

Draft recommendation to the European Commission in complaint 116/2005/MHZ

Recommendation

Case 116/2005/MHZ - Opened on 31/01/2005 - Recommendation on 05/12/2005 - Decision on 20/12/2005

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

According to the complainant, who is a Portuguese MEP, the relevant facts are as follows.

The complainant made a request to the Commission for access to the text of the letter dated 30 March 2004 that Portugal's then Minister of Finance ("the Minister of Finance") had sent to the Commission. This letter was a reply to the Commission's queries in the framework of an excessive deficit procedure initiated by the Commission against Portugal.

On 24 September 2004, the Commission refused to provide access to the requested document on the grounds that its disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Member State concerned (i.e., Portugal). This exception to public access is contained in Article 4(1)(a), fourth indent, of Regulation 1049/2001.

On 11 October 2004, the complainant made a confirmatory application under 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 (2) ("Regulation 1049/2001") for access to the document.

On 6 December 2004, the Commission confirmed its initial refusal of access and informed the complainant that partial access should be refused as well given that all parts of the document are covered by the same exception i.e., Article 4(1)(a), fourth indent, of Regulation 1049/2001 (3). The Commission also stated in its reply to the complainant that the disclosure would have adverse repercussions on the financial markets' perception of Portugal's economic situation.

On 4 January 2005, the complainant lodged a complaint with the Ombudsman.

The complainant argues that the Commission's refusal was unfounded. He considers that a



disclosure of the information contained in the letter concerning Portugal's budgetary policy could not shock anyone more than the news published every day in this respect. Furthermore, he takes the view that, if the Commission's interpretation of Article 4(1)(a), fourth indent, of Regulation 1049/2001 were accepted, the actions of the Commission in exercise of the powers conferred on it by the EC Treaty in relation to the protection of economic and monetary union would be excluded from parliamentary control.

The complainant alleged that the Commission has interpreted the exception provided in Article 4(1)(a), fourth indent, of Regulation 1049/2001 too broadly.

The complainant claimed that he should be granted access to the whole document or at least to parts of it.

THE INQUIRY

The opinion of the Commission

The opinion of the Commission contains, in summary, the following comments.

First, the Commission referred to the background of the case.

The complainant, who is an MEP, tabled a written question requesting the Commission to provide him with a copy of a letter sent on 30 March 2004 by the Portuguese Minister of Finance to the former Commissioner Mr Solbes. Mr Almunia, who replaced Mr Solbes, replied to the complainant's question on 30 March 2004. He stated that the complainant's request for access would be handled according to the procedure laid down in Regulation 1049/2001. On 24 September 2004, the Director General for Economic and Financial Affairs replied that the need to protect Portugal's economic and financial policy precluded disclosure of the letter sent by the Minister of Finance. On 11 October 2004, the complainant submitted a confirmatory application. After the second examination of the complainant's request, the Secretary General confirmed, on 6 December 2004, that the letter could not be disclosed.

Secondly, the Commission put forward the reasons for which it considered that access should be denied.

The Commission explained that the excessive deficit procedure laid down in Article 104 of the EC Treaty is politically sensitive and involves delicate discussions between the Commission, the Member States and ECOFIN. This procedure is also likely to be discussed in political circles and financial markets. Therefore, some degree of confidentiality needs to be applied in order to ensure that Member States are in a position to comply with the requirements of the Stability and Growth Pact.

The complainant requested access to a letter in which the Minister of Finance informed the Commissioner responsible for economic and financial affairs of the budgetary measures to be adopted in order to generate additional state revenue, which was the objective envisaged by the Portuguese government. The Commission considered that disclosure of this letter would



adversely affect the Portuguese government's economic and financial policy because such disclosure could jeopardise the government's achievement of those objectives. Therefore, the Commission denied access on the basis of the exception laid down in Article 4(1)(a), fourth indent of Regulation 1049/2001. Since the Commission was of the opinion that this exception precluded it from disclosing the letter of the Minister of Finance, it did not consult the Portuguese authorities on the complainant's application. The Commission took the view therefore that, in any event, pursuant to Article 4(5) of Regulation 1049/2001 (4) , the Commission would have to consult these authorities before considering the release of the document requested by the complainant. In support of that view, the Commission quoted the judgements of the Court of First Instance in Case T-187/03 *Scippacercola v. Commission* (5) and also in Case T-168/02 *IFAW v. Commission* (6) .

The Commission also denied that it interpreted the relevant exception too broadly. The public disclosure of the information contained in the letter would put at risk the successful implementation of the proposed operations. There was a real risk of jeopardising the Portuguese government's capacity to achieve its objectives. The Commission also stated that it considered the possibility of granting partial access. However, the letter in question was a short document specifically dealing with the envisaged budgetary measures. Moreover, there were no significant parts of that letter to which the relevant exception would not apply. In this context, the Commission added that most documents concerning Portugal and relating to the excessive deficit procedure have been made public through the Commission's website.

Furthermore, the Commission pointed out that under the Framework Agreement concluded between the Parliament and the Commission, the European Parliament can obtain access to confidential information held by the Commission in order to exercise its powers. However, the individual members of the European Parliament have no such privileged access to confidential information. Disclosure of a document under Regulation 1049/2001, even at the request of an MEP, puts the document in the public domain.

Finally, the Commission stated that the exception regarding the protection of financial, monetary or economic policy is not subject to a public interest test. Nevertheless, the Commission was aware of the public interest in matters relating to the implementation of the Stability and Growth Pact. Therefore, the Commission publishes as much information as possible regarding this subject through press-releases and its own assessments of the budgetary situation in the Member States. In the present case, the Commission has published its assessment of the budgetary situation in Portugal, which was adopted on 28 April 2004 and which led the Council to decide on the abrogation of the Decision on the existence of an excessive deficit in Portugal.

The Commission concluded that it has struck the right balance between the public interest in being informed about the budgetary situation in the Member States and the sensitivity of the excessive deficit procedure. The Commission reiterated in this context that the latter procedure requires a certain degree of confidentiality.

The complainant's observations

The complainant's observations on the Commission's opinion can be summarised as follows.



The complainant stated that the Commission recognised in its opinion that it did not act in accordance with Article 4(5) of Regulation 1049/2001 because it failed to consult the Portuguese authorities. However, the Commission's opinion gave no indication that it would be likely to correct this failure by consulting the Portuguese authorities. The complainant argued that the Commission should do so, as soon as possible.

Furthermore, the complainant stated that the Commission, in its opinion to the Ombudsman, kept raising the same arguments as it has already raised in the prior correspondence with the complainant (quoted by him in his complaint to the Ombudsman). The complainant stressed that, for instance, the Commission again stated in its opinion that matters that are central to its political activity under the Treaty should not be accessible to the European Parliament.

The complainant also argued that, by using its discretionary power on the basis of general and unaccountable arguments and without any external control the Commission is failing to respect the right of access to documents laid down in Article 42 of the Charter of Fundamental Rights of the European Union.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman's request to the Portuguese authorities

In accordance with Article 3(3) (7) of the Statute of the European Ombudsman (8), the Ombudsman sent a request for information to the Portuguese authorities. The latter were asked to inform the Ombudsman whether they consider that disclosure of the letter in question would adversely affect the Portuguese government's economic and financial policy.

The Portuguese authorities' reply

In its reply, the Portuguese Representation to the European Union informed the Ombudsman that the Portuguese authorities take the view that, in Portugal's current budgetary situation, the letter dated 30 March 2004, which the Minister of Finance had sent to the Commission in the framework of the excessive deficit procedure, does not contain elements that could affect Portugal's economic and financial policy. The letter in question could therefore be disclosed to the complainant.

The Ombudsman's further request to the Commission

On 26 September 2005, the Ombudsman sent a copy of the Portuguese authorities' answer to the Commission. He also asked the Commission to inform him whether, in the light of that answer, the Commission was now ready to give a positive response to the complainant's application for access to the letter in question.

The Commission's reply

No reply was received from the Commission before expiry of the deadline (15 October 2005) or over the following six weeks.

THE DECISION

1 Refusal to grant access to document

1.1 The complainant, an MEP, asked the Commission for access to the letter dated 30 March 2004, which Portugal's then Minister of Finance ("the Minister of Finance") had sent to the



Commission in the framework of the excessive deficit procedure. The Commission refused the complainant's confirmatory application for access on the grounds that disclosure of the letter would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Member State concerned (i.e., Portugal). This exception to public access is contained in Article 4(1)(a), fourth indent, of Regulation 1049/2001.

The complainant alleges that the Commission has interpreted the exception contained in Article 4(1)(a), fourth indent, of Regulation 1049/2001 too broadly.

The complainant claims that he should be granted access to the whole document or at least to parts of it.

1.2 In its opinion, the Commission argues that the excessive deficit procedure laid down in Article 104 of the EC Treaty is politically sensitive and involves delicate discussions between the Commission, the Member States and ECOFIN. This procedure is also likely to be discussed in political circles and financial markets. Therefore, some degree of confidentiality needs to be applied in order to ensure that Member States are in a position to comply with the requirements of the Stability and Growth Pact.

The Commission considered that disclosure of the letter, in which the Minister of Finance informed the Commissioner responsible for economic and financial affairs of the budgetary measures to be adopted in order to generate additional state revenue, which was the objective envisaged by the Portuguese government, would adversely affect the Portuguese government's economic and financial policy because such disclosure could jeopardise the government's achievement of those objectives. Therefore, the Commission denied access on the basis of the exception laid down in Article 4(1)(a), fourth indent of Regulation 1049/2001. Since the Commission was of the opinion that this exception precluded it from disclosing the Minister of Finance's letter, it did not consult the Portuguese authorities on the complainant's application. The Commission also took the view that, in any event, pursuant to Article 4(5) of Regulation 1049/2001 (9), it would have to consult these authorities before considering the release of the document.

1.3 The Ombudsman first notes that, despite the Commission's reference in its opinion to Article 4 (5) of Regulation 1049/2001 ("A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement"), the Commission has provided no evidence that the Portuguese authorities have requested that the document concerned not be disclosed. Furthermore, the Commission has stated that it did not consult the Portuguese authorities because, having itself formed the view that that disclosure of the letter would adversely affect the Portuguese government's economic and financial policy, it was precluded from disclosing the letter.

1.4 The Ombudsman notes, however, that Article 4(4) of Regulation 1049/2001 provides that, as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception provided for in paragraph 1 or paragraph 2 of Article 4(4) of Regulation 1049/2001 is applicable, unless it is clear that the document shall or shall not be



disclosed.

1.5 The Ombudsman finds it difficult to understand how the Commission could consider itself to be better placed than the authorities of a Member State to decide whether disclosure of a document would adversely affect the financial, monetary and economic policy of that Member State. The Ombudsman therefore requested the assistance of the Portuguese authorities, who informed him that, in Portugal's current budgetary situation, the letter in question did not contain elements which, if disclosed, could affect Portugal's economic and financial policy.

1.6 In the light of the Portuguese authorities' answer, the Ombudsman asked the Commission whether it was now prepared to give a positive response to the complainant's application for access to the letter in question. The Commission has failed to reply to the Ombudsman, even six weeks after the expiry of the pertinent deadline. The Ombudsman points out that this failure in itself constitutes a *prima facie* instance of maladministration.

1.7 In view of the Commission's failure to reply, the Ombudsman considers that it is appropriate to proceed immediately to a draft recommendation in this case, in order to prevent administrative delay from frustrating the complainant's right of access to documents, contained in Article 42 of the Charter of Fundamental Rights of the European Union.

2 Conclusion

The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3(6) of the Statute of the European Ombudsman:

The draft recommendation

The Commission should promptly review its refusal to give the complainant access to the document in question and provide access unless one or more of the exceptions contained in Regulation 1049/2001 applies.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 28 February 2006. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 5 December 2005

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(2) OJ 2001 L 145, p. 43.



(3) “The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: — (...) — the financial, monetary or economic policy of the Community or a Member State;”

(4) “A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”.

(5) Case T-187/03 *Scippacercola v. Commission* , judgment of 17 March 2005, paragraphs 54 and 55.

(6) Case T-168/02 *IFAW v. Commission* , judgment of 30 November 2004, paragraphs 57 and 58.

(7) Article 3(3) provides: “The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it.”

(8) Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(9) “A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”.