

Decision of the European Ombudsman closing his own-initiative inquiry OI/2/2009/MHZ concerning the European Commission

Decision

Case OI/2/2009/MHZ - **Opened on** 06/05/2009 - **Decision on** 12/11/2009

THE BACKGROUND TO THE OWN-INITIATIVE INQUIRY

1. One of the founding principles of the European Union is the rule of law. EU law confers rights and obligations on the authorities of each Member State, as well as on individuals and businesses. The authorities of each Member State are responsible for implementing and enforcing EU law, and they must also guarantee rights conferred by EU law.

2. The EC Treaty makes the Commission responsible for ensuring that the Member States apply EU law correctly. In this role, it is sometimes called "*the guardian of the Treaty*". Anyone can complain to the Commission about an infringement thought to have been committed by a Member State. The Commission can also act on its own initiative. In either event, the first formal step is for the Commission to send a "*letter of formal notice*" to the Member State. The letter of formal notice specifies what the Member State is alleged to have done wrong (in euro-jargon: the "*infringement*") and invites its observations. The next formal step is the "*reasoned opinion*". This contains the Commission's analysis of the infringement, and sets a time limit for the Member State to bring it to an end. If the Member State does not comply within the time limit, the Commission can refer the matter to the Court of Justice.

3. For citizens who want to understand and monitor how the Commission fulfils its duties as guardian of the Treaty, and/or how Member States fulfil their duties to implement and enforce EU law, correspondence between the Commission and Member States relating to infringements is a natural focus of interest. To obtain access to such correspondence, citizens could apply, either to the Commission, or to the authorities of the Member State concerned, or to both.

4. If the application is made to the Commission, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [1] applies ('the Regulation'). The Member State concerned may object to disclosure without its prior agreement. However, the Commission cannot refuse access unless the objection is formulated in terms of one or more of the



exceptions provided by the Regulation [2] .

5. If the application is made to the authorities of the Member State, it is national law which applies. However, the Member State must consult with the Commission " *unless it is clear that the document shall or shall not be disclosed* " [3] .

6. The European Ombudsman wishes to address two issues in this own-initiative inquiry. The first is to ensure that citizens know how to obtain access to documents relating to infringements. The second is to ensure that, if access is refused, citizens can find out whether it is the Commission or a Member State which is responsible for the refusal, and whether the refusal is based on national law, or on EU law.

7. In the Ombudsman's view, lack of clarity in this area could lead citizens to believe that European integration is a process which excludes and disempowers them.

Complaint 2330/2008/MHZ

8. On 5 August 2008, the EO received a complaint from a Polish NGO against the Commission (complaint 2330/2008/MHZ). The complainant alleged that the Commission unfairly refused access to the reasoned opinion it had addressed to Poland, in accordance with the procedure under Article 226 EC. The Commission based its refusal on Article 4(2) third indent of the Regulation, which provides that 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. The Commission stated that the investigation was ongoing and, therefore, disclosure of the reasoned opinion could undermine the protection of its purpose. The Commission referred to the relevant *Petrie* case-law [4] in support of its refusal.

9. In light of the above case-law, the Ombudsman did not find sufficient grounds to open an inquiry into the above complaint. However, in a letter dated 14 September 2008, he suggested to the Commission, that, when handling possible similar cases in the future, it could inform applicants that the refusal of access under the Regulation does not constitute an obstacle to possible disclosure of the document under national law. Therefore, if such applicants have not already done so, they could consider addressing their national authorities in this respect. The Ombudsman took the view that the Regulation would not prevent the national authorities from disclosing a reasoned opinion, if they wished to do so, or if national law obliged them to do so.

10. The Commission replied to the Ombudsman on 29 January 2009. It stated that " *in this case* " it did not seem appropriate to advise the applicant to consider addressing the national authorities. It further explained that " *if [the Polish authorities] receive a request for access to this document, they are likely to consult the Commission, which will give a negative opinion. Therefore, inviting the applicant to submit the request to the national authorities would be misleading.* "

11. On 16 February 2009, the Ombudsman asked the Commission to clarify whether the



statement quoted above reflects a general policy of giving a negative opinion when consulted by national authorities regarding requests for access to reasoned opinions, and or letters of formal notice, in accordance with Article 5 of the Regulation [5] , or whether it is based on the specific content of the particular reasoned opinion in the present case.

12. On 18 March 2009, the Commission replied. On the one hand, it stated that its statement referred to the reasoned opinion in the present case, and that the Commission does not "*routinely*" refuse access to reasoned opinions, and or letters of formal notice, but examines each request on a case by case basis, as required by the Regulation. It added that this approach applies to cases when the Commission is consulted by a Member State on disclosure of documents sent to that Member State. On the other hand, however, it stated that "*... when the Commission has refused access to a document it has sent to a Member State, it would be inconsistent not to give a negative opinion on disclosure following a consultation by that Member State.*"

Reasons for the own-initiative inquiry

13. Bearing in mind his concerns, as described in points 6 and 7 above, the Ombudsman took the view that the position adopted by the Commission in its correspondence with the Ombudsman concerning complaint 2230/2008/MHZ needed clarification.

14. It appeared that, if the Commission, (a) refuses to advise citizens to turn to national authorities for access, and (b) gives, as a matter of principle, a negative opinion to the Member States, it may considerably reduce European citizens' chances of having access to documents which they wish to consult under national law, if the latter foresees such a possibility. Moreover, the Ombudsman did not find convincing the Commission's explanation as to why it could not give the above advice.

15. The Ombudsman also asked the Commission to explain the legal basis on which it relies for giving Member States a negative opinion.

16. Finally, the Ombudsman took the following into consideration. The *Petrie* case-law, on which the Commission based its negative decision on the individual request submitted to it (case 2330/2008/MHZ), relies on the idea that it is reasonable for a Member State to expect the Commission to maintain confidentiality in relation to infringement documents. However, it does not appear reasonable for the Commission to invoke such an expectation as a reason for giving a negative opinion, if it is the Member State itself which consults the Commission.

17. Article 195 of the Treaty establishing the European Community empowers the European Ombudsman to conduct inquiries on his own-initiative into possible instances of maladministration in the activities of Community institutions and bodies. The Ombudsman thus decided to open the present own-initiative inquiry to give the Commission an opportunity to provide a better explanation of its policy when replying to Member State consultations regarding access to reasoned opinions, and or letters of formal notice. He also decided to inform the Member States of the present own-initiative inquiry.



THE SUBJECT MATTER OF THE INQUIRY

18. The Ombudsman put the following questions to the Commission:

- Since the Regulation entered into force, how many times have Member States consulted the Commission regarding individual requests, submitted to them in accordance with national law, for access to its reasoned opinions and or letters of formal notice? How did the Commission reply to such consultations? If any of the Commission's replies were negative, what justification did it give?
- In the Commission's view, what is the legal basis for any such negative opinions?
- How many of these consultations were preceded by the Commission's refusal to grant access to the same document, which was in reply to a direct request submitted to it by an individual?
- Does the Commission consult the Member State concerned, before deciding whether to disclose its reasoned opinions and or letters of formal notice?

19. In addition to the above questions put to the Commission, the Ombudsman informed the Member States' Permanent Representations of the present own-initiative inquiry and invited them to submit comments, if they wished to do so.

THE INQUIRY

20. On 30 July 2009, the Commission submitted an opinion (in the form of a short description and a more detailed table) in response to the Ombudsman's inquiry. Portugal and the Czech Republic sent their respective contributions on 23 June 2009; the Slovak Republic, on 21 July 2009; Poland, on 24 July 2009; Lithuania, on 30 July 2009, and Hungary on 4 August 2009. On 2 July 2009, Finland informed the Ombudsman that it had no comments.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

The arguments submitted by the Commission in its opinion

21. The Commission stated that it had "occasionally" been consulted by Member States' authorities on the disclosure of the documents originating from it.

22. There is no trace in the Commission's files of any consultation prior to 2005.

23. In the period between January 2005 and June 2009, the Commission recorded a number of consultations made on the basis of Article 5 of the Regulation and it compiled a table detailing these consultations [6]. The Commission explained that the table might not be fully comprehensive because some consultations were addressed directly to the Commission's services, and no systemic record was kept at central level.



24. The Commission also stated that "it appears" that most of the consultations concerned the disclosure of documents relating to infringement proceedings, or written submissions to the European Court of Justice.

25. As regards the legal basis for its negative opinions, the Commission stated that, when it informs a Member State that it disagrees with disclosure, it gives reasons, referring to the exceptions set out in Article 4 of the Regulation under which it would have refused access, if the request had been sent to the Commission.

26. There was only one case where a Member State consulted the Commission on the disclosure of a Commission document to which the Commission had previously refused access. The document concerned consisted of the UK pleadings in ECJ case C-88/03, insofar as they reflected the content of Commission's submissions in this case. The Commission gave a negative opinion on the basis of Article 4(2) second indent of the Regulation [7] .

27. Finally, the Commission stated that, pursuant to Article 4(4) and (5) of the Regulation [8] , the Commission does not consult Member States on the disclosure of its own documents. However, where Commission documents reproduce or fully reflect the content of a document originating from a Member State, the Commission does consult the national authorities regarding the possible disclosure of their corresponding documents.

The contributions of the Member States

[9]

28. As regards access to reasoned opinions and or letters of formal notice, the Member States which submitted comments agreed in substance with the Commission's position, as expressed in its correspondence with the complainant in case 2330/2008/MHZ, and with the Ombudsman, before the present own-initiative inquiry was launched. For example, if Portugal, which has received a small number of requests for access to reasoned opinions and or letters of formal notice, refuses such access, it does so on the basis of national and Community rules. If Lithuania were to receive such requests, it would treat them in accordance with its national law, which provides that the right for public access to documents arises only when any related court proceedings have ended, and the court has made its decision. Lithuania took the view that the public should be able to consult the open-ended list of situations in which documents should be publicly accessible, and be provided with clear criteria as to how such evaluations are made. Poland considered that access should be given to infringement documents, only after the closure of infringement proceedings. In all other cases, consultation under Article 5 of the Regulation is needed, and the institution's opinion should be followed, in accordance with the principle of loyal cooperation. For these reasons, the advice to citizens as suggested by the Ombudsman (referred to in paragraph 9 above) is not justified. Hungary took the view that, if the Commission refuses access to a document, and the applicant then requests the Member State for access to the same document, which the latter is also holding, the Member State shall then consult the Commission in accordance with Article 5 of the Regulation.



The Ombudsman's assessment

29. First, the Ombudsman notes that, according to the table, the Commission gave a positive opinion in six of the 16 consultations on reasoned opinions and or letters of formal notice. In addition, it raised no objections to 10 individual requests in one UK consultation, which involved 32 individual requests concerning only one infringement proceeding.

30. The table further shows that three of the six consultations to which the Commission replied positively related to infringement proceedings that had already been closed. However, as regards the three remaining positive replies, no reasons were indicated. Similarly, in the UK case, involving 32 individual requests, no basis was indicated for the Commission's positive or negative opinions.

31. The Commission, therefore, replied positively to 6 consultations out of 16, and to 10 of the 32 individual requests in the above UK consultation concerning one infringement. This would suggest that the Commission does not consistently give a negative answer to Member States' consultations concerning individual requests for access to reasoned opinions and or letters of formal notice, which have been submitted to national authorities under national law.

32. As regards the Commission's reasons for issuing negative opinions, it stated that they are based on the exceptions set out in Article 4 of the Regulation, under which it would also have refused access, if the request had been sent directly to the Commission. The table annexed to the Commission's opinion shows that the basis for 10 negative opinions was Article 4 (2) third indent of the Regulation (court proceedings and legal advice) and, in two cases, Article 4(2) second indent of the Regulation (the purpose of inspections, investigations and audits). The Commission did not, however, comment on the *Petrie* case-law in this context.

33. The Ombudsman notes that the *Petrie* case, which, as regards this point, relies on the judgment of the Court of Justice in *WWF*, excludes the right of public access under Community law to letters of formal notice and reasoned opinions in the period before the matter has been brought before the Court of Justice because "the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure" [10]. The Ombudsman does not see how this reasoning could possibly be used to argue that Community law creates an entitlement to confidentiality for Member States, which overrides, through Article 5 of Regulation 1049/2001, the possible requirements of the relevant *national* law in this regard. To the contrary, if national law permits, or obliges, the authorities of a Member State to disclose to their citizens any letters of formal notice or reasoned opinions sent to that Member State, the authorities are not required, as a matter of Community law, to refrain from applying national law.

34. The Ombudsman bases this view on his understanding that the purpose of Community law regarding the fundamental right of access to documents is to enhance the rights of EU citizens. Its aim is not to deprive EU citizens of their rights to monitor how their elected authorities are implementing and enforcing EU law.



35. In light of the above, the Ombudsman takes the view that, in carrying out its duties relating to infringements and public access to documents, the Commission should take reasonable steps to enable citizens to understand that, if a Member State refuses access to letters of formal notice or reasoned opinions that have been sent to it by the Commission, the Member State is responsible for that refusal under national law.

36. Moreover, the Ombudsman consistently takes the view that principles of good administration require that institutions should be as helpful and service-minded as possible. They should explore equally every legal possibility to achieve a satisfactory outcome for citizens' administrative actions, regardless of whether these actions are governed by Community or national law. Where a request for access to public documents is made, the above requirements of good administration are reinforced by the objective of the Regulation, which is to guarantee the greatest possible public access to documents emanating from the institutions. As the Court of First Instance held in *Franchet and Byk*, the ultimate, common aim is to give citizens the opportunity to monitor more effectively the lawfulness of how public powers are exercised [11] .

37. The Ombudsman considers that the reasons given by the Commission in its correspondence with the Ombudsman, but not developed in its opinion, as to why it cannot give advice to citizens, should be seen and evaluated against the above background.

38. The Commission argued that it would be inconsistent to give the advice referred to in paragraph 9 above, because, if it has already refused an individual access to the reasoned opinion, it cannot give a subsequent positive opinion if consulted by the Member State regarding the disclosure of the same document by the latter.

39. The principle of consistency means that institutions should follow their normal administrative procedures, and be seen to be reliable. The Commission considers that it would thus act in the same way, when maintaining its view about the secrecy of a certain reasoned opinion and or letter of formal notice, in both its administrative relations with citizens, and its administrative relations with the Member State.

40. However, as the Commission admitted in its opinion, and showed in its table, to date there has been only one situation to which the above argument on inconsistency could, in fact, apply. Only once did a Member State consult the Commission regarding access to a document which the Commission had already refused to disclose. Moreover, the request did not concern access to a reasoned opinion and or letter of formal notice. This could indeed suggest that such situations seldom occur.

41. The Commission's table further shows that out of 62 consultations, 16 concerned requests for access to reasoned opinions and or letters of formal notice. These 16 consultations were requested by the United Kingdom, Denmark, Holland and Spain [12] . One of the UK consultations referred to 32 individual requests for access to the same infringement documents.

42. The number of consultations referred to above, relating to reasoned opinions and or letters



of formal notice, concern, in fact, 16 different infringement proceedings. This is a rather low number of consultations for the period of four and a half years covered by the table. This could possibly indicate that Member States do not always consult the Commission. Also, it cannot be excluded that, at least in some cases, Member States did grant access to the reasoned opinions and or letters of formal notice. It may well be that, even if the request concerned a document whose disclosure had already been rejected by the Commission, the Member State's subsequent assessment under national law led the latter to conclude that access should be given.

43. The Ombudsman has been informed, however, by those Member States, which, in response to his request, submitted their contributions to the present own initiative inquiry, that they do not normally give access to reasoned opinions and or letters of formal notice under national law, unless the relevant infringement procedure has ended.

44. In light of the above, the Ombudsman concludes that, if the Commission, in all cases, and regardless of which country is concerned, were to adopt a principle whereby it advises unsuccessful applicants that they can turn to the national authorities, it could indeed be giving them false expectations. The Ombudsman, therefore, concludes his own-initiative inquiry without finding maladministration on the part of the Commission.

45. Nevertheless, he considers that citizens would find it helpful if the Commission, which is aware that the practice of public access to infringement documents is not the same in all Member States, could inform citizens that they can apply for access to documents in infringement procedures, either by applying to the Commission, or to the authorities of the Member State concerned, or to both. Furthermore, they could further be informed that, if they submit their request for access to such documents to the authorities of the Member State, it is national law which applies. The Commission could include such information on its excellent and citizen-friendly website concerning infringements [13]. The Ombudsman would be willing to assist the Commission in drafting this information, and will make a further remark in this respect below.

46. The Ombudsman would like to thank the Member States which contributed to the present own-initiative inquiry. In particular, he notes the Lithuanian position which favours minimum standards for public access to EU-related documents and information held by Member States authorities. This view supports the consistent position of the Ombudsman that such common standards would make it easier for citizens to monitor how the EU functions.

Conclusions

On the basis of his inquiry into the present own-initiative inquiry, the Ombudsman closes it with the following conclusion:

The Ombudsman does not find an instance of maladministration.



The Ombudsman attaches two annexes to the present decision: (i) " *Contributions of the Member States to the own-initiative inquiry OI/2/2009/MHZ* ", and (ii) " *Consultations by Member States, pursuant to Article 5 of Regulation 1049/2001, received between January 2005 and June 2009* ".

The President of the Commission and the permanent representations of the Member States will be informed of this decision.

FURTHER REMARK

The Ombudsman considers that it would assist citizens if the Commission, which is aware that public access to infringement procedure documents is not the same in all Member States, could inform citizens that they can gain access to such documents by applying, either to the Commission, or the authorities of the Member State concerned, or both. Furthermore, they could be informed that, if they submit their request for access to such documents to Member State authorities, it is national law which applies.

The Commission could include such information on its excellent and citizen-friendly website concerning infringements [14] . The Ombudsman would be willing to assist the Commission in the drafting of this information.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 12 November 2009

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145 p. 43.

[2] Case C-64/05 *Sweden (IFAW) v Commission* [2007] I-11389, paragraph 76.

[3] Article 5 of the Regulation 1049/2001 reads as follows:

" Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed , the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution. "



[4] Case T-191/99 *Petrie and others v Commission* [1999] II-3677, paragraph 68.

[5] See footnote 3.

[6] The table constitutes the second annex to the present decision.

[7] Article 4(2) second indent reads as follows:

" The institutions shall refuse access to a document where disclosure would undermine the protection of ... court proceedings and legal advice ".

[8] Article (4)4 reads as follows:

" As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or not be disclosed. "

Article 4(5) of the Regulation reads as follows:

" A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement ".

[9] The detailed summary of the contributions constitutes the first annex to the present decision.

[10] Case T-191/99 *Petrie and others v Commission* [1999] II-3677, paragraph 68.

[11] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] II-2023, paragraph 112.

[12] Submitted by the UK on 29 occasions, by Denmark on 17 occasions, by Spain and Poland on three occasions, by the Netherlands on six occasions and once by Finland, Sweden, Ireland and Belgium.

[13] http://ec.europa.eu/community_law/your_rights/your_rights_en.htm [Link]

[14] http://ec.europa.eu/community_law/your_rights/your_rights_en.htm [Link]

ANNEX TO DECISION ON OI/2/2009/MHZ

The contributions of the Member States [15]

Portugal



1. A few requests for access to reasoned opinions and/or letters of formal notice have been submitted to the Portuguese authorities. These authorities agree with the Commission's position on the matter. When making this conclusion, they took into account the protection of third party interests and reservations concerning other aspects of confidentiality at a particular stage of proceedings.

2. Access to the documents in question was refused, as an exception to the general rule, on the basis that there was a confidentiality risk, and that third party interests could have been endangered. This was done on the basis of implemented Community rules and national legal orders, namely, Article 4 of the Regulation and Article 6 of Decree-law 46/2007 of 24 August 2007, which regulates access to administrative documents and their re-use and transposes to the national legal order Directive 2003/98/EC of Parliament and of the Council of 17 November 2003.

Czech Republic

3. The Czech Republic referred to a recent judgment of the Court of First Instance [16] and stated that, in this judgment, the Court referred to the principle of equality of arms "*as one of the elements of the broader concept of a fair trial.*" In light of this case-law, the Czech Republic took the view that, when the Commission refuses access to documents relating to pending infringement proceedings, preventing the parties from being exposed to all external influences, in particular, from members of the public, it should also automatically give a negative opinion when a Member State consults it regarding access to the same documents in its possession.

4. According to the Czech Republic, the opposite approach would defeat the aim of the Commission's refusal. This would diminish the Commission's right to defend its interests from all external influences, as set out in the Regulation and confirmed by the above mentioned case-law.

Poland

5. Poland understands the Ombudsman's inquiry to concern the link between the Commission's right to refuse disclosure on the basis of Article 4(2) of the Regulation, and the Commission's position when responding to consultations requested by the Member States on the basis of Article 5 of the Regulation.

6. Poland shares the Ombudsman's concerns for the protection of citizens' rights and the principle of transparency relating to the Union's activities. Nevertheless, it supports the Commission's view that it would be inconsistent for the Commission to advise applicants, to whom it had refused access to documents, that they could approach national authorities for access to the same documents. In this respect, Poland took the view that national rules on access to documents are linked to the related Community rules by Article 5, first indent, of the Regulation. According to this Article, if a Member State receives a request for access to a document in its possession, originating from an institution, it shall consult the institution concerned in order to adopt a position which does not jeopardise the Regulation's objectives.



For Poland, this means that it should repeat its original disclosure refusal, if it is approached by a Member State for consultation on the basis of Article 5 of the Regulation.

7. Even if this does not result directly from the wording of the first indent of Article 5 of the Regulation, Poland considers that the Commission's negative opinion should be considered binding on the basis of the principle of loyal cooperation, set out in Article 10 of the EC Treaty and referred to in point fifteen of the preamble to the Regulation [17] . In addition, the possible friendly outcome of an Article 226 dispute between the Commission and the Member State would constitute another argument in favour of national authorities having to respect the Commission's position.

8. Poland considers, therefore, that if the Commission advises applicants to whom access was refused under the Regulation, that they could turn to national authorities to request access under national law, this would give the "*false impression* " that national authorities can disclose documents, purely on the basis of national law, without taking the Commission's position into account.

9. As regards the consultations carried out on the basis of Article 5 first indent of the Regulation, Poland shares the Ombudsman's view that the Commission's negative opinion, in reply to the Member State's consultation, cannot be automatic, and cannot be taken on the basis of which kind of document is concerned. In this respect, Poland referred to the established case-law that the institution needs to examine each document individually in order to see whether it may be disclosed or not. The mere fact that a document falls within the scope of one of the exceptions provided for in Article 4 of the Regulation is not sufficient to justify a refusal of disclosure.

10. Nevertheless, the fact that the Commission opposes the disclosure of the reasoned opinions and/or letters of formal notice in many cases does not permit one to conclude that the Commission does so automatically, without taking into consideration the particular circumstances of each case. To date, the opinions which the Commission has sent to Poland in terms of Article 5, first indent of the Regulation do not appear to be drafted automatically. Each one was justified and referred to relevant legal provisions and appropriate case-law.

11. Citizens are not, however, "*completely* " deprived of access to the documents in question. The exceptions covered by Article 4 (2) of the Regulation are not absolute. The possibility to refuse access, pursuant to *Petrie* , is justified, as a matter of principle, until the close of proceedings in each individual case.

12. Poland interpreted Article 5 of the Regulation on the basis of two situations: (i) where a Member State considers that it is clear that the document should be disclosed; and (ii) where a Member State considers that it is clear that the document should not be disclosed. When Article 226 proceedings end, Poland discloses documents without consulting the Commission. If Poland considers that access should be refused, it should always consult the institution concerned. In its opinion, only the European institutions which know the details of the case, and which have experience of applying the Regulation regarding requests for access, can assess the situation and take an informed decision.



Slovak Republic

13. The Slovak Republic agrees that the disclosure of any documents issued in the course of infringement proceedings could negatively affect the pending procedure. According to the Slovak Republic, the letters of formal notice and reasoned opinions, and all communication which takes place between the Commission and a Member State in the course of an infringement procedure, fall within the scope of the exception concerning the protection of the purpose of inspections, investigations and audits contained in Article 4(2), third indent of the Regulation.

14. The Slovak Republic welcomes the possibility of consulting the Commission, as provided in Article 5 of the Regulation, and considers the Commission's practice in this regard appropriate, as long as it provides adequate explanations regarding its refusal for access to documents.

15. Finally, the Slovak Republic drew particular attention to the possibility for a Member State to request an institution not to give access to a document originating from that Member State without its prior agreement under Article 4(5) of the Regulation.

Hungary

16. Hungary pointed out that, pursuant to the Regulation, applicants who wish to have access to documents can refer directly to the Commission or to the Member State. In the latter case, in view of Article 5 of the Regulation, the Member State can either:

(i) refer the request directly to the institution; or

(ii) after consulting the institution, decide on the request itself, unless it is clear that the document shall or shall not be disclosed.

17. Hungary also pointed to Article 5(7) of the Commission's rules of procedure [18], which provides that:

" Where a Member State receives an application for access to a document originating from the Commission, it may, for the purposes of consultation, contact the Secretariat-General, which shall be responsible for determining the Directorate-General or department responsible for the document within the Commission. The issuing Directorate-General or department [responsible for] of the document reply to the application after consulting the Secretariat-General. "

18. Hungary considers that, if the Commission has already refused access to a document, it is inconsistent to grant access to the same document, if the Commission is consulted by a Member State in this respect. Article 5 of the Regulation states that, if the Commission refuses access to a document, and then the applicant requests the Member State for access to the same document, also held by that Member State, the Member State in question shall consult the Commission. Thus, the Commission has no reason to change its previous opinion, since it is



fully aware of the circumstances of the case. The Commission examined them thoroughly when making its decision regarding the original request for access.

19. Nevertheless, if the Commission decides to refuse access to a document, the applicant can, in accordance with Article 8 of the Regulation, make use of the available remedies, namely, by submitting a confirmatory application, starting court proceedings, or submitting a complaint to the Ombudsman.

20. According to the Hungarian authorities, documents prepared in ongoing infringement procedures fall under the third indent of Article 4(2) of the Regulation (the purpose of inspections, investigations and audits). They consider that disclosing such documents during the consultation procedure between the Commission and Member States, or during a possible court case, could jeopardise the entire infringement proceedings, and fail to ensure that the Member State fulfils its contractual obligations or supports its practice appropriately.

Lithuania

21. First, Lithuania stated that it has not received any requests from citizens to provide information regarding documents relating to infringement procedures.

22. Lithuania agrees with the Ombudsman that the principle of transparency, introducing clearly defined procedures for public access to EU institution documents, is one of the most important democratic achievements of the EU. However, documents relating to infringement procedures are unique, not only from a Community point of view, but also from the perspective of the national legal systems. The aim of these documents is to determine whether a Member State has infringed EU law. Such documents could be equated to documents in pre-trial or court proceedings under national law.

23. Article 117 of the Lithuanian Constitution states that all court cases are public, with the exception of some cases involving family or private life, and the protection of commercial, professional or state secrets. However, the public's right of access to documents arises only after the closure of court proceedings and after the court decision has been taken.

24. The Regulation provides that institutions shall not allow access to documents if such access could harm the protection of court proceedings (Article 4(2) second indent of the Regulation), or the aims of audits or inspections, (Article 4(2) third indent of the Regulation). Public access can also be denied if it would harm the decision-making process, unless there is a greater interest in public disclosure. Therefore, Lithuania agrees with the provisions of the Regulation. Access to documents should be controlled in cases where the documents concerned are to be used in a pre-trial infringement procedure.

25. Nevertheless, each request for access to documents should be evaluated individually, and applicable exceptions for access should be indicated. Citizens should have access to an open-ended list of situations in which documents are accessible to the public, as well as clear criteria on how the public right of access to documents is evaluated.



[15] These contributions are referred to in chronological order, according to the date of their submission to the Ombudsman.

[16] Case T-36/04 *Association de la presse internationale v Commission* [2007] ECR II-3201, paragraphs 63, 79 and 80.

[17] " *Even if it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.* "

[18] 2001/937/EC, ECSC, Euratom: Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), OJ 2001 L 345 p. 94.

CONSULTATIONS BY MEMBER STATES PURSUANT TO ARTICLE 5 OF REGULATION 1049/2001 RECEIVED FROM 2005 TO JUNE 2009

Date

Member State

Requested documents

Commission position

Article of procedure

21-01-2005

UK

Reasoned Opinion sent to UK in the infringement case 2004/2036

Negative Art. 4(2) 3rd indent

11-02-2005

UK

Commission correspondence on infringement case 2004/4389



Negative Art. 4(2) 3 rd indent

28-02-2005

UK

Exchanges between the Commission and the UK authorities in infringement case 2000/4976

No objection

08-03-2005

UK

Exchanges between the Commission and the UK authorities in infringement cases: 1995/4853
1997/4562 1998/4017 1999/2119

No objection as regards case 1998/4017 Negative as regards the other cases Art. 4(2) 3 rd
indent

13-04-2005

UK

Commission correspondence in infringement case 2001/4027

Negative Art. 4(2) 3 rd indent

26-04-2005

UK

Infringement case 2001/4466 Radioactive contamination at Earley, Reading

Negative Art. 4(2) 3 rd indent

29-04-2005

UK

Letters of formal notice, reasoned opinions and referrals to the Court in infringement cases
involving the Scottish Executive (32 cases)

No objections as regards 10 cases Negative as regards the other cases Art. 4(2) 3 rd



24-06-2005

UK

UK Government reply to the Commission in infringement case 2004/4881, insofar as it reflects the content of the Commission's letter

Negative Art. 4(2) 3 rd indent

25-07-2005

UK

Letter of formal notice in infringement case 2005/2225

Negative Art. 4(2) 3 rd indent

Date

Member State

Requested documents

Commission position

Article of procedure

02-02-2006

UK

Commission Article 226 letter dated 13 December in relation to EC Complaint reference 2003/4272

Negative Art. 4(2) 3 rd indent

06-03-2006

UK

Commission response dated 10 January 2006 relating to the use of shredded tyres as landfill engineering material in connection with the Landfill Directive and the Waste Framework Directive



No objection

07-03-2006

UK

Letter from UK Perm Rep to the Director General for Employment which quotes extensively from the Director General's letter.

No objection

16-03-2006

UK

Four letters sent to the UK in relation to the National Allocation Plan

No objection

19-06-2006

UK

Reasoned Opinion sent to UK in the infringement proceedings 1999/5132

Negative Art. 4(2) 3 rd indent

26-07-2006

UK

Reasoned opinion in infringement case 1995/2047

No objection

17-08-2006

NL

Letter of formal notice - infringement case 2004/2313

No objection (case closed)

04-10-2006

18



UK

UK pleadings in Court case C-88/03 insofar as they reflect the content of Commission submissions in this case

Negative Art. 4(2) 2nd indent

Art. 230 EC

03-11-2006

DK

Commission submissions in Case C-464/02

No objection

13-11-2006

E

Letter of formal notice + closure document - infringement case 2005/2079

No objection (case closed)

13-11-2006

E

Letter of formal notice + closure document - infringement case 2005/2296

No objection (case closed)

13-11/2006

E

Letter of formal notice - infringement case 2005/2074

Negative Art. 4(2) 3rd indent

05-12-2006

UK



Letter of formal notice of 18.10.2006

Negative Art. 4(2) 2 nd indent

29-12-2006

DK

Letter of formal notice and reasoned opinion (2006/2240)

Negative Art. 4(2) 2 nd indent

Date

Member State

Requested documents

Commission position

Article of procedure

07-05-2007

UK

UK pleadings in Court case C-215/04 insofar as they reflect the content of Commission submissions in this case

Negative Art. 4(2) 2 nd indent

Art. 226 EC

11-05-2007

DK

Letter from Director General Verrue to Ambassador Grube of 29-03-2007 related to the Danish measures proposed following the judgement in case C-150/04 (Commission v. DK)

Negative Art. 4 (2) 3 rd indent



Art. 226 CE

31-08-2007

IRL

GforGo's complaint against Galileo of 2003

Negative/Partial Art. 4(3) 2nd indent Art. 4(1) a 3rd indent

05-09-2007

UK

COREU documents on sanctions and illegal logging in Burma/Myanmar

Negative Art. 4(1)a 3rd indent

29-10-2007

DK

Infringements: 2004/0138 -2004/0575 - 2004/0660

No objection

19-11-2007

DK

Seven letters of formal notice sent by the Commission to the Danish authorities in the years 2004-2007

No objection

21-11-2007

UK

Letter sent as part of the informal stage of infringement proceedings (recognition of diplomas in clinical psychology)

Negative Art. 4(2) 3rd indent



Date

Member State

Requested documents

Commission position

Article of procedure

07-01-2008

NL

Written observations of the Commission in Court case C-5 25/06

Negative Art. 4(2) 2nd indent

Art. 234 EC

06-03-2008

UK

Opinion of DG TRADE

No objection

04-04-2008

DK

Documents pertaining to the infringement procedure 2008/0268

Negative Art. 4(2) 3rd indent

08-04-2008

DK

Infraction case against Denmark -case N° -2008/0265

No objection



09-04-2008

DK

Commission's infraction case against Denmark - case no. 2008/0264 to 2008/0270

No objection

05-05-2008

UK

Two letters concerning the application of Directive 1999/5/EC

No objection

12-06-2008

NL

Two Commission letters on a closed infringement case 2002/4578

No objection

23-06-2008

PL

Commission's Application in Court case C-547/07

No objection

Art. 226 EC

03-07-2008

PL

Written submissions of the Commission in Court case C-475/07

Negative Art. 4(2) 2 nd and 3 rd indent

Art. 226 EC

24-07-2008

23



DK

Request for access to documents in case P/98/4719 (complaint - possible infringement)

No objection

31-07-2008

FI

Written observations of the Commission in Court case C-470/03

No objection

Art. 234 EC

26-08-2008

NL

III/F/5430/92 supplementary protection for plant production products

No objection

05-09-2008

NL

Correspondence concerning the Air France-KLM Merger

Negative Art. 4 (2) 3 rd indent

16-09-2008

UK

E-mails exchanged during informal stage of infringement proceedings (implementation of Directive 2002/58/EC)

Negative Art. 4(2) 3 rd indent

26-09-2008

DK

24



Written observations of the Commission in Court case C-127/08

No objection

Art. 234 EC

02-10-2008

UK

Written observations of the Commission in Court case C-190/06

No objection

Art. 234 EC

12-12-2008

UK

Letter from DG INFSO requesting information (later became infringement case 2009/2114)

Negative Art. 4(2) 3 rd indent

15-12-2008

SV

Written submissions of the Commission in Court case C-419/07

No objection

Art. 226 EC

30-12-2008

PL

Commission's Application in Court case C-545/08

Negative Art. 4(2) 2 nd indent Art. 4(2) 3 rd indent

Art. 226 EC



Date

Member State

Requested documents

Commission position

Article of procedure

07-01-2009

UK

Letter of formal notice in infringement case 2007/4156

Negative Art. 4(2) 3 rd

08-01-2009

FI

Detailed opinion regarding notification 2008/425/RO

Article 4(2) 3 rd indent

02-02-2009

UK

UK pleadings in Court joined cases T-211/04 and T-215/04; in joined cases C-428/06 and C-434/06 and in case C-88/03 insofar as they reflect the content of Commission submissions in these cases

No objection

Art. 230 EC

16-02-2009

DK

Letters from DG TREN of 1-4-2004 and of 4-10-2004 "Future regime for oil and gas activities



carried out by Danish Underground Consortium in the Danish part of the North Sea"

No objection

18-02-2009

DK

letter of formal notice in case 2004/2018

No objection

18-02-2009

DK

Letter of formal notice in case 2006/2349

Negative Article 4(2) 3 rd indent

08-04-2008

DK

Documents in the Commission's infringement case against Denmark 2008/0266

Negative Article 4(2) 3 rd indent

15-04-2009

DK

letters from DG TREN in infringement cases 2005/2219, 2006/2154, 2006/2415 (Transposition of Directive 2003/30/EC on the promotion of the use of bio fuels or other renewable fuels for transport)

No objection

16-04-2009

UK

Written submissions of the Commission in Court case C-394/07

No objection



Art. 234 EC

24-04-2008 (Flemish Community) 29-04-2008 (French Community)

B

All document originating from the Commission in the administrative file leading to the adoption of the Belgian list of events of major importance pursuant to Article 3a of Directive 89/552/EEC

Negative Article 4(2) 3rd indent

01-05-2009

DK

Written submissions of the Commission in Court case C-150/04

No objection

Art. 226 EC

08-05-2009

NL

Comments of the European Commission (art. 8.2) of the Dutch notification 2008/0140/NL

No objection

16-05-2008

UK

Two letters concerning the application of Directive 1999/5/EC and the GSM Gateway services in the UK

No objection

19-06-2009

DK

Letter of formal notice - infringement cases 2008/4171 and 2009/4227



Negative Art. 4(2) 3 rd indent