

Report on the meeting of the European Ombudsman inquiry team with representatives of the European Commission

Correspondence - 08/07/2022

Case 925/2022/LDS - **Opened on** 10/05/2022 - **Decision on** 29/11/2022 - **Institution concerned** European Commission (No further inquiries justified) |

Case title : How the European Commission dealt with two requests for public access to documents concerning the Swedish and Danish national plans under the Recovery and Resilience Facility

Date : Thursday, 30 June 2022

Remote inspection arrangements

Present

European Commission Representatives

SG

Deputy Head of Unit - Transparency, Document Management & Access to Documents

Senior Expert - Coordinator for inter-institutional Relations

Legal and Policy Officer - Access to Documents

Legal and Policy Officer - Access to Documents

SG RECOVER

Deputy Head of Unit - Interinstitutional relations, Steering Board Secretariat

Policy Officer – Access to Documents



Head of Unit - Italy, Finland, Sweden, Denmark – European Semester

Head of Unit - Bulgaria, Romania, Croatia, Slovenia - Business Environment, Public Administration

Policy Officer – Denmark, Ireland – Energy, Environment, Mobility, State aid

Policy Officer - Germany, Austria, Portugal, Ireland, Malta - Social Affairs, Education, Health

ECFIN

Head of Unit - Economies of the Member States I - Bulgaria, Romania, Sweden

Senior Expert - Economies of the Member States III - Denmark, Ireland, Portugal

LEGAL SERVICE

Legal Officer

European Ombudsman's Representatives

Leticia Díez Sánchez, Inquiries Officer

Tanja Ehnert, Inquiries Coordinator

Peter Dyrberg, Inquiries and Process Expert

Louisa Jakobsson, Inquiries Trainee

Purpose of the meeting

The purpose of the meeting was for the Ombudsman inquiry team to clarify certain questions that arose when inspecting the documents at issue in case 925/2022/LDS.

Case 925/2022/LDS concerns the Commission's refusal to give public access to documents on the evaluation of the Swedish and Danish Recovery and Resilience Plans (RRPs), as part of the European Recovery and Resilience Facility (RRF). The Commission registered the request as GESTDEM 2021/5985 (Swedish RRP) and GESTDEM 2021/5460 (Danish RRP).

The Commission refused (full) access to some of the documents it identified as falling within the scope of the request, based on the fourth indent of Article 4(1) (a) (protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State), the first subparagraph of Article 4(3) (protection of the decision-making process) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation



1049/2001.

Prior to the meeting, the Ombudsman inquiry team shared with the Commission the questions it wanted to discuss, which concerned mostly the Commission's application of the above exceptions to refuse public access to documents in Regulation 1049/2001.

Introduction and procedural information

The Ombudsman inquiry team introduced themselves, thanked the Commission representatives for meeting with them and set out the purpose of the meeting. It then outlined the legal framework that applies to meetings held by the Ombudsman, in particular, that the Ombudsman would not disclose any information identified as confidential to any person outside the Ombudsman's Office, without the prior consent of the Commission.

The Ombudsman inquiry team explained that a report on the meeting would be drawn up and that the draft would be sent to the Commission for review to ensure it was factually accurate and complete.

Information exchanged

The European Commission asked for the confidential treatment of all documents not (fully) disclosed to the complainant.

A representative from the Legal Service of the Commission informed the Ombudsman inquiry team that a similar case, concerning access to documents relating to the Spanish RRP, is currently pending before the General Court of the European Union [1]. The documents at stake in case T-77/22 are, he said, either related or analogous to the ones identified in GESTDEM 2021/5985 and GESTDEM 2021/5460, the requests investigated by the Ombudsman in this case. The Legal Service representative explained that the General Court will eventually rule on the correctness of the Commission's use of the exceptions provided in Articles 4(1)a, fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State), 4(1)b (protection of privacy and the integrity of the individual) and 4(3) first subparagraph (protection of the ongoing decision-making process) of Regulation 1049/2001, which had also been invoked by the Commission in this case. The General Court will also rule on the existence of an overriding public interest capable of prevailing over the interest protected by Article 4(3) first subparagraph, as alleged by the applicant and contested by the Commission.

The representatives from SG RECOVER then provided some context to the purpose and functioning of the RRF.

After this introduction, the Commission representatives proceeded to respond to the questions that the Ombudsman inquiry team had shared before the meeting.



GESTDEM 2021/5460 - Danish RRP

1. On the application of the exception in Article 4(1)a, fourth indent (protection of the public interest regards the financial, monetary, economic policy of the Union or a Member State) of Regulation 1049/2001

a) Could the Commission please explain on what basis it came to the conclusion that (full) disclosure of some of the identified documents could undermine the public interest as regards the financial, monetary or economic policy of Denmark? For example, on what basis did the Commission refuse access to the three attachments to document 23 (Ares(2021)2656043)?

The representatives from SG RECOVER explained that the documents in question contain information that has a direct impact on the ongoing process of monitoring and evaluating the implementation of the Danish RRP. The RRP is an important instrument, containing key reforms and investments to address challenges identified in country-specific recommendations under the European Semester framework of economic and social policy coordination. The RRF mobilises important financial support to Denmark and the measures in the RRP are clearly linked to the financial and economic policies of Denmark and the EU. They therefore have an impact on both the Danish economy and the economy of the EU as a whole. The European Commission considers that disclosing the information in the documents could put into question projects that are currently in the implementation phase, and create financial issues if the Member States were not in a position to implement the milestones and targets it agreed to (and therefore could not receive the relevant payments under the RRF). Furthermore, this could expose Denmark to unjustified speculations that could destabilise its economic and financial policy.

As regards the example, SG RECOVER representatives noted that the three attachments to document 23 (Ares(2021)2656043) relate to measures in the RRP on tax deduction schemes for green R&D, road transport and agriculture, which account for a substantial part of the allocation from the RRF to Denmark. These documents contain detailed information on R&D expenditures, some broken down to NACE codes, of different companies. In the same group of documents, there is information on costing concerning two of Denmark's most important economic sectors: transport and agriculture. Disclosing the information could have important macroeconomic effects on Denmark that could impact the EU economy as a whole.

The Ombudsman inquiry team asked the Commission to clarify the differences between the documents to which the complainant was refused access and the information that was publicly available. The representatives from SG RECOVER responded that the documents contain more detailed information about potential investments on an individual business level that is not reflected in the Danish RRP or the Commission published assessment documents.

The Ombudsman inquiry team noted that the Danish authorities, when consulted by the Commission on the disclosure of the identified documents, did not invoke the exception in



Article 4(1)a, fourth indent, but stated that some of the documents identified would contain sensitive commercial information, as protected by Article 4(2) of Regulation 1049/2001. As regards document 23 (Ares(2021)2656043), that is, an email from the Danish authorities to the Commission with three attachments, the Danish authorities did not oppose the disclosure of the three attachments. Nevertheless, the Commission refused access to the three attachments in their entirety.

In reply, the Commission representatives said that, while Denmark did not oppose to the disclosure of the three attachments in question, it remains nonetheless the responsibility of the Commission to decide on the document's disclosure. The process of approving an RRP is long and difficult, containing numerous exchanges between the Member State concerned and the Commission. Even if in this case the Member State did not oppose to the disclosure of the three attachments, the Commission took the view that disclosing these documents was likely to harm the public interest as regards the financial, monetary or economic policy of Denmark.

b) Could the Commission please explain how concretely (full) disclosure of some of the identified documents would have undermined the public interest as regards the financial, monetary or economic policy of the EU, based on concrete examples from the non-disclosed documents? For example, how would (full disclosure) of some of the documents have led to "interferences and speculations at each step of the negotiation process, and eventually entail risks to financial stability"?

SG RECOVER representatives provided the example of the components assessment fiches of the Green Tax Reform, which contain internal exchanges between different Directorates-General of the Commission. These exchanges relate to technical aspects whose sharing could be detrimental to the implementation of the reform in Denmark. This would be true even after the RRP has been approved, as the plan can be updated and amended throughout the implementation phase of the project, and the implementation of the reform is ongoing.

SG RECOVER also noted that the RRF has the particularity of being financed by the EU based on funds raised on financial markets. Negative impact in the implementation in one Member State would also have an impact on the EU as a whole as the EU is directly exposed to possible risks of speculations which could have an impact on the EU's position on the financial markets, the conditions under which it borrows and reimburses funds.

II. Why did the Commission not rely on the exception in Article 4(2) (protection of commercial interests) of Regulation 1049/2001, as suggested by the Danish authorities?

The Commission representatives explained that, although the Danish authorities were consulted in the assessment of the access request, the Commission is ultimately responsible for the final decision on the request and is not obliged to follow the Member State's position. The Commission's assessment is based on broader considerations than those taken into account by national authorities. It is for this reason that the Commission can choose to refuse access to documents although a Member State does not oppose it. It can also do so on different grounds than those presented by a Member State.



III. On the application of the exception in Article 4(3), first subparagraph (protection on an ongoing decision-making process) of Regulation 1049/2001

a) The Danish RRP was adopted by the Council on 13 July 2021. Could the Commission please clarify which decision-making process was still ongoing at the time of the adoption of the confirmatory decision?

SG RECOVER representatives explained that there was a factual mistake in the confirmatory decision, as the Danish RRP had already been adopted at the time the confirmatory decision was issued. However, the representatives of SG RECOVER noted that the decision-making process continues even after the adoption of the RRP, for several reasons.

Firstly, in some cases negotiations are still ongoing as to the operational arrangements between the relevant Member State and the Commission.

Secondly, Member States may update and amend their national RRP, as set out in the RRF Regulation. For example, because of the updated Member States' maximum financial contribution published on 30 June 2022, or the launch of the RePowerEU plan. On the latter, the Commission has proposed (proposal currently being discussed by EP/Council) that Member States include a new chapter in their national plans on EU energy independence and/or the amendment of existing provisions on energy projects and reforms to take advantage of additional funding.

Thirdly, the assessment of milestones and targets by the Commission is closely linked to the national plans and the preparatory documents used to draft and evaluate them. Indeed, the implementation of the national measures described in the RRP by the Danish authorities is currently ongoing, and financial support will be provided by the Commission only upon fulfilment of the corresponding milestones and targets. So far, Denmark has not introduced any payment requests, and assessment of the milestones and targets will take place in the context of the future payment requests.

The Ombudsman inquiry team asked the Commission to explain in more detail how seemingly different decisions (that is, the Council decision approving the RRP, the Commission decision approving the disbursement of assistance following the positive evaluation of milestones, and the Council decision approving the amendment of a RRP) can be considered part of the same decision-making process.

SG RECOVER representatives responded that the decision-making process can extend as long as 31 December 2026, which is the deadline for the adoption of payment decisions by the Commission, subject to the fulfilment of the relevant milestones and targets by 31 August 2026. It is important to protect the integrity of the implementation process. As an example, they referred to the sections in the RRP which are devoted to Research and Development within the Green Tax Reform, as their corresponding milestones and targets have not yet been positively assessed by the Commission. Should the measure be questioned prematurely, the milestones



and targets might not materialise. This would impede the fulfilment of the target and milestone and, in turn, the disbursement of financial support.

The Ombudsman inquiry team asked the Commission about the difference between the information contained in the documents that had not been disclosed to the complainant and that contained in documents that had been disclosed. Specifically, the inquiry team noted that the milestones contained in the RRP have a high level of detail, and that related information had already been released in the Commission's staff working document accompanying the proposal for a Council implementing decision on the approval of the assessment of the recovery and resilience plan for Denmark. [2]

SG RECOVER representatives responded that, while some documents shared with the complainant go beyond what is contained in the staff working document, the information contained in the non-disclosed documents was more detailed and revealed sensitive information on specific businesses and market sectors. Disclosing this information could affect the economic functioning of Denmark, which would in turn harm the financial interest of the EU as a whole. This is why, for example, information on costing was excluded from public access.

b) Could the Commission please explain on what basis it came to the conclusion that (full) disclosure of some of the documents would "strain the working relations between the European Commission and the Danish authorities"? It is our understanding that the Danish authorities were consulted on the access request, and objected to the disclosure of some commercially sensitive information only.

SG RECOVER representatives responded that a successful implementation of the national plans is based on mutual trust between the Commission and the Member States. Even if the Danish authorities did not oppose the disclosure of certain documents, the Commission believed that granting access to some of the documents, notably those which reflect frank exchanges, could undermine mutual trust in the ongoing implementation process.

IV. Overriding public interest

From the wording of the confirmatory decision, we understand that the Commission considers that some information contained in the Danish RRP relates to emissions into the environment. Did the Commission consider this when assessing the existence of an overriding public interest?

The Commission representatives clarified that, due to the nature of the RRP (outlining possible measures, actions and objectives considered by the Danish authorities for future implementation), no "information on emissions into the environment", within the meaning of Article 6(1) of the EU Aarhus Regulation, is contained in the documents in question. They noted that, according to the Court, the concept of information relating to emissions into the environment 'may not, in any event, include information containing any kind of link, even direct, to emissions into the environment.' [3] It is not sufficient for information to qualify as "information on emissions into the environment", if the relevant information merely shows a *potential* impact on emissions into the environment.



The Ombudsman inquiry team asked if the Commission had considered that, in certain documents, its services had acknowledged the fact that some aspects of the national plan are incompatible with the do no significant harm (DNSH) principle concerning emissions into the environment. [4]

The Commission representatives responded that, even if some of the documents contained these discussions, the measures that are not compatible with DNSH principle were not included in the final plan positively assessed by the Commission and approved by the Council. Indeed, in line with the RRF Regulation, the RRF shall only support measures respecting the DNSH principle.

IV. Questions on individual documents

a) Some of the non-disclosed documents are minutes of meetings between the Commission and the Danish authorities. Some of these minutes [5] summarise the discussions in broad terms. Could the Commission please explain why it refused access (given that the Danish RRP had been approved)? Did the Commission consider granting partial access to other minutes [6] (given that the Danish RRP had been approved)?

SG RECOVER representatives explained that these minutes are internal documents that were not shared with the Member State. They reflect open and frank discussions and individual viewpoints that may point to internal criticism and not always correspond to the final position of the Commission. If they were redacted for partial disclosure, the remaining parts would not be sufficient to render their disclosure meaningful.

b) We understand that the documents “First observation report 5 May 2021 on submitted Danish RRP” (Ares(2021)5707600), “Completeness check at plan level” (Ares(2021)5707667), “Component assessment” (Ares(2021)5707693), “Economic impact assessment 12 June 2021” (Ares(2021)5707706) and “Component assessment fiches” (Ares(2021)5707767) contain the Commission’s assessment of the submitted RRP. Could the Commission please confirm whether it shared these documents with the Danish authorities at the time? Would the Commission consider disclosing these documents now that the RRP has been approved?

SG RECOVER representatives confirmed that these documents were part of the assessment process of the Danish RRP and were not disclosed to the Danish authorities. They are therefore internal documents of the European Commission.

SG RECOVER representatives restated that, even though the Danish RRP has been adopted, the Commission considers that the decision-making process is still ongoing throughout the implementation of the plan until end 2026. However, wider public access is not excluded, as the assessment of a request for access to documents takes place on a case-by-case basis considering the context in which a request is received.



GESTDEM 2021/5985 - Swedish RRP

I. On the temporal scope of the request: “Preparatory documents”

The Commission identified only documents dating after 28 May 2021 (the date the Commission received the official Swedish RRP) and did not consider any “preparatory documents” to fall within the scope of the request. It seems that, in the Danish case (GESTDEM 2021/5460), the Commission did identify “preparatory documents” (the Commission received the official Danish RRP on 30 April 2021, but identified documents dating from the end of 2020). Could the Commission please explain the difference in approach to these two access requests?

SG RECOVER representatives explained that the requests for access to documents were handled by two different teams, and each team interpreted the request differently. In the Swedish case, also taking into account the exchanges with the applicant, the team considered the request to start at the moment of formal submission. This was justified as, in line with the RRF Regulation, the formal evaluation of an RRP starts with its formal submission. The complainant had been invited at confirmatory stage to submit a new access request concerning the documents produced before the official submission of the Swedish RRP.

II. Application of the exception in Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary, economic policy of the Union or a Member State) of Regulation 1049/2001

Could the Commission please explain on what basis it came to the conclusion that (full) disclosure of some of the identified documents could undermine the public interest as regards the financial, monetary or economic policy of the European Union and Sweden, based on concrete examples from the non-disclosed documents? For example, how would (full disclosure) of some of the documents lead to “interferences and speculations at each step of the negotiation process, and eventually entail risks to financial stability”?

SG RECOVER representatives explained that the same considerations as regards the Danish case also apply to this case. They noted that the Swedish RRP contains key reforms and investments for Sweden, that the RRF mobilises important financial support for Sweden and that the measures in the RRP are clearly linked to the financial and economic policies of Sweden. They emphasised the clear link between the Swedish economy and the economy of the EU as a whole. Unjustified disclosure would leave room for unjustified interference, which could hinder the implementation of the Swedish RRP and create financial issues for the Member State. Furthermore, this could expose Sweden and the EU to unjustified financial speculation. This was particularly the case as the RRP of Sweden had not yet been adopted at the time of the confirmatory decision.

The Ombudsman inquiry team noted that the Swedish authorities, when consulted by the Commission on the access request, did not oppose the disclosure of the identified documents. In reply, the Commission representatives explained, like in the Danish case, that the Commission can refuse access to documents originating from a Member State or reflecting the



position of that Member State, even though the Member State does not oppose the disclosure of the documents when consulted.

In this context, in order to provide concrete examples, SG RECOVER representatives noted that one of the main challenges to be addressed by the Swedish RRP relates to the housing market in Sweden. Measures proposed to reform the housing market led to the fall of the Swedish government in summer last year and the resignation of the Swedish prime minister at the time. As a result, proposed measures relating to a very sensitive reform that had followed long and detailed discussions had to be eventually removed from the plan. Another example of a sensitive measure relates to the Swedish climate investments in the industrial sector (*Industry Leap*), which has a significant impact on both the national and the regional economy. The sensitivity of the information has, however, decreased now that the plan has been adopted. If a new access request was received now, it would be assessed in this context.

III. On the existence of an overriding public interest

Could the Commission please confirm whether it assessed if “environmental information” within the meaning of the EU Aarhus Regulation is contained in the requested documents?

The Commission representatives referred back to their previous statements in the context of the Danish case, GESTDEM 2021/5460. They confirmed that the documents at issue in this access request do not contain “*information on emissions into the environment*”, within the meaning of Article 6(1) of the EU Aarhus Regulation.

The Ombudsman inquiry team asked if the Commission had assessed whether the documents at issue contain “*environmental information*” within the meaning of Article 2(1)d of the Aarhus Regulation. The Commission representatives responded that the focus of Article 6 of the EU Aarhus Regulation is on information related to emissions into the environment and referred back to its previous comments.

IV. Questions on individual documents

COM documents “preliminary technical assessment” of the SE RRP (Ares(2021)3921945) and comments on the Swedish technical annex (Ares(2021)4323772) state that these are not formal positions of the Commission. Could the Commission please explain what this means?

SG RECOVER representatives explained that these documents are prepared by the services. Only decisions adopted by the College of Commissioners can be considered formal positions of the Commission.

For our background information, could the Commission please explain whether it conducted the assessment of all national RRP based on the same templates? If not, why are there differences in approach?

SG RECOVER representatives clarified that the procedures for the assessment of RRP are



broadly standardised to ensure replicability and accountability. The examples provided by the Ombudsman inquiry team (Completeness check at plan level, Ares(2021)5707667, Component assessment, Ares(2021)5707693, Economic Impact Assessment, Ares(2021)5707706, and Competent assessment fiches, Ares(2021)5707767) have equivalents drawn up in the assessment of the Swedish RRP, but these had not yet been finalised at the time of the confirmatory decision and were thus not identified.

Conclusion of the meeting

The Ombudsman inquiry team thanked the Commission representatives for the explanations and clarifications provided.

Brussels, 8 July 2022

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[1] Case T-77/22, *Asesores Comunitarios v Commission* .

[2]
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0154&qid=1624626503568>
[Link] .

[3]
https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_environnement_-_en.pdf
[Link]

[4]

[5] For example:

- Ares(2021)1609557

- Ares(2020)6692492

- Ares(2020)6635315

- Ares(2020)6412482

[6] For example:



- Ares(2021)2644563

- Ares(2021)2644529

- Ares(2021)2182369

- Ares(2021)2017589

- Ares(2020)7156699