

Special report from the European Ombudsman to the European Parliament concerning lack of cooperation by the European Commission in complaint 676/2008/RT

Special Report

Case 676/2008/RT - Opened on 28/03/2008 - Recommendation on 27/10/2008 - Special report on 28/03/2008 - Decision on 07/07/2010

(Made in accordance with the Statute of the European Ombudsman [1])

INTRODUCTION

1. The Ombudsman considers that the present case raises an important issue of principle. He takes the view that the Commission has failed to cooperate sincerely with the Ombudsman during his inquiry into this complaint. The Ombudsman, therefore, seeks Parliament's assistance to ensure that the Commission will respect the duty of sincere cooperation with the Ombudsman in the future.

THE BACKGROUND TO THE COMPLAINT

2. The complainant is a non-governmental organisation acting in the field of environmental protection. On 1 March 2007, it asked the Commission for access to information and documents held by the Directorate-General (DG) for Enterprise and Industry and former Vice-President Verheugen. The information and documents requested related to meetings between the Commission and representatives of car manufacturers, at which the question of the Commission's approach to carbon dioxide emissions from cars was discussed. The Commission gave only partial access to the requested documents.

3. On 25 June 2007, pursuant to Article 7, second paragraph, of Regulation (EC) No 1049/2001 of 31 May 2001 regarding public access to European Parliament, Council and Commission documents ('Regulation 1049/2001') [2] , the complainant submitted a confirmatory application to the Commission, which replied on 9 August 2007.

4. With reference to 18 letters, received by former Vice-President Verheugen from various car manufacturers, the Commission informed the complainant that it needed to consult their authors



[3] . This was in order to assess whether an exception to the right of access, as provided for in Article 4(1) [4] or 4(2) [5] of Regulation 1049/2001, applied to the content of the said letters. The Commission indicated that, following this consultation, it would give the complainant access to all the letters which were not subject to the aforementioned exception.

5. On 14 November 2007, the Commission informed the complainant that no exceptions to the right of access were found in relation to fifteen letters. Accordingly, the complainant was granted access to these letters. However, the Commission refused to grant access to three letters, sent by Porsche AG to former Vice-President Verheugen. In so doing, it based its decision on the exception set out in Article 4(2), first paragraph of the Regulation 1049/2001 [6] , namely, that their disclosure would undermine the protection of the company's commercial interests.

THE SUBJECT MATTER OF THE INQUIRY

6. The complainant alleged that the Commission:

- wrongly refused access to the Porsche AG letters, on the basis of the first paragraph of Article 4(2) of Regulation 1049/2001; and
- wrongly refused partial access to the Porsche AG letters, on the basis of Article 4(6) of Regulation 1049/2001 [7] .

The complainant claimed that:

- the Commission should grant it access to the requested letters in their entirety.

THE INQUIRY

7. The complaint was forwarded to the Commission with a request for an opinion on its content by 31 May 2008. The Commission requested an extension of time, which was granted until 30 June 2008. Once received, the Commission's opinion was forwarded to the complainant with an invitation to submit observations. The complainant sent its observations on 4 September 2008.

8. On 25 September 2008, in accordance with Article 3(2) of the Ombudsman's Statute, the Ombudsman's services carried out, at the Commission's premises, an inspection of the documents to which the complainant referred.

9. A copy of the report on this inspection was sent both to the complainant and to the Commission.

10. On the basis of the inspection carried out, the Ombudsman made a draft recommendation to the Commission on 27 October 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS



A. Allegation of failure to grant access to the relevant documents and related claim

Arguments presented to the Ombudsman

11. The complainant alleged that the Commission wrongly refused: (i) access to the Porsche AG letters, on the basis of the first paragraph of Article 4(2) of Regulation 1049/2001; and (ii) partial access to the Porsche AG letters, on the basis of the Article 4(6) of Regulation 1049/2001. It also claimed that the Commission should grant it access to the requested letters in their entirety.

12. The complainant argued that the Commission failed to give a detailed explanation regarding which of Porsche AG's commercial interests could be relevant, and did not take into account the overriding public interest in disclosure.

13. In its opinion, the Commission argued that the three letters in question detailed Porsche AG's " *specific position on the automobile market* ". The Commission went on to say that it could not provide further details as regards the content of the letters without revealing their content. It reiterated that disclosure of the letters would undermine the protection of Porsche AG's commercial interests.

14. Additionally, the Commission pointed out that it did, in fact, carry out " *the public interest test* " and concluded that Porsche AG's commercial interests outweighed the public interest in disclosing the letters. It added that partial access could not be granted because the letters did not contain parts that could be disclosed without harming Porsche AG's commercial interests.

The Ombudsman's assessment leading to the draft recommendation

15. Article 1(a) of Regulation 1049/2001 provides that the aim of this Regulation is to ensure the widest possible access to documents held by the Council, the European Parliament and the Commission. According to the established case-law of the Court of Justice of the European Union any exceptions to this principle have to be interpreted strictly.

16. In order for a refusal of access to be valid, the Commission has to have followed the assessment sequence found below and have examined:

(i) first, whether the requested document falls within the scope of one of the exceptions provided for in Article 4 of Regulation 1049/2001;

(ii) second, whether disclosure of that document would specifically and actually undermine the protected interest;

(iii) third, whether there is no overriding public interest in disclosure; and



(iv) fourth, whether the need for protection applies to the whole document in question.

17. The Commission refused to grant the complainant access to Porsche AG's relevant letters on the basis of the first paragraph of Article 4(2) of Regulation 1049/2001. According to this provision, "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property ... "

18. The letters in question were sent by Porsche AG in the context of a consultation held by the Commission with key stakeholders concerning the review of the Community Strategy to reduce carbon dioxide emissions from passenger cars. It was, therefore, likely that the three letters contained information on Porsche AG's business relations. Consequently, the Commission could have regarded them as falling within the scope of the exception laid down by Article 4(2), first paragraph of Regulation 1049/2001.

19. The Ombudsman's services inspected the three Porsche AG letters, as well as an exchange of e-mails between the Commission and Porsche, in which the Commission informed Porsche that it intended not to disclose the three letters.

20. On the basis of the inspection, the Ombudsman concluded that the Commission had wrongly refused access to the Porsche AG letters on the basis of Article 4(2), first paragraph and Article 4(6) of Regulation 1049/2001 and that this was an instance of maladministration. On 27 October 2008, the Ombudsman, therefore, made a draft recommendation to the Commission, which contains the details of the Ombudsman's factual and legal analysis [8]. The operative part of the draft recommendation was as follows:

The Commission should grant access to the three letters sent by Porsche AG to the former Vice-President Verheugen in their entirety or consider partially disclosing them.

On the basis of Article 195 EC (now Article 228 TFEU), the Ombudsman asked the Commission to give a detailed opinion within three months, that is, by 31 January 2009.

The developments after the Ombudsman's draft recommendation

22. The Commission did not reply to the draft recommendation. Instead, throughout the six months following the deadline given by the Ombudsman for a reply, it repeatedly asked for extensions to that deadline. These requests were made on 30 January, 23 February, 26 March, 29 April 2009, 29 May and 26 June 2009 respectively.

23. The Ombudsman accepted all the Commission's requests for extensions. However, in his letter to the Commission of 3 July 2009, he pointed out that it was unclear why the drafting of a detailed opinion was taking such a long time that it required a sixth request for an extension of the deadline.

24. On 17 July 2009, the Commission replied to the Ombudsman's above letter. It stated that it



was not in a position to give a substantive reply to his draft recommendation because it still needed to finish consulting the third party about the proposed disclosure of documents. In this respect, it explained that, according to Article 5, paragraph 6, of the Detailed rules for the application of Regulation 1049/2001 ('the Detailed rules') annexed to Commission Decision 2001/937/EC [9] , when it intends to disclose a third party document against the explicit wish of the author, the Commission " *shall inform the author of its intention to disclose the document ... and shall draw his attention to the remedies available to him to oppose disclosure.* " According to the Commission, Porsche AG " *would be prevented from taking such legal action if the Commission were to disclose the documents against their will as a response to the Ombudsman's draft recommendation* ". The Commission stated that it was aware that it could not indefinitely postpone its reply to the Ombudsman's draft recommendation. However, it preferred to exhaust all possibilities to reach an agreement with the third party rather than simply " *confirm its decision not to disclose the documents* ".

25. On 30 September 2009, the Commission sent another letter to the Ombudsman. It stated that it had decided to grant partial access to the three letters and had, therefore, created edited versions of the documents. It appears that the Commission informally submitted this proposal to grant partial access to Porsche AG. However, the latter failed to inform the Commission of its opinion on the matter. Consequently, the Commission decided to officially notify Porsche AG of its intention to disclose the edited versions of the three letters. In this respect, the Commission recalled that, in accordance with the provisions of Article 5(6) of its Detailed rules, when it intends to disclose a third party document against the explicit wish of the author, the Commission suspends the effects of its decision to disclose the documents for ten working days , in order to give the author the possibility to challenge this decision before the General Court and to request interim measures. The Commission concluded that the disclosure of the three letters would, therefore, be postponed for a period of ten working days starting from the date the notification would be received by Porsche AG.

26. On 27 October 2009, the Commission's services clarified that the Commission's letter of 30 September constituted the Commission's final reply to the Ombudsman's draft recommendation. The Commission further added that it did not foresee sending the Ombudsman another reply relating to the present case. It indicated that the decision to inform Porsche of its intention to disclose the three letters had been sent for translation and it would be sent to Porsche in the beginning of November 2009. It clarified again that the ten-day time limit would run from the moment when Porsche AG received the said decision. Therefore, " *the procedure of disclosure of the three letters could not advance before mid November 2009* ". The Commission finally stated that it could provide the Ombudsman with a copy of the notification letter sent to Porsche, if he so wished.

27. On 9 November 2009, the Ombudsman sent another letter to the Commission, in which he requested (i) a copy of the notification letter sent to Porsche AG by the Commission and (ii) to be informed about the outcome of the procedure initiated by the Commission in order to grant access to the relevant letters.

28. On 4 December 2009, the Commission's services informed the Ombudsman's services by



telephone that (i) the notification letter would be sent shortly to Porsche AG, and (ii) a copy of the notification letter would be forwarded to the Ombudsman. After a further check with the Commission services, it appeared that, as of 15 December 2009, the notification letter to Porsche had still not been sent out.

The Ombudsman's assessment

29. The Ombudsman recalls that, in accordance with Article 228 TFEU (ex Article 195 EC), "*where he establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views*" (emphasis added).

30. The Ombudsman notes that, in the present case, the Commission did not provide its opinion within the three-month deadline provided for in Article 228 TFEU, that is by 31 January 2009. The Commission instead requested six extensions of the deadline to submit its detailed opinion on the Ombudsman's draft recommendation. In July 2009, and again in September 2009, the Ombudsman informed the Secretariat-General of the Commission of his intention to present a Special Report to Parliament if he did not receive an answer to his draft recommendation. Only then did the Commission reply that it was not in a position to give a substantive reply to his draft recommendation because it still needed time to finish consulting the third party about the proposed disclosure of documents. The Commission stated that it was aware that it could not indefinitely postpone its reply to the Ombudsman's draft recommendation. It, nevertheless, added that it preferred to exhaust all possibilities to reach an agreement with the third party rather than simply "*confirm its decision not to disclose the documents*".

31. On 30 September 2009, the Commission sent another letter to the Ombudsman. It stated that it had decided to grant partial access to the three letters and had, therefore, produced edited versions of these documents. It appears that this proposal to grant partial access was informally submitted by the Commission to Porsche AG. The latter failed to inform the Commission of its opinion on the matter. Consequently, it appears that the Commission concluded that it needed formally to inform Porsche AG of its intention.

32. However, to date, that is, the date of submission of this Special Report, the Ombudsman has no information in his possession establishing that the Commission has, in fact, sent a formal letter of notification to Porsche AG.

33. The Ombudsman takes the view that the Commission's explanations as to why it could not reply to his draft recommendation are unconvincing.

34. In its various communications on the matter, the Commission explained that it could not comply with its Treaty obligation to reply to the draft recommendation because of ongoing consultations with Porsche AG concerning the proposed disclosure of the documents in question. The Commission justified the length of the above consultations by putting forward two arguments: (i) the prospect of achieving a positive outcome in the negotiations with Porsche AG as regards the proposed disclosure; and (ii) the need to give Porsche AG a reasonable period



of time to take legal action against the Commission's decision to disclose the documents in question.

35. As regards the Commission's *first argument*, the Ombudsman recalls that, in the framework of the consultations provided for in Article 4, paragraph 4, of Regulation 1049/2001 [10], the Commission must establish a deadline for the third party author of a document to reply to it. This deadline should enable the Commission to abide by its own deadlines [11]. In the Ombudsman's view, the Commission's own deadlines necessarily include the deadline established by the Treaty on the Functioning of the European Union for giving a detailed opinion on a draft recommendation from the Ombudsman.

36. As regards the Commission's *second argument*, the Ombudsman notes that the Commission's procedural rules require that, if it intends to give access to a document against the explicit opinion of the author, it should inform the latter of its intention to do so and of the legal remedies available to him or her to oppose disclosure [12]. In this regard, the Ombudsman points out that it took the Commission 11 months to inform him that it intended to give access to Porsche AG's letters. Moreover, even at the date of the present Special Report was submitted to Parliament, that is, over 15 months after the draft recommendation was issued, the Commission appears not to have yet informed Porsche AG of its intention to give access to the documents so as to allow Porsche to exercise its legal rights.

37. In light of the above, the Ombudsman considers that consultation with Porsche AG and the need to allow Porsche AG to exercise its legal rights cannot justify the Commission's extraordinary delay in first replying to the draft recommendation and subsequently in carrying out its decision to inform Porsche AG of its intention to release the documents. In this connection, the Ombudsman recalls the relevant case-law concerning the principle of sincere cooperation (former Article 10 EC, replaced in substance by Article 4, paragraph 3, Treaty on European Union) [13], according to which the Union institutions are also subject to the duty to cooperate in good faith in their relations with each other. This obligation is clearly stipulated by the new Article 13, paragraph 2 of the Treaty on European Union [14].

38. The Ombudsman concludes with great regret that, by delaying for 15 months its reply to his draft recommendation and by failing to implement its undertaking to notify Porsche AG of its intention to disclose, the Commission infringed its obligation to cooperate with him sincerely and in good faith.

39. The Ombudsman emphasises that the Commission's attitude is detrimental not only to inter-institutional dialogue, but also to the public image of the EU. He points out that, in the course of the present inquiry, he established an instance of maladministration and gave the Commission every possibility to remedy it. The Commission's uncooperative attitude in this regard risks eroding citizens' trust in the Commission and undermining the capacity of the European Ombudsman and the European Parliament adequately and effectively to supervise the Commission. As such, it runs counter to the very principle of the rule of law, on which the Union is, *inter alia*, founded (Article 2 TEU).



40. The Ombudsman, therefore, considers that the Commission's attitude in the present inquiry justifies the submission of a Special Report to Parliament.

B. The Ombudsman's recommendation

In light of the above, the Ombudsman invites the European Parliament to consider that the Commission should:

(i) acknowledge that the excessive delays in responding to the Ombudsman in this case constitute a breach of its duty of sincere cooperation as envisaged by the TEU;

and

(ii) give an undertaking to the European Parliament that it will respect the duty of sincere cooperation with the Ombudsman in the future.

The European Parliament could consider adopting a resolution accordingly.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 24 February 2010

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15, as last amended by Decision of the European Parliament 2008/587/EC, Euratom of 18 June 2008, 2008 OJ L 189 p. 25.

[2] OJ 2001 L 145, p. 43. Article 7, second paragraph, of Regulation 1049/2001 provides that: "*In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.*"

[3] Article 4(4) of Regulation 1049/2001 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 shall not be disclosed.*"

[4] Article 4(1) of Regulation 1049/2001 reads as follows: "*The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) the public interest as regards:



- *public security,*
- *defence and military matters,*
- *international relations,*
- *the financial, monetary or economic policy of the Community or a Member State;*

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. "

[5] Article 4(2) of Regulation 1049/2001 reads as follows: "*The institutions shall refuse access to a document where disclosure would undermine the protection of:*

- *commercial interests of a natural or legal person, including intellectual property,*
- *court proceedings and legal advice,*
- *the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. "*

[6] See footnote 5.

[7] Article 4(6) of Regulation 1049/2001 reads as follows: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. "*

[8] The draft recommendation is published on the Ombudsman's website:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/3735/html.bookmark>
[Link]

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

[10] See footnote 3.

[11] Article 5(5) of the Detailed rules for the application of Regulation 1049/2001, annexed to the Commission decision 2001/937/EC provides that: "*The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply ... "*

[12] In accordance with the provisions of the Article 5(6) of the Detailed rules for the application of Regulation 1049/2001, annexed to the Commission decision 2001/937/EC.

[13] Case C-230/81 *Luxembourg v Parliament* [1983] ECR 255, paragraph 37 and Case



C-204/86 *Greece v Council* [1988] ECR 5323, paragraph 16.

[14] Article 13, paragraph 2, TEU reads as follows: "*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.*"