

## Decision of the European Ombudsman on complaint 1044/2004/GG against the European Commission

Decision

**Case 1044/2004/GG - Opened on 22/04/2004 - Decision on 22/09/2004**

A researcher working at the Centre for European Policy Studies (CEPS) in Brussels requested access to a Commission document concerning the European Stability and Growth Pact. The document in question was the Commission's Recommendation for a Council Decision giving notice to Germany to take measures for the deficit reduction necessary to remedy the situation of excessive deficit. The Commission rejected the request for access to the document on the grounds that its disclosure would undermine the protection of the economic and financial policies of Germany. It also ruled out the possibility of partial access.

In his complaint to the Ombudsman, the complainant objected to this refusal, pointing out that as an academic dealing with economic and institutional developments at the EU level, he needed to have access to all important sources. He stated that the Commission had published the contents of its Recommendation in a press release and that, if the Recommendation did not contain any additional information, one did not understand why it should not be disclosed. If the Recommendation should, however, contain other - essentially more negative - information on Germany's public finances, then the Commission was concealing information of general public interest and possibly deliberately misinforming the public.

In its opinion, the Commission submitted that all the financial and economic data it had taken into consideration in its Recommendation were already in the public domain through its press release and that the technical assessments of the stability and convergence programmes were available on the Internet. However, the Recommendation itself had not been published to safeguard the confidentiality of the Commission's reasoning on this sensitive topic. The explanatory memorandum to the Recommendation contained the Commission's own assessment of Germany's budgetary situation. The Commission argued that full disclosure of the Recommendation could lead to a negative perception by the financial markets and could hamper the budgetary consolidation. It would thus adversely affect the financial and economic policy of Germany. The Commission added that no relevant macro-economic information had been concealed from the public and that the complainant's legitimate scientific interest had not been affected.

The Ombudsman noted that the very fact of recommending to the Council to give notice to Germany to take measures for deficit reduction was bound to affect its perception by the



financial markets. However, he considered that the Commission's view that the disclosure of the reasoning underlying its Recommendation could still lead to a negative perception did not appear to be unreasonable. He also noted that, since the Commission had ruled out partial access to the document and since the complainant had not raised this issue in his complaint, the issue of partial access did not need to be dealt with. On the basis of these considerations, the Ombudsman concluded that there was no maladministration on the part of the Commission.

Strasbourg, 22 September 2004

Dear Mr H.,

On 5 April 2004, you made a complaint to the European Ombudsman concerning the Commission's refusal to grant you access to document SEC (2003) 1317. On 7 April 2004, you forwarded certain supporting documents to me.

On 22 April 2004, I forwarded the complaint to the President of the European Commission, asking for an opinion to be submitted by 30 June 2004.

In a letter sent the same day, the Commission asked for an extension of time for providing its opinion. In my reply of 3 May 2004, I accepted that the opinion should be submitted by 31 July 2004. You were informed accordingly in a letter sent the same day.

The Commission sent its opinion on 30 June 2004. I forwarded it to you on 12 July 2004 with an invitation to make observations, if you so wished, by 31 August 2004. 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.

## THE COMPLAINT

The complainant, a researcher at the Centre for European Policy Studies (CEPS), requested access to document SEC (2003) 1317, the European Commission's recommendation for a Council Decision concerning Germany's excessive budget deficit, which was made in the context of the Excessive Deficit Procedure.

The Commission rejected both the application and the confirmatory application, relying on Article 4 (1) (a) fourth indent of Regulation 1049/2001 (concerning the protection of "the financial, monetary or economic policy of the Community or a Member State"), arguing that a disclosure of the document would negatively affect Germany's economic and financial position. In its decision on the confirmatory application, the Commission also ruled out the possibility of granting partial access.

In his complaint to the Ombudsman lodged in April 2004, the complainant alleged that the Commission's refusal to grant access to the relevant document was not justified. He pointed out that as an academic dealing on a day-to-day basis with the economic and institutional



developments at the EU level, he needed to have access to all important sources.

The complainant pointed out that the Commission had published the contents of its recommendation in a press release. In the complainant's view, however, neither this document nor the examination of the national stability and convergence programmes that were published by the Commission could make up the negative effects of being denied access to the relevant official document that had been the basis of the Council's decision of 25 November 2003.

The complainant submitted that if the recommendation did not contain any information additional to that which had already been published, one did not understand why the disclosure of this recommendation should be excluded. If the recommendation should however contain other - essentially more negative - information on Germany's public finances, then the Commission was concealing information of general public interest and possibly deliberately misinforming the public.

In the complainant's view, disclosure of the relevant document would not only be conducive to the Commission's self-declared goal of closing the gap to the citizens by means of increased transparency, but also foster the credibility of its assessments under Articles 99 and 104 of the EC Treaty.

The complainant claimed that he should be given unrestricted access to the relevant document.

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion, the Commission made the following comments:

The complainant requested access to the Commission's Recommendation for a Council Decision giving notice to Germany, in accordance with Article 104 (9) of the EC Treaty, to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit (SEC(2003)1317).

The initial request for access had been rejected on 20 January 2004 on the grounds that the disclosure of this document would undermine the protection of the economic and financial policies of Germany (Article 4 (1) (a), fourth indent of Regulation 1049/2001). The refusal to grant access had been confirmed on 10 March 2004.

The Council had sent a Recommendation to Germany on 21 January 2003 in accordance with Article 104 (7) of the Treaty. In the autumn 2003 forecast published on 29 October 2003, the Commission had noted a deterioration in both the budget deficit and the debt-to-GDP ratio and projected that the budget deficit would remain above 3 % of GDP in 2004. The Commission had decided therefore on 18 November 2003 to recommend to the Council two Decisions under Article 104 (8) and 104 (9). The ECOFIN Council meeting on 25 November 2003 had not adopted the Decisions recommended by the Commission.



As the complainant had pointed out, the Commission had issued a press release summarising the content of its two Recommendations. This press release contained the macro-economic data that had led to the Commission's decision, the measures to be taken by Germany and the implementation reports that were to be submitted.

In fact, the press release reflected the whole operative part of the Recommendation under Article 104 (9). However, the Recommendation itself had not been published. In order to safeguard the confidentiality of the Commission's reasoning on this sensitive topic, the Recommendation had only been circulated to a limited number of persons and had been classified "EU restricted" in accordance with the Commission's security rules. The explanatory memorandum to the Recommendation contained the Commission's own assessment of Germany's budgetary situation. Full disclosure of the Recommendation could lead to a negative perception by the financial markets and could hamper the budgetary consolidation. The disclosure would thus adversely affect the financial and economic policy of Germany; pursuant to Article 4 (1) (a) fourth indent of Regulation 1049/2001, access to this document had to be denied.

The right balance between the need for transparency on the one hand and the sensitivity of the matter on the other hand had been struck. Furthermore, since the Council had not accepted the Commission's Recommendation, disclosing its content would reduce the Commission's room for manoeuvre when reconsidering the matter in the future. The exception provided for in Article 4 (3) of Regulation 1049/2001 was therefore also applicable.

All the financial and economic data that the Commission had taken into consideration were already in the public domain, as were the measures it had recommended. What remained confidential was the Commission's reasoning on the basis of which it had decided to act. This was part of the Commission's position in a delicate negotiation involving the Council and a Member State in particular. No relevant macro-economic information had been concealed from the public. The complainant's legitimate scientific interest had therefore not been affected by the non-disclosure of the relevant document.

All relevant information was already in the public domain through the press release and the technical assessments of the stability and convergence programmes available on the internet.

#### **The complainant's observations**

No observations were received from the complainant.

## **THE DECISION**

### **1 Refusal to grant access to document**

1.1 The complainant, a researcher working at the Centre for European Policy Studies (CEPS) in Brussels, requested access to the Commission's Recommendation for a Council Decision giving notice to Germany, in accordance with Article 104 (9) of the EC Treaty, to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit (SEC(2003)1317). The Commission rejected this request on the grounds that the disclosure of this document would undermine the protection of the economic and financial policies of



Germany (Article 4 (1) (a), fourth indent of Regulation 1049/2001). In his complaint to the Ombudsman, the complainant objected to this refusal.

1.2 In its opinion, the Commission submitted that all the financial and economic data that it had taken into consideration in its Recommendation were already in the public domain through its press release on the Recommendation and the technical assessments of the stability and convergence programmes, available on the internet. However, the Recommendation itself had not been published in order to safeguard the confidentiality of the Commission's reasoning on this sensitive topic. The explanatory memorandum to the Recommendation contained the Commission's own assessment of Germany's budgetary situation. Full disclosure of the Recommendation could lead to a negative perception by the financial markets and could hamper the budgetary consolidation. The disclosure would thus adversely affect the financial and economic policy of Germany; pursuant to Article 4 (1) (a) fourth indent of Regulation 1049/2001, access to this document had to be denied. The Commission also argued that disclosing the content of the Recommendation would reduce its room for manoeuvre when reconsidering the matter in the future. According to the Commission, the exception provided for in Article 4 (3) of Regulation 1049/2001 was therefore also applicable.

1.3 The complaint is directed at the Commission's refusal to grant access to the relevant document. The Ombudsman notes that the rejection of 20 January 2004 was based exclusively on Article 4 (1) (a) fourth indent of Regulation 1049/2001, and that this decision was confirmed by the Commission's decision of 10 March 2004 rejecting the complainant's confirmatory application. No reference to Article 4 (3) of Regulation 1049/2001 was made in these decisions. The Ombudsman therefore considers that there is no need for him to examine the Commission's contention that the refusal of access could (also) be based on this provision.

1.4 The Commission submitted that the disclosure of the reasoning underlying the relevant Recommendation made under Article 104 (9) could lead to a negative perception by the financial markets and could hamper the budgetary consolidation. According to the Commission, the disclosure would thus adversely affect the financial and economic policy of Germany. According to Article 104 (7) of the Treaty, the Council shall, where an excessive deficit has been found to exist, make recommendations to the Member State concerned with a view to bringing that situation to an end within a given period. Article 104 (9) provides that where a Member State persists in failing to put into practice such recommendations, the Council may give notice to the Member State to take, within a specified time-limit, measures for the deficit-reduction which is judged necessary by the Council in order to remedy the situation. The Ombudsman considers that the very fact of recommending to the Council to give such notice to Germany under Article 104 (9) was bound to affect the perception of this Member State by the financial markets. However, the Commission's view that disclosing the reasoning underlying this recommendation could still lead to a negative perception by the financial markets and thus hamper the budgetary consolidation in Germany does not appear to be unreasonable.

1.5 The Commission's view that the reasoning underlying its Recommendation could not be disclosed leaves open the possibility of granting access to those parts of the relevant document that set out the data and facts on which this reasoning was based. The Ombudsman notes,



however, that the Commission has explained, in its decision on the confirmatory application, why no such partial access could be granted in the present case. He further notes that the complainant has not raised the issue in his complaint. The issue of partial access will therefore not be dealt with in the present decision.

## **2 Conclusion**

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS