

Decision of the European Ombudsman closing his inquiry into complaint 1649/2012/RA against the Council of the European Union

Decision

Case 1649/2012/RA - **Opened on** 07/09/2012 - **Decision on** 09/09/2013 - **Institution concerned** Council of the European Union (Settled by the institution) |

This complaint concerns the Council's refusal to grant public access to a document containing Common Steps towards visa-free short-term travel of Russian and EU citizens.

The Council explained that the Common Steps include a list of actions for both the EU and Russia to implement in preparation of a visa-free travel agreement. The content of the document was not communicated to the public by the negotiating partners. Its unilateral release by the EU would therefore negatively affect the climate of confidence among the actors involved in the negotiations and would prejudice the EU's relations with Russia.

The complainant argued that the Common Steps contain commitments that the EU made on behalf of its citizens and which could affect them. Public scrutiny of EU actions that might affect its citizens' fundamental rights should prevail over the alleged protection of the public interest as regards international relations, it insisted. The complainant further argued that similar documents negotiated with other partners (Ukraine and Moldova) are public and available on the Council's website.

Shortly after the complainant submitted observations in this case, the Council informed the Ombudsman that the Russian authorities had agreed to the EU's proposal to provide public access to the Common Steps. The Council thereby published the document on its Public Register of documents and informed the complainant accordingly.

The Ombudsman closed the case as settled by the institution. He also made a further remark, encouraging the Council to consider taking steps towards EU participation in the Open Government Partnership.

The background to the complaint

1. This complaint concerns the refusal of the Council of the European Union to grant public



access under Regulation 1049/2001 [1] to a document containing Common Steps towards visa-free short-term travel of Russian and EU citizens.

2. The complainant, Open Society European Policy Institute [2], requested access to the document on 5 June 2012. On 21 June 2012, the Council granted access only to page 1 of the document. It explained that the rest of the document was exempt from disclosure pursuant to the third indent of Article 4(1)(a) of Regulation 1049/2001 (protection of the public interest with regard to international relations).

3. On 4 July 2012, the complainant submitted a confirmatory application for access. It referred to the fact that the Common Steps had been approved at the EU-Russia Summit on 15 December 2011. It argued that as the negotiations on the Common Steps were therefore over, disclosure of the document would not undermine the protection of the public interest with regard to international relations. Moreover, as the content of the Common Steps was already known to the Russian authorities, disclosure of the documents would not negatively influence future negotiations in that framework.

4. On 24 July 2012, the Council confirmed its initial reply, namely, that access could only be granted to page 1 of the document. The Council further developed its reasons as to why public access to the rest of the document had to be denied on the basis of the third indent of Article 4(1)(a) of Regulation 1049/2001. It explained that the document is a "I/A" item note from the General Secretariat of the Council to the Permanent Representatives' Committee and to the Council and contains the Common Steps towards visa-free short term travel of Russian and EU citizens. The Council adopted the Common Steps on 13 December 2011 and they were launched at the EU-Russia Summit on 15 December 2011. The Common Steps include a list of actions for both the EU and the Russian Federation to implement in preparation of a visa-free travel agreement. Their full implementation remains an essential precondition for the continuation of the visa dialogue.

5. By way of reply to the complainant's argument that public access should be granted as disclosure would not negatively influence future negotiations in the framework of the Common Steps, the Council pointed out that the content of the document was not communicated to the public by either negotiating partner. Thus, its unilateral release by the EU would negatively affect the climate of confidence between the EU and Russia and would thus prejudice the EU's relations with Russia.

6. The Council further pointed out that the Common Steps still need to be fully implemented. After they have been fully implemented, the parties will decide whether to start negotiations on an EU-Russia visa-waiver agreement. It added that the implementation of the Common Steps will be assessed on a regular basis and Russia and the EU will agree to adapt them, if necessary.

7. The Council further stated that it had also examined, pursuant to Article 4(6) of Regulation 1049/2001, the possibility of extending partial access to the document in question, but concluded that this would not be possible.



The subject matter of the inquiry

8. After receiving the response of the Council, the complainant turned to the European Ombudsman, alleging that the Council was wrong to refuse to provide full public access to the document containing Common Steps towards visa-free short-term travel of Russian and EU citizens.

In support of this allegation, the complainant argued that similar documents negotiated with other partners (Ukraine or Moldova) are public and available on Council's website [3] . Publishing these Action Plans on visa liberalisation did not prevent or undermine negotiations of a similar document with Russia, nor did it prejudice relations with the Ukraine and Moldova, said the complainant.

9. The complainant claimed that the Council should grant full access to the requested document or provide satisfactory reasons for refusing to do so.

The inquiry

10. The complaint was submitted to the Ombudsman on 9 August 2012. On 7 September 2012, the Ombudsman opened an inquiry and sent the complaint to the Council with a request for an opinion. That correspondence also contained a request to inspect the document, as well as the following questions to the Council:

Did the Council expressly agree with the Russian authorities that the Council and the Russian authorities would not release the document? If the answer to this question is yes, could the Council please inform the Ombudsman why it considered, in light of the Treaty provisions on transparency and Regulation 1049/2001 on public access to documents, that it was appropriate to conclude such an agreement with the Russian authorities?

Could the Council please explain why it considers that the fact that the Common Steps have not yet been implemented should be determinative in terms of public access? The Ombudsman notes in this regard that legislation adopted by, inter alia, Council that requires implementation by the Member States is nevertheless published in the Official Journal at the moment of its adoption.

Could the Council comment on the complainant's argument that other similar documents (concerning, for example, Ukraine and Moldova) have been published in the past?

11. On 20 December 2012, the Council sent its opinion, which was forwarded to the complainant with an invitation to submit observations. The aforementioned inspection took place on 13 February 2013. Finally, by email and letter dated, respectively, 13 and 25 March 2013, the Council informed the Ombudsman that it was now in a position to disclose the document in



question. The Ombudsman forwarded this information to the complainant on 20 March and 18 April, respectively, with a request for observations. No observations have been received to date.

The Ombudsman's analysis and conclusions

A. Allegation that the Council was wrong to refuse to provide full public access to the document in question and related claim

Arguments presented to the Ombudsman

12. In its opinion, the Council explained that Article 16(8) of the Treaty on the European Union and Article 15(2) of the Treaty on the Functioning of the European Union make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis placed on transparency in the context of legislative activities. The Council pointed out that the Common Steps are not a legislative act, but rather a political document, the implementation of which by both parties is without prejudice to any future act that could be adopted by the Council on a possible future visa waiver agreement with Russia. This explains why the Common Steps have not been published in the Official Journal pursuant to Article 297 TFEU, the Council said.

13. The Council reiterated its argument about the need still to implement the Common Steps and the possibility of their being adapted, if necessary. For this reason, it could be misleading to disclose them to the public, it said.

14. Against this background, the Russian authorities were consulted on the possible disclosure of the Common Steps and indicated that they would not give their agreement to such a disclosure. The Council pointed out, in this regard, that the Common Steps are not a unilateral EU document, but rather a joint document negotiated between the EU and Russia. If the Council were unilaterally to decide to disclose the Common Steps, in the face of the objection of the Russian authorities, this would negatively affect the climate of confidence among actors involved in the negotiations and would prejudice the EU's relations with Russia. It would also seriously affect trust between the EU and other countries with which similar negotiations may take place now or in the future. Public disclosure of the document would therefore undermine the protection of the public interest as regards international relations, as provided for in the third indent of Article 4(1)(a) of Regulation 1049/2001.

15. With regard to the complainant's argument that other agreements have been disclosed, the Council pointed out that if a parallel can be drawn between the Common Steps and Visa Liberalisation Plans (VLAPs) for Ukraine and Moldova, this is only regarding the subject matter of those texts. However, the nature of the Common Steps between the EU and Russia is fundamentally different. The Common Steps are a mutual and reciprocal agreement: they are



jointly owned and have to be implemented not only by Russia, but also by the EU. By way of contrast, VLAPs for Ukraine and Moldova are unilateral EU acts, adopted and owned by the EU, that have to be implemented by Ukraine and Moldova respectively.

16. In its observations, the complainant stated that the Common Steps contain commitments that the EU made on behalf of its citizens and which could affect them and other persons on its territory, notably, asylum seekers and migrants. Public scrutiny of EU actions that might affect its citizens' fundamental rights should prevail over the alleged protection of the public interest as regards international relations, it insisted. According to the complainant, the Russian Federation was to send missions to problematic EU countries to check deficiencies in terms of the EU's implementation of its commitments. It is essential that the EU remain accountable not only towards the Russian government, but also towards its own citizens, especially for actions that might affect their rights, it said.

17. The argument that the Common Steps may undergo revision and that their release could therefore mislead the public is not convincing, said the complainant, as all subsequent revisions should also be made public.

18. Finally, with regard to the different nature of the Common Steps and the VLAPS, the complainant pointed out that the latter create obligations only for the partner countries — it should therefore have been for the Ukrainian and Moldovan authorities to decide whether or not to disclose the commitments they had made towards the EU. Given that the Common Steps give rise to commitments on both the EU and Russian sides, each party should be entitled to disclose the document. The Council should therefore not have entered into any deal with the Russian side which would have limited public scrutiny of the EU's actions affecting its citizens' rights.

19. By email dated 13 March 2013, and letter dated 25 March 2013, the Council informed the Ombudsman that the Russian authorities had addressed a letter to the European Commission dated 4 March 2013, confirming their consent to the EU's proposal to provide public access to the Common Steps. In light of this information, the Council published the document on its Public Register of documents [4] and informed the complainant accordingly.

The Ombudsman's assessment

20. The Ombudsman recalls that transparency is an essential aspect of good democratic governance. Transparency makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. As such, openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability. Transparency also facilitates citizens' participation in public activities by ensuring access to information and the means to take part in the process of governance to which they are subject.

21. Recital 2 of Regulation 1049/2001 explains that openness enables citizens to participate



more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. That recital also states that openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

22. The right of access to documents is itself a fundamental right, provided for in Article 42 of the Charter. This fundamental right is given effect in Regulation 1049/2001. The substance of the fundamental right of access to documents nevertheless incorporates exceptions, including where disclosure of the document would undermine the protection of international relations (the third indent of Article 4(1)(a), as invoked by the Council in this case).

23. As regards the Council, the duty to be as transparent as possible applies with particular force in relation to the Council's legislative role. Article 15(2) TFEU states that *"the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act."* Further, the fifth paragraph of Article 15(3) TFEU states that *"the European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures"*. The Court of Justice of the EU has further underscored the importance of transparency as far as the work of the legislator is concerned [5] .

24. The Court has, however, acknowledged a distinction in terms of transparency requirements when an institution is acting in a legislative capacity or as a party to intergovernmental negotiations [6] . In Case T-301/10 *in 't Veld v Commission* , the General Court pointed out that the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion. It further stated that initiating and conducting negotiations in order to conclude, in that case, an international agreement fall, in principle, within the domain of the executive. Public participation in the procedure relating to the negotiation and the conclusion of an international agreement is therefore necessarily restricted, it said, in view of the legitimate interest in not revealing strategic elements of the negotiations [7] .

25. The views of Advocate-General Cruz Villalón in *Council v Access Info Europe* , further underscore this point in relation to the Council: *"the disadvantages that transparency brings, in terms of effectiveness, for the negotiation and adoption of decisions might perhaps be such as to justify sacrificing it where the Council is acting as an intergovernmental body and carrying out functions of that nature, but that can never be the case where it is participating in a legislative procedure. In other words, from an objective point of view, transparency might seem to be a disadvantage in the context of inter-State 'negotiations', but not in 'deliberations' between parties that must reach agreement on the content of a 'legislative' measure. While, in the first case, the predominant concern of each State may be its own interest, in the second case that concern must be the interest of the Union, which is a common interest, founded on the implementation of its fundamental principles, among them democracy."* [8]

26. While the Ombudsman underlines the importance of transparency in this particular area,



which, as the complainant argued, concerns commitments made by the EU on behalf of its citizens and which can affect their fundamental rights, he is conscious of the context in which the document in question was produced.

27. The Ombudsman, therefore, very much welcomes the Council's agreement to release the document in question. He understands that the Council took contact with the Russian authorities to seek their consent to release the document and that the Russian authorities, having consulted the relevant Russian agencies, gave their consent.

28. The Ombudsman infers from the fact that the complainant did not submit observations that it is satisfied by the Council's action. He therefore considers that the Council has settled the matter and thereby satisfied the complainant.

29. The Ombudsman's understanding is that the consent of the Russian authorities to the disclosure of the document in this case was the essential precondition to its release. He refers, in this regard, to the point made by the Council in its opinion that the Russian authorities were consulted on the possible disclosure of the Common Steps and indicated that they would not give their agreement to such a disclosure (see paragraph 14 above). The Ombudsman notes, however, that the Council did not refer to this apparent veto in its reply to the complainant's confirmatory application for access to the document.

30. In this context, the Ombudsman suggests that it would be in the interests of good administration for the Council to raise with its negotiating partner, at the outset of future such negotiations, the Council's obligation to conduct its work as openly as possible. In the event that the other contracting party chooses to insist on the documents relating to negotiations remaining secret, the Council would at least be in a position to inform any future applicant, who requests access to a document, of the precise origin of the opposition to disclosure. As such, the Council would be complying with its obligations under Regulation 1049/2001.

31. More generally, with a view to further promoting transparency in this important area, the Ombudsman suggests that the Council might consider taking steps towards EU participation in the Open Government Partnership (OGP) [9]. This could increase the Union's credibility in the field and provide a forum in which to encourage greater openness by Russia, which recently withdrew its letter of intent to join the OGP. The Ombudsman is aware that the European Commission regards itself as constrained in this regard by the fact that the EU is not a State. However, the Ombudsman thinks it unlikely that the members of the OGP would reject EU participation in the OGP for that reason. He will make a further remark in this regard.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Council has settled the matter and thereby satisfied the complainant.



The complainant and the Council will be informed of this decision.

Further remark

The Ombudsman suggests that the Council consider taking steps towards EU participation in the Open Government Partnership (OGP). This could increase the Union's credibility in the field and provide a forum in which to encourage greater openness by Russia.

P. Nikiforos Diamandouros

Done in Strasbourg on 9 September 2013

[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, OJ 2001 L 145, p. 43.

[2] According to its website, the Open Society European Policy Institute influences and informs European Union policies to ensure that open society values are at the heart of EU action, both inside and outside its borders. See:

<http://www.opensocietyfoundations.org/about/offices-foundations/open-society-european-policy-institute> [Link]

[3] A search on the Council's website leads one, for example, to the EU-Ukraine Visa Dialogue - Action Plan on Visa Liberalisation:

<http://register.consilium.europa.eu/pdf/en/10/st17/st17883.en10.pdf> [Link]

[4] The document is available at:

<http://register.consilium.europa.eu/pdf/en/11/st18/st18217.en11.pdf> [Link]

[5] See, notably, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, and Case T-233/09 *Access Info Europe v Council*, judgment of 22 March 2011, not yet published in the ECR.

[6] In its opinion, the Council itself referred to the *"distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis placed on transparency in the context of legislative activities"*.

[7] Case T-301/10, *in 't Veld v Commission*, judgment of 19 March 2013, not yet published in



the ECR, paragraph 119-120, and the case law cited therein.

[8] See the Opinion of Advocate General Cruz Villalón in Case C-280/11 P *Council v Access Info Europe* , at paragraph 66.

[9] According to its website, Open Government Partnership is a new multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. OGP is overseen by a steering committee of governments and civil society organizations. See:

<http://www.opengovpartnership.org> [Link]