

Decision on how the European Commission dealt with two requests for public access to documents concerning the Swedish and Danish Recovery and Resilience Plans (case 925/2022/LDS)

Decision

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

The case concerned two requests for public access to documents related to how the European Commission evaluated the Danish and Swedish national plans under the Recovery and Resilience Facility (RRF). The requests were made by a journalist, who was one of a number of journalists seeking to obtain information about how national plans had been drawn up and approved, in an effort to hold public authorities to account.

The Commission identified 111 documents as falling under the request but granted access to only parts of those documents. In refusing access to the remainder, it invoked exceptions set out in the EU's legislation on public access to documents, arguing that disclosure could undermine an ongoing decision-making process and the financial, monetary or economic policy of the EU and the Member States concerned.

The RRF forms part of an unprecedented EU-funded stimulus package for Member State economies in the aftermath of the COVID-19 pandemic. Against this background, it is understandable that there is considerable public interest in knowing how the national Recovery and Resilience Plans, including the two in this case, were put in place. The Ombudsman takes the view that the RRF must be matched with high transparency standards to ensure meaningful accountability.

While it is clear that the documents relating to the two RRFs, by their very nature, concerned economic and financial matters, the Ombudsman considered that the Commission did not satisfactorily explain how disclosing them would undermine financial, monetary or economic policy. The arguments presented by the Commission were vague and general in nature. The Ombudsman also found that the Commission had not convincingly explained how the exception for protecting an ongoing decision-making process applied.

While the Ombudsman acknowledges the need to ensure the integrity of negotiations, there is also clearly a public interest in ensuring as much transparency as possible, with a view to ensuring proper accountability for this unprecedented EU-funded facility. In addition, the two



Member States concerned did not identify the same risk as the Commission arising from disclosing the documents at issue. The Ombudsman was not convinced that the Commission had properly assessed whether the public interest in disclosure outweighed the interests it invoked for withholding access.

Against this background, the Ombudsman suggested that the Commission contact the complainant to establish if he still wants to pursue his request and, if so, to reassess the requests, given the Swedish plan has since been approved. She also suggested that the Commission draw on her assessment in this case in dealing with future public access requests concerning the negotiations on the Recovery and Resilience Plans and exchanges related to the Commission's evaluation of Member States' performance under the RRF, with a view to ensuring a consistent approach with clear explanations.

Background to the complaint

1. In response to the COVID-19 pandemic, the EU created the Recovery and Resilience Facility (RRF). It is an instrument by which the European Commission raises funds in the markets to help Member States implement reforms and investments. With over EUR 700 billion available, the RRF is designed to play a crucial role in addressing the economic and social impact of the COVID-19 pandemic.

2. To benefit from the support of the Facility, Member States must submit national Recovery and Resilience Plans (RRPs) to the Commission for endorsement and subsequent approval by the Council of the EU. The RRFs set out the reforms and investments (milestones and targets) to be implemented by the end of 2026. Member States can then request payments upon completion of the milestones and targets.

3. The complainant is a journalist who, along with other journalists, is working to obtain an insight into how RRFs come into being, that is the process of negotiating and approving RRFs.

4. In September 2021, the complainant asked the Commission for public access to “ *documents held by the Commission on the evaluation of the Danish [...] recovery and resilience plan [...], as part of the European Recovery and Resilience Facility (RRF)* ”, under the EU legislation on public access to documents. [1] In October 2021, the complainant submitted an identical request concerning the Swedish RRF.

5. In November 2021, the Commission replied to the requests. It identified more than 200 documents, totalling thousands of pages, as coming within their scope. It did not disclose those documents to the extent desired by the complainant.

6. In December 2021, the complainant asked the Commission to review its decisions (by making what is referred to as a ‘confirmatory application’). The complainant noted that the Commission had dealt with his two requests differently in that it had read his request concerning the Danish



RRP in a wider sense than it had read his request concerning the Swedish RRP. The Commission deemed the Danish request to cover documents that had been drafted or received concerning the Danish RRP *before* its formal submission to the Commission while, for the Swedish request, only documents drafted or received *after* the formal submission of the Swedish RRP were deemed to be within the scope of complainant's request.

7. In April 2022, the Commission adopted its confirmatory decisions, after having consulted with the two Member States. [2] The Commission held, first, that it was not an issue that the Danish and Swedish requests had been dealt with differently; the complainant could submit a new request for public access to documents concerning the documents drafted or received *before* the Swedish RRP was submitted to the Commission. Second, the Commission largely upheld its original decisions. Some additional documents were disclosed. Many documents were disclosed partially, subject to redactions on grounds of protecting personal data - these redactions are not contentious and they are therefore not part of this inquiry. Many documents were not disclosed at all.

8. The grounds invoked for not disclosing the documents at issue in this inquiry were to protect the public interest as regards the financial, monetary or economic policy of the European Union or a Member State, [3] as well as to protect an ongoing decision-making process [4] . In reply to an argument of the complainant that there was an overriding public interest in disclosure, in particular because some of the information concerned the environment within the meaning of the Aarhus Regulation [5] , the Commission held that there was no such interest.

9. Dissatisfied with the Commission's replies, the complainant turned to the Ombudsman in May 2022. The complainant's views were: a) that the Commission had wrongly narrowed the scope of his Swedish request — it should have interpreted the Swedish request in the same way as it interpreted the Danish request; b) the Commission's decisions were not in accordance with the EU legislation on public access, including the Aarhus Regulation.

The inquiry

10. The Ombudsman opened an inquiry into the complaint.

11. In the course of the inquiry, the Ombudsman inquiry team inspected the documents at issue, that is the documents that were not disclosed on the grounds of protecting the financial, monetary or economic policy of the European Union or a Member State, and an ongoing decision-making process.

12. The inspected documents fell largely into three categories: a) exchanges between Commission staff, including assessments of the national RRP, that had not been shared with the Member State; b) exchanges between Commission staff and staff of the Member State authorities, including excel sheets submitted by the Member State on costs to be covered by the RRP at a very detailed level; and c) minutes of meetings between Commission staff and staff of the Member State authorities, which had not been shared with the Member State.



13. The Ombudsman inquiry team also met with representatives of the Commission to clarify certain matters. [6]

14. The Commission's views were in essence:

As concerns the protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State

- The Commission enjoys wide discretion when determining whether disclosure would undermine that public interest. It follows from the EU legislation on public access that this public interest cannot be superseded by another public interest that is deemed more important.
- Disclosure of the documents could lead to interference in and speculation during the negotiation process and to unwarranted pressure on the Commission and other EU institutions assessing the plan. The Swedish and Danish national plans, which amount to EUR 3.3 billion and EUR 1.5 billion respectively, have an impact on the respective national economies and, as a result, on the economy of the EU as a whole. As the measures set out in the plans are clearly linked to the financial and economic policies of Sweden, Denmark and the EU, the Commission considered there to be a reasonably foreseeable risk that disclosing the documents could undermine the financial or economic policy of Sweden, Denmark and the EU as a whole.
- The RRF has the particularity of being financed with money raised on financial markets on behalf of the EU. The negative impact on implementation in one Member State could therefore affect not just the Member State concerned but also the EU's position on the financial markets which, in turn, could affect the economy of the EU as a whole.
- While the Swedish and Danish authorities did not oppose disclosure of the requested documents on the ground of protecting financial, monetary or economic policy [7], the Swedish plan in particular included measures in economically and politically sensitive areas that, if disclosed, could have hindered the adoption of the plan. The Commission therefore concluded that the documents could not be disclosed.

As concerns the protection of an ongoing decision-making process

- The assessment of the Swedish RRP was still ongoing when disclosure was refused. Disclosure of the documents requested by the complainant, at that stage, would have revealed preliminary views on policy options on which the decision had yet to be adopted. This would discourage Commission officials from having free and open discussions, which are necessary to accomplish their tasks. Additionally, disclosure of the documents would undermine the climate of mutual trust with the two Member States.
- The Danish plan had already been approved by the Council at the time of the adoption of the confirmatory decision. [8] However, in the meeting with the Ombudsman inquiry team, the Commission representatives said, first, that the decision-making process would continue even after the plan's adoption. In some cases negotiations on the approval of the operational arrangements between the Member State and the Commission are still ongoing. Second, the RRF Regulation allows Member States to update and amend their national plans under certain conditions. [9] Third, the achievement of milestones and targets contained in the national plans will be periodically assessed by the Commission until 31 December 2026. [10] In the Commission's view, the documents at issue contain information that could hinder the adoption



of the related decisions.

As concerns an overriding public interest in disclosure

- The interest of Swedish voters and taxpayers affected by the Swedish plan - put forward by the complainant - did not override the need to protect the ongoing decision-making process. Moreover, the Aarhus Regulation was not relevant, as the measures contained in the Swedish plan do not relate to “*emissions in the environment*” within the meaning of the Aarhus Regulation. In any case, the documents at issue do not contain “*environmental information*” within the meaning of the Aarhus Regulation.

- Similarly, and contrary to the view of the complainant in his application, the measures contained in the Danish plan do not relate to “*emissions in the environment*” within the meaning of the Aarhus Regulation. The measures included in the plan aim to “*reduce emissions*” into the environment, the Commission said. The Commission added that, according to the RRF Regulation, every measure in the plan must comply with the “*do no significant harm*” principle. In this regard, the Commission stressed that not all the measures in the Danish plan relate to CO₂ emissions.

15. In the meeting with the Ombudsman inquiry team, the representatives of the Commission acknowledged that the sensitivity of some of the information that was not disclosed had diminished since the confirmatory decisions at issue were taken. The Swedish RRP had been approved in the meantime. Therefore, if the Commission had to decide now on a new request, the outcome may be different.

The Ombudsman’s assessment

The different handling of the Swedish and Danish requests

16. The two requests for public access were worded in an *identical* way. However, the Commission read them differently, namely in the Danish case so as to include documents drafted or received before the formal submission of the Danish RRP, while in the Swedish case, so as to exclude such documents. A public authority should not deal with identical matters in a contradictory manner. Moreover, nothing would have prevented the Commission from taking contact with the complainant to clarify the scope of his requests if it entertained doubts in that respect. It may in fact be useful to do so more generally, to facilitate matters both for the Commission and the applicant, thus avoiding misunderstandings and unnecessary work. The Ombudsman finds that the way the Commission handled the Swedish request was not an example of good administration.

The grounds for refusing public access

17. As concerns the Commission’s view that disclosure would undermine the financial, monetary or economic policy of the Union or a Member State, it is appropriate to emphasise that public access to documents is a fundamental right, and therefore it should be construed broadly. That said, the EU institutions have a wide margin of discretion when deciding on what the protection of the public interest as regards financial, monetary or economic policy of the Union or the Member States calls for in terms of disclosure of documents. The risk of those



policies being undermined must not, however, be merely hypothetical and a refusal to disclose documents must be appropriately reasoned.

18. In this case, the Member States concerned had not identified any risk to their financial, monetary or economic policy arising from disclosing the documents at issue. While the Commission may, *as a matter of law*, take a different view, it is very difficult to understand, *as a matter of fact*, what insight the Commission has into the financial, monetary or economic policy of the two Member States that should prevail over their own views on what risks the disclosure of the documents would entail. While it is clear that the documents relating to the two RRP by their very nature *concerned* economic and financial matters, it is not clear how their disclosure would *undermine* financial, monetary or economic policies. It is also hard to draw the conclusion that the disclosure of the documents would undermine the financial, monetary or economic policy of the Union. The arguments presented by the Commission remain vague and general in nature, making it difficult to distinguish them from any other event that could potentially affect the economy of the two Member States or the Union.

19. As concerns the protection of an ongoing decision making process, it is clear that in the Swedish case, the process had not yet ended when the Commission decided on the complainant's request for documents.

20. It is, however, difficult to understand that, in the Danish case, the Commission relied on the argument of an ongoing decision-making process, suggesting that the decision-making process on the national plans can extend to 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. The Commission has not provided any argument showing how precisely the disclosure of the documents, which are related to the setting of milestones, could seriously undermine the Commission's evaluation of the milestones. It is not clear how documents pertaining to the closed negotiations of a RRP 'transform' into documents in an ongoing decision-making process on complying with the RRP. Citizens may understandably be concerned that the work of the Commission and the Danish and Swedish authorities on the RRP is, according to the Commission, of such a nature that allowing citizens to have knowledge of it would seriously undermine that work.

Aarhus Regulation and overriding public interest

21. The Aarhus Regulation establishes an overriding public interest in disclosure where information about emissions into the environment is concerned. It does so in relation to two grounds for refusing disclosure [11]. Neither of the two grounds applies in this case. Thus, there is no automatic overriding public interest in this case.

22. However, the fact that there is no automatic overriding public interest under the Aarhus Regulation, does not mean that there is not an overriding public interest in disclosure that can be established following a specific assessment. [12]

23. That assessment must take into account the fact that some documents constitute



environmental information or even information about emissions into the environment within the meaning of the Aarhus Regulation. [13] In these circumstances, the grounds invoked by the Commission to refuse public access must be applied all the more restrictively.

24. The RRF forms part of an unprecedented stimulus package, financed by the EU, for the economies of the Member States. The RRF was heralded as a cornerstone for the economic recovery after the COVID-19 pandemic. The importance of the RRF must be matched with high transparency standards [14] , and it is understandable that there is considerable public interest in knowing how the two RRFs in this case came into being. The media, whose role includes holding public authorities accountable, is naturally seeking to obtain insight into the matter. The Commission has not disputed that citizens' interest in this is of a public nature. Still it has found that the interest of citizens cannot prevail over the interest in keeping its talks with the two Member States secret, at the cost of accountability. It has not provided specific reasoning for that view. It has referred to the need not to compromise the climate of mutual trust between it and Member States. However, that consideration is general and it is hard to see how it should apply in this specific case, as the two Member States have not considered the mutual trust compromised. Thus, it is not apparent that the Commission has properly weighted the interests at play against each other. If it has, the Commission has not adequately explained how.

25. In light of the above, the Ombudsman takes the view that the Commission's assessment of the two requests for public access falls short.

26. The Ombudsman has considered the possibility of proposing a solution in this case, inviting the Commission to reassess both requests in light of the observations set out above.

27. The Ombudsman notes, however, that, regrettably, more than a year has passed since the complainant made the two requests. In the meantime, the complainant has received documents from the Danish and Swedish authorities, in reply to requests for public access he made to those authorities. Moreover, the process leading to the approval of the Swedish RRF has ended, and the Commission representatives acknowledged in the meeting with the Ombudsman inquiry team that the assessment of the Swedish request may differ if it had to assess it now.

28. Against that background, the Ombudsman believes that the most appropriate course of action is for the Commission to contact the complainant to hear to what extent he upholds his two requests. If he does, the Commission should revisit its assessment of the two requests, in light of the observations above and taking into account that the Swedish Recovery and Resilience Plan has since been adopted. The Ombudsman will make a suggestion to that effect below.

29. More generally, the Ombudsman urges the Commission to deal with future public access requests, covering the negotiations that took place on the RRFs or on the exchanges that will take place as the Commission evaluates Member States' performance on milestones and targets, bearing in mind the assessment set out above. This is essential so that the public can follow how these funds are disbursed and used and determine whether they are truly transformative for our economies, as promised by the Commission [15] .



Conclusion

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

The European Commission failed to give adequate and convincing reasons for refusing to grant public access to the documents in question, and handled the two identical public access requests in a contradictory manner.

Suggestions for improvement

The Commission should contact the complainant to hear to what extent he upholds his requests for public access. If he does, the Commission should then revisit its assessment of the requests, in light of the Ombudsman's observations and the fact that the Swedish Recovery and Resilience Plan has been adopted in the meantime.

The Commission should deal with future public access requests covering the negotiations that took place on the RRP or on the exchanges that will take place as the Commission evaluates Member States' performance on milestones and targets, bearing in mind the assessment set out above.

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

Emily O'Reilly European Ombudsman

Strasbourg, 29/11/2022

[1] 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] In their reply the Swedish authorities did not oppose disclosure of the documents; however, they invited the Commission to consider whether disclosure could seriously undermine the Commission's decision making process. The Danish authorities, in their reply, considered that a number of documents should not be disclosed, to protect commercial interests.

[3] Article 4(1)(a), fourth indent, of Regulation 1049/2001.



[4] Article 4(3) of Regulation 1049/2001.

[5] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies,
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367> [Link].

[6] <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/163455> [Link]

[7] In the Danish case, the confirmatory decision mistakenly stated that the Danish authorities had opposed disclosure on that ground. As stated above, the Danish authorities opposed disclosure of some documents in order to protect commercial information.

[8] In the confirmatory decision, the Commission mistakenly stated that the Danish plan had not been approved by the Council at the time when the confirmatory decision was taken.

[9] Articles 18 and 21 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility,
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0241> [Link].

[10] Article 19 of the RRF Regulation.

[11] Namely in relation to Article 4(2), first and third indents of Regulation 1049/2001 (commercial interests, and investigations and audits).

[12] There can be a public interest overriding the interest in protecting the decision making process but not the interest in protecting financial, monetary or economic policies, cf. Article 4 of Regulation 1049/2001.

[13] The RRF Regulation provides that no measure included in a national recovery and resilience plan should lead to significant harm to environmental objectives within the meaning of Article 17 of the Taxonomy Regulation (Regulation (EU) No 2020/852 on the establishment of a framework to facilitate sustainable investment, by setting out a classification system (or 'taxonomy') for environmentally sustainable economic activities). According to the RRF Regulation, the assessment of the national plans should ensure that each measure (reforms and investments) within the plan complies with the 'do no significant harm' principle (DNSH). According to guidance provided by the Commission, Member States should provide an individual DNSH assessment for each measure within each component of the national plan (Commission Notice, Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation Brussels, 12.2.2021, C(2021) 1054 final, pp. 2 and 3, available at: https://ec.europa.eu/info/sites/default/files/c2021_1054_en.pdf [Link]).

[14] Cf. the Ombudsman's strategic initiative SI/6/2021/LDS,
<https://www.ombudsman.europa.eu/en/case/en/59363> [Link].



[15]

https://ec.europa.eu/info/strategy/recovery-plan-europe_en#:~:text=The%20aim%20is%20to%20mitigate,the%20gr

[Link]