# Decision of the European Ombudsman closing his inquiry into complaint 98/2012/ER against the European Commission

Decision
**Case** 98/2012/ER - **Opened on** 17/02/2012 - **Decision on** 27/09/2013 - **Institution concerned** European Commission ( No maladministration found ) |

## The background to the complaint

**1.** The present case concerns the Commission's refusal to give the complainant access to a letter of formal notice sent to Italy in the framework of its handling of an infringement complaint.

**2.** The complainant is an Italian citizen who in 2009 submitted a complaint to the Commission concerning Italy's alleged failure properly to implement Directive 83/391 on workers´ safety. [1]

**3.** On 13 October 2011, the Commission informed the complainant that it had opened an investigation and that, on 30 September 2011, it had sent a letter of formal notice to the Italian authorities. The Commission also briefly identified the points included in the letter of formal notice.

**4.** On 15 October 2011, the complainant submitted a request for access to the letter of formal notice sent to the Italian authorities. The Commission rejected this request on the basis of the exception provided by Article 4(2) third indent (protection of the purpose of investigations) of Regulation 1049/2001 [2] .

**5.** On 21 November 2011, the complainant submitted a confirmatory application, which was rejected by the Commission on 9 January 2012. In its decision, the Commission confirmed the applicability of the exception to public access provided by Article 4(2) third indent of Regulation 1049/2001 as interpreted in the case law of the Court of Justice. The Commission also ruled out the possibility of granting partial access and took the view that the complainant had not established an overriding public interest that would justify the disclosure of the letter of formal notice despite the need to protect the ongoing investigation.

**6.** On 9 January 2012, the complainant turned to the Ombudsman.

# The subject matter of the inquiry

**7.** The Ombudsman opened an inquiry into the following allegation and claim.

## Allegation:

The Commission unlawfully refused the complainant access to the requested document.

Supporting arguments:

(i) The exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 and the case-law to which the Commission referred in its reply to the complainant do not apply to the present case because:

(a) the request for access only concerned the technical assessment of the compatibility of the relevant Italian rules with EU legislation on workers' safety and not any further correspondence concerning the ongoing talks between the Commission and the Italian authorities. The exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 refers to the overall content of ongoing inspections and negotiations and not to the technical assessment of the compatibility of national legislation with EU law. Access to such a technical assessment therefore cannot, as such, affect the purpose of inspections or the outcome of the ongoing negotiations between Italy and the Commission.

(b) the complainant does not have a direct personal interest in the complaint but is only acting in the public interest concerning workers' safety.

(c) the judgments in Cases T-191/99 and C-139/07 are not applicable to the present case, due to the reasons outlined in points (a) and (b).

(ii) The exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 and the case-law which the Commission referred to in its reply to the complainant do not apply, given that the protection of the right to safe and healthy working conditions is a public interest, and that right is enshrined in the EU Charter of Fundamental Rights (Article 31) and national Constitutions (for instance, Article 41 of the Italian Constitution).

(iii) The exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 and the case-law to which the Commission referred in its reply to the complainant do not apply, given that the content of the letter of formal notice against Italy was published in an online article on 16 December 2011.

## Claim:

The Commission should grant access to the document.

# The inquiry

**8.** On 17 February 2012, the Ombudsman asked the complainant for clarifications concerning his complaint, which he provided on 9 March 2012. On 10 July 2012, the Ombudsman forwarded the complaint to the President of the Commission, with an invitation to submit an opinion on the above allegation and claim.

**9.** The Commission submitted its opinion on the complaint on 16 November 2012. The Ombudsman forwarded the opinion to the complainant for possible observations, which he sent on 9 December 2012.

# The Ombudsman's analysis and conclusions

## A. Allegation that the Commission unlawfully refused access to the requested document

### Arguments presented to the Ombudsman

**10.** In his complaint to the Ombudsman, the complainant essentially argued that the conditions for invoking the exception relied on by the Commission were not fulfilled in the case at hand.

**11.** In its opinion, the Commission reasserted that its decision to refuse access was justified on the basis of the exception foreseen in the third indent of Article 4(2) of Regulation 1049/2001, as clarified by the judgments of the EU Courts in Cases T-191/99 [3] and C-139/07. [4]

**12.** More specifically, as regards the complainant's *first supporting argument* , the Commission recalled the objectives of letters of formal notice in the framework of infringement proceedings and the importance of securing an atmosphere of mutual trust and genuine cooperation between the Commission and the Member State concerned at this stage, so to enable them to open discussions with a view to reaching a swift solution to the dispute. According to the Commission, a disclosure of documents such as the one at issue in the present case might damage this atmosphere and thus jeopardize the outcome of ongoing investigations.

**13.** The Commission considered that this was indeed the risk in the present case and that a partial disclosure could not be envisaged either, since the requested letter contained a detailed factual and legal analysis of the points of disagreement between the Commission and the Italian authorities, which were impossible to separate. The Commission pointed out that the technical assessment of the compatibility of the relevant Italian rules with EU law constitutes an integral part of the letter of formal notice and should be considered to be the result of the investigations

carried out.

**14.** The Commission recalled that infringement proceedings exclusively involve the Commission and the Member State concerned and that the complainant is not a party to these proceedings but only a source of information. The Commission also stressed that the complainant had acknowledged that he had a personal interest in the disclosure of the letter of formal notice sent to the Italian authorities. However, such a personal interest was not relevant when assessing a request for access to documents on the basis of Regulation 1049/2001. Only an overriding public interest could have justified disclosure in the present case. According to the Commission, no such interest had been established, however.

**15.** Finally, the Commission reiterated its view that the findings of the European Courts in Cases T-191/99 and C-139/07 were applicable in the present case, notwithstanding the arguments to the contrary put forward by the complainant.

**16.** As regards the complainant's *second supporting argument* , the Commission stressed that the fundamental right to safe and healthy working conditions would be better protected if the infringement procedure was swiftly and efficiently brought to an end, and this objective required that the contacts between the Member State and the Commission remained confidential. The Commission also recalled that the objective to put an end to a violation of EU law was itself a public interest which called for the confidentiality of the letter of formal notice.

**17.** As regards the complainant's *third supporting argument* , the Commission stated that the content of the letter of formal notice, which had been published in an on-line journal on 16 December 2011 and to which the complainant had referred, did not concern the complainant's infringement complaint but a completely different case in the field of environmental protection. The Commission added that, in any case, it remains bound by the obligation of confidentiality even if the Member State concerned adopted a conduct capable of breaking the atmosphere of mutual trust and disclosed the relevant documents. The Commission stressed, however, that this was clearly not the case here.

**18.** In his observations, the complainant reiterated the reasons on the basis of which he considered that the exception provided for by Article 4(2), third indent of Regulation 1049/2001 and the case-law quoted by the Commission are not applicable in the present case. In particular, he pointed out that the relevant exception refers to the overall content of ongoing inspections and negotiations and not to the mere technical assessment of the compatibility of national legislation with EU law. He further pointed out that both in Case T-191/99 and in Case C-139/07 the request for access to documents had been submitted by persons that were parties to the relevant proceedings, while, in the present case, he acted in the public interest without being personally involved.

**19.** The complainant also noted that, in its opinion, the Commission explained that it did not apply the exceptions set out in Regulation 1049/2001 in an automatic way but assessed their applicability in accordance with the merits of the complainant's request. According to the complainant, this showed that the Commission failed properly to apply EU law but instead

engaged in subjective and arbitrary assessments.

**20.** More specifically, the complainant considered that the Commission did not explain how and why the disclosure of the requested document could affect the atmosphere of mutual trust between the Member State and the Commission. In his view, the Commission's finding on the point was therefore merely subjective.

**21.** The complainant also argued that the Commission failed to provide sound reasons to explain why the confidentiality of the contacts between the Member States and the Commission was necessary swiftly to bring to an end the infringement procedure and therefore better to achieve the protection of the fundamental right to safe and healthy working conditions.

**22.** Finally, the complainant stressed that, contrary to the view put forward by the Commission, the on-line journal he quoted had indeed published the content of the letter of formal notice in the infringement proceeding to which his complaint had given rise. Thus, since the details of the letter were already in the public domain, the Commission had no reasons to refuse the requested disclosure.

## The Ombudsman's assessment

**23.** According to the third indent of Article 4(2) of Regulation 1049/2001, 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.

**24.** The Ombudsman recalls that, according to the settled case-law of the EU Courts, the exceptions to the general right of access to documents must be interpreted and applied strictly [5] . The mere fact that a document concerns an interest protected by an exception cannot itself justify the application of that exception. Therefore, in order to be able lawfully to rely on an exception, the institution concerned is required to assess (i) whether access to the document would specifically and actually undermine the protected interest and (ii) whether there is no overriding public interest in disclosure. That assessment must be apparent from the reasons underpinning the decision [6] .

**25.** The Ombudsman also recalls, however, that the Court of Justice has allowed a number of exceptions to the institutions' obligation to examine specifically and individually the documents to which access has been requested. In particular, the Court has ruled that it is in principle open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, and provided that the institution establishes in each case that the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose. [7]

**26.** The Ombudsman further notes that the Court of Justice has so far expressly acknowledged

the possibility of relying on such general presumptions in a number of cases, namely, in case of procedures for reviewing State aid, [8] merger control procedures [9] and proceedings pending before the EU Courts. [10] The Ombudsman underlines that the General Court has further found that a similar general presumption can be relied upon in case of documents relating to infringement procedures. [11] In so doing, the General Court has confirmed that the principle of law identified by the Tribunal in its judgement in Case T-191/99, quoted by the Commission in its opinion, remains valid despite the innovations in the legal regime for public access to documents introduced by Regulation 1049/2001.

**27.** In order to explain why he should nevertheless be given access to the relevant document, the complainant argued that (i) the object of his request of access, that is the technical assessment of the compatibility of national legislation with EU law, and (ii) the nature of his interest in disclosure distinguished the present case from the precedents referred to by the Commission.

**28.** As regards the object of the complainant's request, the Ombudsman cannot but agree with the Commission when it asserts that the technical assessment of the compatibility of the relevant national rules with EU law constitutes an integral part of the letter of formal notice. In fact, it is the very purpose of such a letter to inform the Member State concerned of the issues that, in the Commission's view, need to be addressed and of the reasons for this position.

**29.** As regards the nature of the complainant's interest, and namely the fact that the complainant claims to be acting in the public interest only, the Ombudsman recalls that in the legal regime of public access to documents established by Regulation 1049/2001 the motives why a request for access is submitted are irrelevant. Thus, on the one hand, the applicant is under no obligation to specify his interest in disclosure. On the other hand, the treatment and outcome of a request for access is not affected by the nature or type of the interest that drives the applicant.

**30.** This does of course not mean that Regulation 1049/2001 does not take into consideration the interest that the public may have in the disclosure of a given document. Indeed, the existence of a general presumption against disclosure under Article 4(2), third indent of Regulation 1049/2001 does not stand in the way of granting access where it can be established that there is an overriding public interest in disclosure. In this context, the complainant invoked the public interest in safe and healthy working conditions.

**31.** The Ombudsman acknowledges that safe and healthy working conditions are not only a paramount public interest but also form the subject-matter of a fundamental right according to Article 31 of the EU Charter of Fundamental Rights. He considers, however, that merely invoking this fundamental right is not sufficient to establish that there was indeed an overriding public interest in disclosure.

**32.** The Ombudsman also notes in this context that the Commission has acknowledged the importance of safe and healthy working conditions and it has stressed that such conditions could be better achieved if the infringement procedure against Italy was swiftly and efficiently

brought to an end. According to the Commission, this objective requires that the contacts between the Member State and the Commission remain confidential. The Commission also recalled that the objective to put an end a violation of EU law is itself a public interest which calls for the confidentiality of the letter of formal notice.

**33.** In his observations, the complainant also argued that the Commission failed to provide sound reasons to explain why the confidentiality of the contacts with the Member States was necessary to bring swiftly to an end the infringement procedure.

**34.** In that regard, the Ombudsman notes that the Commission maintained that the disclosure of documents relating to an infringement proceeding could break the atmosphere of mutual trust between the Commission and the Member State and therefore jeopardise the chances to reach an early settlement. The Ombudsman also notes that this position is supported by the case law of the Court of Justice. Even if it could appear reasonable to take the view that openness of infringement procedures could, at least in some cases, promote compliance by the Member State better than secrecy, the case law of the Court is clearly and strongly to the contrary. The Ombudsman therefore considers that the Commission is entitled to maintain its refusal to give access to letters of formal notice on the grounds that the case law of the Court has endorsed its view that the chances of finding a compromise would be adversely affected if the content of the exchanges between the Commission and the Member States were to be made available to the public while the negotiations are ongoing.

**35.** With his third supporting argument, the complainant submitted that the exception invoked by the Commission to refuse the disclosure of the letter of formal notice did not apply in the present case, given that the content of the letter has already been published on the internet.

**36.** In that respect, the Ombudsman is not convinced by the argument put forward by the Commission in its opinion that it remained bound to refuse to disclose a document such as the one at issue in the present case even if the Member State to which the relevant letter had been addressed had decided to make it available to the public. However, the Ombudsman also notes that the Commission stressed that this situation had not arisen in the present case.

**37.** The Ombudsman considers that there is no need for him to ascertain whether or not the text available on the website mentioned by the complainant does indeed correspond to the letter of formal notice addressed to Italy in the framework of the infringement proceeding to which the complainant's complaint gave rise. In view of the fact that the Commission has decidedly stated that the document to which the complainant wishes to be given access was not disclosed by the Italian authorities, the necessary conclusion is that it would (if the text available on the said website was indeed that letter) have been disclosed by a third party. However, the Ombudsman recalls that he has already acknowledged that the publication of a confidential document by a third party is not, as such, a sufficient reason to justify its disclosure by an EU institution. [12] In particular, if an institution was obliged to grant public access to a confidential document purely on the grounds that it was unlawfully disclosed by a third party, that institution would be forced to endorse the unlawful disclosure ex-post. This would result in encouraging third parties to publish confidential documents without authorisation. The Ombudsman therefore considers

reasonable the Commission's finding that it remained bound by the obligation of confidentiality despite the alleged publication of the letter.

**38.** In light of the above, the Ombudsman considers that the complainant's allegation cannot be upheld, and as a consequence his related claim cannot succeed either.

# B. Conclusions

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

**The Ombudsman finds no maladministration in the present case**

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

P. Nikiforos Diamandouros

Done in Strasbourg on 27 September 2013

[1] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L183, p.1.

[2] European Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commissions documents, OJ 2001 L145, p. 43.

[3] Case T-191/99 *Petrie and others v Commission* [2001] ECR II-3677.

[4] Case C-139/07 *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885.

[5] See Case C-266/05 P *Sison v. Council* [2007] ECR I-1233, paragraph 63.

[6] See joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 49.

[7] See joined Cases C-39/05 P and C-52/05 P quoted above, paragraph 50.

[8] See Case C-139/07 *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885.

[9] See judgment of *** in Case C-404/10 P *Commission v Editions Odile Jacob* and judgment of *** in Case C-477/10 P *Commission v Agrofert Holding* .

[10] See Case C-523/07 P *Sweden and others v API and Commission* [2010] ECR I-8533.

[11] Case T-29/08 *Liga para Protecçao de Natureza (LPN) v Commission* [2011] ECR II-6021. The judgment is currently under appeal. On 5 September 2013, Advocate General Wathelet delivered his opinion on the appeal case and proposed to confirm the General Court's judgment and dismiss the appeal.

[12] See the European Ombudsman's decision of 19 December 2012 in case 2161/2011/ER.