

Decision of the European Ombudsman on complaint 1481/2003/OV against the European Commission

Decision

Case 1481/2003/OV - Opened on 18/09/2003 - Decision on 07/12/2004

Summary of decision on complaint 1481/2003/OV against the European Parliament

A Belgian non profit organisation made a request, on the basis of Regulation 1049/2001 [1] , to Commission for access to all documents related to a control mission concerning the Objective 3 Programme, priority 3, under the European Social Fund (ESF) in the Flemish region. The Commission refused access to the requested document, on the basis of Article 4 (2), third indent, of the Regulation, as the documents concerned an inspection report about the use of EU funds paid for a project about which there was a dispute with a Member State. The confirmatory application made by the complainant was equally rejected by the Secretariat General of the Commission which concluded that there was no overriding public interest in the disclosure of the requested document, as the complainant's interest was a private and not a public interest.

In July 2003, the complainant lodged a complaint with the European Ombudsman claiming that the Commission should grant access to the requested document.

In its opinion on the complaint, the Commission observed that the complainant had already received the excerpts from the inspection report concerning its own project. The parts of the report not disclosed to the complainant were irrelevant as regards the project operated by the complainant, as they concerned the other audited projects and the central management by the Flemish ESF Agency. As regards the reasons for refusing full access, the Commission stated in the first place that disclosure of the report at this stage would undermine the current investigation, as it would put in the public domain provisional findings by Commission inspectors, to which the audited parties have not yet responded. The Commission also repeated that there was no overriding public interest in disclosure of the report. The Commission's opinion was forwarded to the complainant who made no observations however.

In his decision, the Ombudsman observed that the report requested clearly related to activities of inspections, investigations and audits referred to in Article 4 (2) of Regulation 1049/2001. He pointed out that, at the time when the complainant made his request for access to the mission report in March 2003, the Commission was still pursuing its financial control investigation with the Flemish ESF Agency - foreseen in Article 38 of Regulation 1260/1999 [2] - and would, depending on the latter's reply, decide whether or not to make financial corrections under Article



4 of Regulation 448/2001 [3] . The Commission could thus properly form the view that the disclosure of the other parts of the mission report could undermine the protection of the purpose of its investigation. In these circumstances, the Commission was, in accordance with the case-law of the Community courts, entitled to refuse access on the basis of Article 4 (2), third indent, of Regulation 1049/2001, unless there was an overriding public interest in disclosure. The Ombudsman however considered that the complainant had not sufficiently demonstrated that there would be an overriding public interest in disclosure of the other parts of the report concerning the other projects. No instance of maladministration was thus found.

[1] Regulation (EC) n° 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

[2] Council Regulation n° 1260/1999 laying down general provisions on the Structural Funds, OJ L 161 of 26 June 1999, p. 1.

[3] Commission Regulation n° 448/2001 laying down detailed rules for the implementation of Council Regulation 1260/1999 as regards the procedure for making financial corrections to assistance granted under the Structural Funds, OJ L 64 of 6 March 2001, p. 15.

Strasbourg, 7 December 2004

Dear Mr V.,

On 25 July 2003, you made a complaint to the European Ombudsman on behalf of the VZW Unizo Regio Kortrijk against the Commission's refusal of access to documents concerning the European Social Fund audit report EPD 3, objective 3, of October 2002 (OP1999BE05DO003).

On 18 September 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 14 November 2003. I forwarded it to you with an invitation to make observations, if you so wished. No observations appear to have been received from you.

I am writing now to let you know the results of the inquiries that have been made.

I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant's lawyer, the relevant facts were as follows:

The complainant is the "VZW Unizo Regio Kortrijk", a Belgian non profit association. On 25 March 2003, the complainant's lawyer made a request, on the basis of Regulation 1049/2001 (1) , to Commission DG Employment and Social Affairs for access to all documents related to the control mission concerning the Objective 3 Programme, priority 3, under the European Social Fund (ESF) in the Flemish region.



On 7 May 2002, DG Employment and Social Affairs refused access to the requested documents, on the basis of Article 4 (2), third indent, of Regulation 1049/2001, on the grounds that the documents concerned an inspection report about the use of EU funds paid for a project about which there was a dispute with a Member State.

On 21 May 2002, the complainant's lawyer made a confirmatory application to the Secretariat General of the Commission, stating that his client was individually affected by the dispute about the use of funds. By letter of 18 June 2002, the Secretariat General of the Commission confirmed the rejection decision, concluding that there was no overriding public interest in the disclosure of the requested document, as the complainant's interest was a private and not a public interest.

On 25 July 2003, the complainant made the present complaint to the Ombudsman claiming that the Commission should grant access to the requested documents.

THE INQUIRY

The Commission's opinion

The complainant's lawyer requested full access to the report on the control mission concerning the Objective 3 Programme, priority 3, under the European Social Fund (ESF) in the Flemish region, which was carried out between 30 September and 9 October 2002. The complainant has already received the excerpts of the report concerning its project.

As regards the background, the Commission indicated that the purpose of the mission was to examine and to test the management and internal control systems with regard to projects carried out in Flanders under the Objective 3 Programme, which receives grants from the European Social Fund (ESF). Four projects were selected for on-the-spot control visits. These included a project operated by the complainant, called "The successful foreign entrepreneur". Several provisions of the Structural Funds Regulations are relevant to this case:

According to Article 38 of Regulation 1260/1999 (2) and Article 6 of Regulation 438/2001 (3), the national managing authority is the Commission's sole interlocutor as regards such control missions. In this case, the national managing authority is the Flemish ESF Agency.

The requested report contains the Commission's provisional findings on this control mission and has been submitted for comments to the Flemish ESF Agency in accordance with Article 38.4 of Regulation 1260/1999. The Agency has forwarded the relevant excerpts to the project operators concerned, giving them an opportunity to comment on the Commission's findings as regards their projects.

Depending on the Flemish ESF Agency's reply, the Commission will decide whether or not to make financial corrections under Article 4 of Regulation 448/2001 (4). This procedure is not yet completed.



Article 8 of Regulation 2185/96 (5) states that *"information communicated or acquired under this Regulation shall be covered by professional secrecy (...)"*.

The complainant has received the excerpts from the report concerning its own project, and was invited by the Flemish ESF Agency to comment on the Commission's findings regarding its specific project. The complainant contests some of the Commission's findings and requests access to the full report before sending its final comments to the ESF Agency.

As regards the reasons for refusing full access, the Commission stated in the first place that disclosure of the report at this stage would undermine the current investigation, as it would put in the public domain provisional findings by Commission inspectors, to which the audited parties have not yet responded. There is a need to protect the investigation and the rights of audited parties. On the other hand, there is no overriding public interest in disclosure of the report. Therefore, public access to this report has to be denied on the basis of Article 4 (2), third indent, of Regulation 1049/2001.

The report has only been disclosed to the parties concerned within the legal framework, which is applicable to control missions on the implementation of programmes receiving grants under the Structural Funds.

The rights of the complainant have been fully respected since it has received the excerpts of the report concerning its own project and has been invited to comment on them. The parts of the report not disclosed to the complainant are irrelevant as regards the project operated by the complainant. They concern the other audited projects and the central management by the ESF Agency. The complainant's argument that it is not in a position to comment on the Commission's findings without having access to the full report is ill-founded.

The Commission therefore maintains its position that, pending the investigation, no part of the report can be disclosed to the public on the basis of Regulation 1049/2001. Access is provided for in the framework of the relevant provisions concerning the Structural Funds and is limited to the managing authority and, as regards their specific projects, to the project operators.

The complainant's observations

The complainant made no observations on the Commission's opinion.

THE DECISION

1 The claim for access to the requested documents

1.1 The complainant, a Belgian non profit association, claims that the Commission should grant access, on the basis of Regulation 1049/2001 (6), to the report on the control mission concerning the Objective 3 Programme, priority 3, under the European Social Fund (ESF) in the Flemish region, which was carried out between 30 September and 9 October 2002.

1.2 The Commission observed that the complainant has already received the excerpts from the report concerning its own project, and was invited by the Flemish ESF Agency to comment on the Commission's findings regarding its specific project. The parts of the report not disclosed to



the complainant are irrelevant as regards the project operated by the complainant, as they concern the other audited projects and the central management by the ESF Agency.

As regards the reasons for refusing full access, the Commission stated in the first place that disclosure of the report at this stage would undermine the current investigation, as it would put in the public domain provisional findings by Commission inspectors, to which the audited parties have not yet responded. There is a need to protect the investigation and the rights of audited parties. On the other hand, there is no overriding public interest in disclosure of the report. Therefore, public access to this report has to be denied on the basis of Article 4 (2), third indent, of Regulation 1049/2001. The Commission further stated that access is provided for in the framework of the relevant provisions concerning the Structural Funds and is limited to the managing authority and, as regards their specific projects, to the project operators.

1.3 The Ombudsman notes that the access requested by the complainant concerns a control mission report of the Commission. The purpose of the mission was to examine and to test the management and internal control systems with regard to four projects - among which the one of the complainant - carried out in Flanders under the Objective 3 Programme of the European Social Fund. The report contains the Commission's provisional findings on this control mission and has been submitted for comments to the Flemish ESF Agency in accordance with Article 38 (Financial Control) of Council Regulation 1260/1999 (7) laying down general provisions on the Structural Funds. The Agency has forwarded the relevant excerpts to the project operators concerned, giving them an opportunity to comment on the Commission's findings as regards their projects. The complainant has thus received access to the excerpts of the control mission report concerning its own project. The Commission however refused to grant the complainant access to the parts of the report concerning the other projects.

1.4 Article 4 (2) of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of *"the purpose of inspections, investigations, and audits, unless there is an overriding public interest in disclosure"*.

1.5 The Ombudsman notes that the control mission report in question was established in the framework of the financial control of assistance foreseen in Article 38 of Council Regulation 1260/1999 laying down general provisions on the Structural Funds. Article 38.2 of the Regulation provides that *"the Commission, in its responsibility for the implementation of the general budget of the EC shall ensure that Member States have smoothly functioning management and control systems so that Community funds are efficiently and correctly used. To that end (...) Commission officials and servants may (...) carry out on-the-spot checks, including sample checks, on the operations financed by the Funds and on management and control systems (...)"*. Article 38.4 provides that *"following this examination and evaluation (...), the Commission may make observations, particularly regarding the financial impact of any irregularities detected. These observations shall be addressed to the Member State and the managing authority of the assistance concerned. The observations shall be accompanied, where necessary, by requests for corrective measures to remedy the management shortcomings found (...)"*.



1.6 The report requested in the present case thus clearly relates to activities of inspections, investigations and audits referred to in Article 4 (2) of Regulation 1049/2001. However, the fact that the document at issue concerns an inspection cannot in itself justify application of the exception invoked (8) . The Ombudsman shall thus determine whether, in the present case, the Commission erred in its assessment that disclosure of the report could undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

1.7 In that regard, the Ombudsman notes that, at the time when the complainant made his request for access to the mission report in March 2003, the Commission was still pursuing its financial control investigation with the Flemish ESF Agency - foreseen in Article 38 of Regulation 1260/1999 - and would, depending on the latter's reply, decide whether or not to make financial corrections under Article 4 of Regulation 448/2001 (9) .

1.8 The Commission could thus properly form the view that the disclosure of the other parts of the mission report could undermine the protection of the purpose of its investigation. In these circumstances, the Commission was, in accordance with the case-law of the Community courts, entitled to refuse access on the basis of Article 4 (2), third indent, of Regulation 1049/2001, unless there was an overriding public interest in disclosure.

1.9 With this regard, it should first be recalled that the complainant was provided full access to the parts of the report concerning its own project. The Ombudsman however considers that the complainant has not sufficiently demonstrated that there would be an overriding public interest in disclosure of the other parts of the report concerning the other projects.

1.10 On the basis of the above, the Ombudsman considers that the Commission's position appears reasonable and in conformity with Regulation 1049/2001. No instance of maladministration was thus found. It should however be noted that the highest authority on the interpretation of Community law is the Court of Justice.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation (EC) n° 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.



- (2) Council Regulation n° 1260/1999 laying down general provisions on the Structural Funds, OJ L 161 of 26 June 1999, p. 1.
- (3) Commission Regulation n° 438/2001 laying down detailed rules for the implementation of Council Regulation 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds, OJ L 63 of 3 March 2001, p. 21.
- (4) Commission Regulation n° 448/2001 laying down detailed rules for the implementation of Council Regulation 1260/1999 as regards the procedure for making financial corrections to assistance granted under the Structural Funds, OJ L 64 of 6 March 2001, p. 15.
- (5) Council Regulation n° 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292 of 15 November 1996.
- (6) Regulation (EC) n° 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.
- (7) Council Regulation n° 1260/1999 laying down general provisions on the Structural Funds, OJ L 161 of 26 June 1999, p. 1.
- (8) See, with regard to inspection reports, in particular Case T-20/99, *Denkavit Nederland BV v. Commission*, [2000] ECR II-3011.
- (9) Commission Regulation n° 448/2001 laying down detailed rules for the implementation of Council Regulation 1260/1999 as regards the procedure for making financial corrections to assistance granted under the Structural Funds, OJ L 64 of 6 March 2001, p. 15.