an employment scheme (case 358/2020/PB)

Recommendation

Case 358/2020/PB - **Opened on** 08/07/2020 - **Recommendation on** 10/11/2021 - **Decision on** 08/06/2022 - **Institution concerned** European Commission (Recommendation agreed by the institution) |

The European Commission refused to disclose its correspondence with the Danish authorities in a state aid file that was closed one and a half decades ago. The correspondence was about the legality of legislation introducing a scheme that was intended to help unemployed persons find a job. A Danish trade union sought access to the correspondence.

The Commission relied on a 'general presumption of confidentiality' to refuse disclosure of the documents. Despite two solution proposals by the Ombudsman, it refused to examine the correspondence to decide whether it could be disclosed. The Commission considered that, in general, disclosure of any of the content of state aid files, even 15 years after the state aid investigation has been finalised, would harm the trust between itself and the Member States.

The Ombudsman notes that the application of the 'presumption of confidentiality' is a possibility, not an obligation. The presumption can be rebutted and, as an exception to the fundamental principle of providing access to documents, must be applied strictly.

The Ombudsman identified a number of elements that show the Commission could have dealt with the request in a more citizen-friendly and service-minded manner, by examining the limited number of documents in question in order to decide whether they could be disclosed. These elements include the passage of time, the absence of commercial or other third party or otherwise sensitive information in the documents, their limited number, the fact that the Danish authorities had themselves recently disclosed some of the documents, and lastly the public interest in uncovering possible widespread misuse of cheap state-subsidised labour.

Therefore, the Ombudsman makes this recommendation to the Commission that it should examine the documents in question.



Made in accordance with Article 4(1) of the Statute of the European Ombudsman [1]

Background to the complaint

1. Almost twenty years ago, Denmark planned to create a 'back to work' scheme intended to help unemployed persons find a job. It involved subsidised traineeships, which meant that some companies would benefit from subsidised labour. The Danish authorities contacted the European Commission to ensure that the scheme would be in line with the EU's rules on state aid.

2. Denmark's correspondence with the Commission on this matter took place in 2003-2004. [2]

3. In 2019, the complainant, a trade union, requested public access to that correspondence under the EU rules on public access [3] .

4. The Commission (Directorate General Competition) refused to disclose the correspondence, referring to the interest in protecting the purpose of investigations [4] . It informed the complainant that established case-law recognises the existence of a "*presumption of confidentiality that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities*" [5] . Regarding the fact that the state aid procedure was closed many years earlier, the Commission quoted judgments to the effect that the presumption of confidentiality may be relied upon after the closure of the procedure. The judgments referred extensively to the interest in protecting commercial information and the interest in ensuring that undertakings cooperate in antitrust investigations.

5. On the issue of whether there was a public interest that would override confidentiality in this case [6] , the Commission said that the complainant had not put forward arguments to demonstrate such an interest.

6. The complainant asked the Commission to review its refusal to disclose the documents (by making what is known as a 'confirmatory application').

7. As regards the Commission's reference to concerns about commercially sensitive information and the case-law cited, the complainant observed that the documents it had asked for in all likelihood did not contain commercial information or involve companies, but concerned only the compliance of Danish legislation with EU law.

8. The complainant moreover informed the Commission about media reporting about possible misuse of the 'back to work' scheme, which had warranted the attention and response of the Danish government. It argued that this demonstrated a 'public interest' that would override the confidentiality relied on by the Commission.

9. The Commission rejected the complainant's request for review. It held in particular that the mutual trust that must govern the relations between a Member State and the Commission in



state aid matters would be undermined if it were to disclose exchanges with a Member State. It stated:

“The European Commission has been so far successful in fostering a genuine dialogue with Member State authorities [in state aid matters] . Such dialogue requires an atmosphere of mutual trust and a free exchange of views and information related to the investigations. The ability to have such an exchange of views, free from external pressure, is a key component for the success of the investigative activities.

The disclosure to the public of the documents in question would thus seriously undermine the effective state aid control under [...] Article 108 of the Treaty on the Functioning of the European Union and the capacity of the European Commission to preserve the climate of mutual trust. The release, contrary to the specific rules on the confidentiality of information exchanged within the State aid investigation, of the requested documents would indeed have a detrimental effect on the atmosphere of mutual trust between the Commission and the Member States. Such disclosure would thus affect future discussions between the Commission services and national authorities because the quality of such discussions depends heavily on the full, frank and thorough exchanges. This is only possible with the assurance of confidentiality of these exchanges.

The Court recognised in the Agrofert judgment [7] and confirmed in the AlzChem ruling [8] , relating in particular to State aid investigations, that disclosure of information gathered in the context of State aid procedure under Article 108 TFUE would risk jeopardising the willingness of the Member State to cooperate with the European Commission in the framework of State aid investigations even after the definitive closure of the case, thus seriously jeopardising any future decision-making process of the institution and the purpose of the investigations.”

10. With regard to the complainant’s argument that there was an overriding public interest that required disclosure, the Commission stated that there was no public interest: “... you represent [a Danish trade union] (...) which would qualify the interests in this case as private, not public. ” The Commission also stated that “ Given that the case did not raise general issues with state aid, the general considerations of the media interest in alleged misuse of the scheme in relation to low-paid jobs are not sufficiently specific and pressing to overturn the confidentiality and provide access to the documents.”

11. The complainant then turned to the European Ombudsman.

The inquiry

12. The Ombudsman’s inquiry team inspected the documents the complainant had requested and subsequently met with the staff of the Commission.

13. The Ombudsman twice proposed to the Commission that it should examine the documents requested to decide whether they should be disclosed or not [9] . The documents form part of a



state aid file that was closed a very long time ago (one and a half decades ago); the content of the documents pose no issues in terms of commercial or other third party information; the number of documents was limited and hence manageable in terms of assessing; and the information contained in the documents was not sensitive. In her second proposal, the Ombudsman drew to the Commission's attention the fact, reported by the complainant during this inquiry, that the Danish authorities had in fact granted public access to several key documents to which the Commission had refused access in the interest of maintaining the trust of Member States.

14. The Commission rejected the Ombudsman's proposals.

15. The complainant maintained its complaint.

The Ombudsman's assessment after the proposals for a solution

16. The issue in this case is whether the Commission dealt with the complainant's request in accordance with the principles of good administration.

17. In refusing the complainant's request, the Commission relied on the general presumption of confidentiality as concerns state aid files. This means that disclosure of the documents requested was refused without the Commission examining them [10] .

18. It must be recalled that reliance on a general presumption is an *option* and not an obligation. [11] Moreover, it is clear from case-law that the presumption is a *rebuttable* presumption. [12] It also follows from case-law that a general presumption of confidentiality, as an exception to the fundamental principle of providing access to documents, must be applied *strictly* . [13]

19. It follows that the Commission cannot apply the general presumption mechanically. It cannot turn the confidentiality of closed state aid files into an absolute rule. That would be at odds with the case-law mentioned above that requires it to exercise judgement, considering the specific case.

20. In the case at hand it was readily clear to the Commission that it would be highly unlikely that there was any commercially sensitive information specific to any company in the documents. The documents pertained to a file that does not concern aid to specific companies but a state aid *scheme* which concerns an undefined plurality of companies, determined in an abstract and general manner. [14] The Commission should have taken that into consideration when dealing with the complainant's request.

21. To refuse access to the documents, the Commission has also referred to the mutual trust that must govern the relation between the Commission and a Member State in state aid matters. The Ombudsman does not question in any way the need for that mutual trust which may require



confidentiality.

22. However, the time that has elapsed since events took place is generally a very relevant factor when deciding on the need to keep documents confidential. [15] As concerns infringement proceedings, for example, the Court of Justice has also found it relevant to establish a distinction as to whether the proceedings are on-going or closed and there is no general presumption of confidentiality as concerns definitively closed infringement cases. [16] The Commission has not referred to any case-law that states that the general presumption of confidentiality applies to definitively closed state aid cases, that is cases where there is no pending follow-up/court procedures.

23. In this case, the Commission knew when the request was made that the case had been closed for around one and half decades. It did not consult the Member State concerned with a view to ascertaining whether that Member State would consider the mutual trust betrayed if the documents were disclosed. The subsequent fact that the Member State concerned, Denmark, disclosed documents to the complainant shows that, *as a matter of fact*, the Commission would have been well advised to consult with the Danish authorities, instead of dismissing the complainant's request outright.

24. The Ombudsman also finds it relevant to note that the complainant's request was not extensive. The documents at issue amount to fewer than 200 pages. The Commission has not argued that it would imply excessive work to examine the documents to decide whether they should be disclosed or not.

25. The complainant had also argued that there is an overriding public interest that requires at least some disclosure of the documents at issue. It referred to the fact that the documents concern a national employment reinsertion scheme that was suspected of having serious systemic flaws. Those flaws include possible widespread misuse of cheap state-subsidised labour, an issue that has been raised in the Danish media [17] and which warranted the Danish government's attention.

26. By way of reply on this point, the Commission said, first, that the complainant represented private interests (*"you represent [a Danish trade union] (...) which would qualify the interests in this case as private, not public."*).

27. However, it does not follow from the existence of a private interest (individual or organisational) that the matter cannot at the same time constitute a public interest. A private interest in a matter does not cancel out or make impossible the existence of a public interest. Whether an overriding public interest exists is an issue that needs to be determined objectively on the facts.

28. Second, the Commission stated that *"Given that the case did not raise general issues with state aid, the general considerations of the media interest in alleged misuse of the scheme in relation to low-paid jobs are not sufficiently specific and pressing to overturn the confidentiality and provide access to the documents."*



29. It would seem that the Commission would require a general issue of state aid to be raised in order to consider that an overriding public interest is at stake. It is hard to see why the notion of 'overriding public interest' should be understood so narrowly and why examining possible "widespread misuse of cheap state-subsidised labour" would not qualify. It is also difficult to follow what the Commission means by 'general considerations of the media interest' not being 'sufficiently specific and pressing' - the matter was discussed in the largest Danish daily papers.

30. Against this background, the Ombudsman holds that the Commission did not deal with the complainant's request in accordance with principles of good administration. It could have dealt with the request in a forthcoming, citizen-friendly and service-minded manner, and examined whether the documents could be released. The Commission has not argued that there is a legal obstacle that bars it from dealing with the request in such a manner.

Recommendation

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

The Commission should examine the documents to which public access was requested, to decide whether the documents can be disclosed.

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 4(2) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by 28 February 2022.

Emily O'Reilly European Ombudsman

Strasbourg, 10/11/2021

[1] Available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3
[Link]

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[2] State aid file, COMP/N 172/03.

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



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

[4] Article 4(2), third indent, of Regulation 1049/2001: “ *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(...)

- the purpose of inspections, investigations and audits ”

[5] Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH* , paragraph 50 et seq.,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0139> [Link]

[6] Regulation 1049/2001 provides that the exceptions relied on by the Commission in this case shall apply

“ unless there is an overriding public interest in disclosure ”.

[7] Judgment of the Court of Justice of 28 June 2012, *European Commission v Agrofert* , C-477/10 P,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0477> [Link], paragraph 66:

“In view of the nature of the interests protected in the context of merger control proceedings, the conclusion drawn at paragraph 64 of the present judgment applies regardless of whether the request for access concerns control proceedings which have already been closed or proceedings which are pending. The publishing of sensitive information concerning the economic activities of the undertakings involved is liable to undermine their commercial interests irrespective of whether the proceedings are pending. Furthermore, the prospect of such a publication after the review procedure is closed could jeopardise the willingness of undertakings to cooperate when such proceedings are pending.”

[8] Judgment of the General Court of 7 September 2017, *AlzChem AG v European Commission* , T-451/15,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=194201&pageIndex=0&doclang=EN&mode=lst&> [Link], paragraphs 53-57:

“53 In that regard, it must be recalled that, in merger control proceedings, the prospect of publication, after the closure of such proceedings, of sensitive information concerning the economic activities of the undertakings involved could have an adverse effect on the willingness of undertakings to cooperate when such proceedings are pending (see, to that effect, judgment of 28 June 2012, Commission v Agrofert Holding, C-477/10 P, EU:C:2012:394, paragraph 66). It follows that cooperation with the interested parties during an investigation procedure must be maintained.



54 As regards procedures for reviewing State aid, it must be observed that the documents pertaining to those procedures fall within a framework of administrative tasks specifically assigned to the EU institutions by Article 108 TFEU.

55 The Member State responsible for the granting of aid has moreover a specific role, since it has, in the course of the procedure for reviewing State aid, the right to consult the documents in the Commission's administrative file, unlike other interested parties (see, to that effect, judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61).

56 Furthermore, it is essential that there should be sincere cooperation and mutual trust between the Commission and the Member State responsible for the granting of aid, in the context of investigations concerning the compatibility of State aid with the internal market, so that the various parties should be in a position freely to express their views.

57 It follows from the foregoing that, for the same reasons as relied on in merger control proceedings, stated in paragraph 55 above, and taking into account the particular position of the Member State concerned in the context of a procedure for reviewing State aid, it must be recognised that, as a general rule, the disclosure of documents pertaining to those investigations would jeopardise dialogue and, consequently, cooperation between the Commission and that Member State."

[9] First proposal: <https://www.ombudsman.europa.eu/en/solution/en/148979> [Link] Second proposal: <https://www.ombudsman.europa.eu/en/solution/en/148980> [Link]

[10] It should be noted that the Commission did not list the documents, and the Ombudsman did not consider it necessary to ask it to do so (cf. judgment of the General Court of 28 May 2020 in case T-701/18, *Campbell v European Commission*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018TJ0701> [Link]). The object of the complainant's access request was a clearly identified part of the file here in question (namely the correspondence between the Commission and the Danish authorities).

[11] Judgment of the Court of Justice of 22 January 2020, *Therapeutics International v EMA*, C-175/18 P, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0175> [Link], paragraphs 61: "It follows that recourse to a general presumption of confidentiality is merely an option for the EU institution, body, office or agency concerned and the latter always retains the possibility of carrying out a specific and individual examination of the documents in question to determine whether they are protected, in whole or in part, by one or more of the exceptions laid down in Article 4 of Regulation No 1049/2001."

[12] Judgment of the Court of Justice of 13 March 2019, *AlzChem AG v Commission*, C-666/17 P, paragraph 38-39, <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:62017CJ0666> [Link]

[13] Judgment of the General Court of 29 September 2021, *AlzChem v Commission*, T-569/19,



<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019TJ0569> [Link], paragraph 42 : *“In the same way that the case-law requires that the exceptions to disclosure referred to in Article 4(2) of Regulation No 1049/2001 be interpreted and applied strictly, inasmuch as they derogate from the principle of the widest possible public access to documents held by an EU institution, body, office or agency (judgments of 21 July 2011, Sweden v MyTravel and Commission, C 506/08 P, EU:C:2011:496, paragraph 75, and of 3 July 2014, Council v In ’t Veld, C 350/12 P, EU:C:2014:2039, paragraph 48), the recognition and application of a general presumption of confidentiality must be considered strictly (see, to that effect, judgment of 16 July 2015, ClientEarth v Commission, C 612/13 P, EU:C:2015:486, paragraph 81).”*

[14] Cf. also the definition of a state aid scheme in the Procedural Regulation on State aid, Regulation 2015/1589, Article 1: “ ‘aid scheme’ means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;”

[15] This is for instance reflected in Article 4(7) of Regulation 1049/2001 which provides that the exceptions to public access to documents *may* apply for a maximum of 30 years.

[16] Cf. judgment of the Court of Justice of 21 September 2010 in case C-514/07, *Sweden and Others v API and Commission* , paragraphs 121-122, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0514>, and judgment of the General Court of 14 February 2012 in case T-59/09, *Germany v Commission* , paragraphs 78-79 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62009TJ0059>): “(...) *by contrast with an infringement procedure which is still under way, there is no general presumption that the disclosure of exchanges between the Commission and a Member State in the context of an infringement procedure which has been closed would adversely affect the purposes of the investigations, as referred to in the third indent of Article 4(2) of Regulation No 1049/2001.*” (Paragraph 78.)

[17] For instance *Ekstra Bladet* , Monday 16 December 2019.