European Ombudsman

Decision of the European Ombudsman closing the inquiry into complaint 230/2012/ER against the European Commission

Decision
Case 230/2012/ER - **Opened on** 27/02/2012 - **Decision on** 14/02/2014 - **Institution concerned** European Commission (No maladministration found) |

The background to the complaint

1. This case concerns the European Commission's handling of an infringement complaint regarding the compatibility with EU law of French legislation on spirits and the relevant implementing practice. The case also concerns the Commission's handling of a request for access to a number of documents related to the infringement complaint.

2. The complainant is an association that promotes the interests of European wine distillers. On 13 April 2010, it submitted to the Commission an infringement complaint concerning the French practice allowing the production of wine spirits from by-products of wine-making and not only from wine (the practice in question). The complainant alleged that the practice in question violates EU law, in particular Regulation 110/2008 [1] . It also alleged that the unfair competition by French producers which results from the fact that they are allowed to use raw materials which are much cheaper than wine in order to produce spirits designated as "wine spirits", is causing incalculable harm to the distillation industry of other Member States.

3. Having met with the complainant and having requested information from the French authorities on 8 June 2010 and further clarifications on 17 September 2010, the Commission formally opened infringement proceedings and sent a letter of formal notice to France on 16 February 2011. The infringement procedure was registered under reference number 2010/2162. France was given two months to reply.

4. On 3 March 2011, the Commission's representatives met the complainant once again. During the meeting, the Commission informed the complainant about the time-frame for the different stages of the infringement procedure. The Commission also made it clear that in the context of infringement proceedings, damages for losses sustained by individuals cannot be awarded. Rather, in order to seek compensation, the complainant or its members should consider taking appropriate legal action before national courts.

5. On 27 April 2011, following a request by the French authorities, the Commission extended the deadline for replying to the letter of formal notice by one month. In their reply, which was sent on 18 May 2011, the French authorities maintained that the practice in question is lawful. They also requested a meeting with the Commission which was held on 6 September 2011.

6. On 10 May 2011, the complainant requested another meeting with the Commission. However, on 23 May 2011, the Commission refused to hold a further meeting with the complainant, arguing that no new information was available and that discussions with the national authorities were still ongoing.

7. On 29 August 2011, the complainant wrote again to the Commission, urging it to take action against France in view of the new grape harvest. It provided a detailed account of the very serious consequences of the aforesaid practice for the distillation industry, the wine industry and consumers. It underlined that the unlawful character of the practice had been recognised by the Commissioner competent for the matter in a hearing before the European Parliament. It therefore concluded that the Commission should recognise the urgency of the situation and set a short deadline for France to remedy the alleged infringement. The complainant also considered that the Commission should adopt interim measures to protect the interests of European distillers, such as a temporary ban on trade in French wine spirits, in accordance with Article 24(3) of Regulation 110/2008. On 8 September 2011, the complainant requested a meeting in order to discuss the possibility of adopting the envisaged interim measures but on 23 September 2011 the Commission declined the request.

8. On 26 October 2011, the complainant requested access to the documents included in the file of its infringement complaint.

9. On 11 November 2011, the competent Commissioner replied to a parliamentary question on the status of the infringement complaint and declared that the French authorities were ready to put an end to the practice of allowing the production of wine spirits from certain by-products of wine-making but that negotiations were still ongoing concerning other by-products.

10. On 18 November 2011, the Commission replied to the complainant's request for access. In its reply, the Commission identified a list of five documents covered by the request for access but refused access to all of them on the basis of the third indent of Article 4(2) of Regulation 1049/2001 [2] (protection of the purpose of inspections). On 25 November 2011, the complainant submitted a confirmatory application for access to documents which was rejected by the Commission on 16 January 2012.

11. On 24 January 2012, the complainant turned to the European Ombudsman.

The subject matter of the inquiry

12. The Ombudsman opened an inquiry into the following allegations and claims:

Allegations

(1) The Commission failed properly to handle the complainant's infringement complaint.

In support of its allegation, the complainant argued that:

(i) the Commission, in spite of (a) the urgency of the matter and (b) the fact that it had, on several occasions, already acknowledged the unlawfulness of the relevant French practice, did not adopt a reasoned opinion within a reasonable time and did not give reasons to justify the delay.

(ii) the Commission did not take into due consideration the harmful consequences of the French practice for both the distillation and the wine-making industries, as well as for consumers, and, in particular, it did not adopt a temporary ban on trade in French wine spirits in order to protect the aforesaid industries and consumers.

(iii) the Commission refused the complainant's request to hold a meeting with it without providing adequate reasons for its refusal.

(2) The Commission unlawfully refused the complainant access to the requested documents.

In support of its allegation, the complainant argued that:

(i) the Commission did not carry out a specific and individual assessment of the content of every single document included in the file and it did not check whether the general presumption against disclosure which it invoked was indeed applicable;

(ii) the Commission did not take into consideration all the elements of fact and of law available at the time it took its decision to refuse access and, in particular, the content of the declarations made by Commissioner Ciolos in his answers to several parliamentary questions;

(iii) the Commission did not take into consideration the overriding public interest in disclosure represented by the interests of the groups of persons concerned by the French practice (members of the distillation and wine-making industries and consumers).

Claims

(1) The Commission should address a reasoned opinion to France concerning the unlawful practice.

(2) The Commission should adopt a temporary ban on trade in French wine spirits until France complies with its obligations under EU law.

(3) The Commission should grant the complainant access to the requested documents.

The inquiry

13. On 27 February 2012, the Ombudsman requested the Commission to submit an opinion on the complainant's allegations and claims by 31 May 2012. The Commission's opinion was forwarded to the complainant with an invitation to submit observations, which the complainant sent on 29 June 2012. The complainant sent additional observations on 15 February 2013 and on 7 October 2013.

Further developments

14. On 28 February 2012, the Commission sent a reasoned opinion to the French authorities. In its reasoned opinion, the Commission took the view that by accepting the marketing of spirit drinks under a denomination which refers to wine whereas the raw material used for their production is a by-product of wine-making, France failed to respect its obligations under Regulation 110/2008. The Commission also informed the French authorities that in the absence of action to ensure compliance with the relevant EU rules within two months, it reserved the right to refer the case to the Court of Justice.

15. On 20 July 2012, the complainant contacted the Commission and underlined that, despite the expiry of the two-month deadline set in the reasoned opinion, French producers continued to market, under the denomination 'wine spirit', spirit drinks produced from a by-product of wine-making and that the existing stocks of those spirit drinks had not been destroyed. The complainant emphasised that according to case-law of the Court of Justice, the existence of an infringement of EU law by a Member State must be determined by reference to the situation as it stands at the end of the period laid down in the reasoned opinion and that subsequent measures taken by national authorities in order to ensure proper implementation of EU law are not relevant in assessing whether there has been a breach of EU law by the Member State concerned. The complainant therefore urged the Commission (i) to inform it of the measures it had taken after issuing the reasoned opinion in line with the commitments resulting from the Commission's Communication COM/2012/154 on relations with the complainant in respect of infringements of EU law [3] , (ii) to take all appropriate action to make sure that the French authorities immediately cease to apply the practice in question, and (iii) to refer the case to the Court of Justice. However, according to the complainant, the Commission never provided information on the measures it adopted after it issued the reasoned opinion.

16. On 7 August 2012, the Commission informed the complainant that, in their reply to the Commission's reasoned opinion, the French authorities had declared their intention to put an end to the practice in question by 1 August 2012.

17. On 15 February 2013, the complainant brought to the Ombudsman's attention the answer to

a written parliamentary question on the status of the infringement procedure provided by the competent Commissioner on 31 January 2013. In his answer, the Commissioner informed Parliament that the French authorities had replied to the reasoned opinion on 24 April 2012 and had announced their intention to withdraw the authorisation for the marketing of spirit drinks produced from by-products of wine-making as of 1 August 2012. Following an additional request by the Commission to be given guarantees as to the effectiveness of their announced decision, the French authorities provided details on how the withdrawal would be implemented and how controls would be undertaken to check the compliance of wine spirit producers with the measures taken.

18. On 8 August 2013, the Commission wrote to the complainant and provided it with the information already given by the competent Commissioner to Parliament on 31 January 2013. The Commission also informed the complainant that it had decided to close the infringement complaint on 30 May 2013.

The Ombudsman's analysis and conclusions

Preliminary remarks

19. The Ombudsman notes that, in its additional observations of 15 February 2013, the complainant stressed that, despite its requests for information, notably the one sent on 20 July 2012, the Commission did not inform it of the developments in the infringement complaint and, in particular, of the measures taken after issuing the reasoned opinion against France. The complainant pointed out that it was able to obtain some information on the status of the infringement procedure only indirectly, namely, from the reply given by the competent Commissioner to a written parliamentary question on 31 January 2013. According to the complainant, the Commission's failure to provide information showed once more that the Commission was not handling the infringement complaint properly.

20. The complainant also emphasised that the measures adopted by the Commission following its reasoned opinion were not sufficient. It pointed out that the Commission (i) passively accepted an extension of the French practice well beyond the deadline that it had set in its reasoned opinion, despite the serious consequences for wine spirit producers, (ii) failed to adopt measures to check the effective implementation of its reasoned opinion by the French authorities, and (iii) did not take any measures concerning the marketing of the stock of spirit drinks already produced in breach of EU law.

21. Following the Commission's letter of 8 August 2013 (see paragraph 18 above), the complainant submitted additional observations to the Ombudsman on 7 October 2013. The complainant pointed out that the Commission's letter of 8 August 2013 merely reproduced the information already given by the competent Commissioner in Parliament without providing additional details. The complainant also stressed that the Commission's reply was sent over one year after its previous information letter of 7 August 2012 and over six months after the

Commissioner's reply to the parliamentary question. The complainant considered that such a delay was not justified and that the Commission breached the principles of good administration that it should respect when dealing with infringement complaints.

22. As to the content of the Commission's reply, the complainant reasserted that the Commission erred in merely accepting the declarations provided by the French authorities and not putting in place any measure to check the effective implementation of its reasoned opinion. The complainant stated that the Commission's decision to close the infringement complaint did not take into consideration the issue of the marketing of the stock of spirit drinks already produced in breach of EU law.

23. In its statements outlined above, the complainant comments on (i) the Commission's alleged failure to check the implementation of the agreement reached with the French authorities, (ii) the Commission's alleged failure to consider the issue of the marketing of the stock of spirit drinks already produced in breach of EU law, and (iii) the Commission's failure to inform the complainant in a timely manner of the developments and of the closure of the case. The Ombudsman notes that these arguments relate to matters arising following the making of the complaint to her Office and that they are not matters entirely covered by the allegations as made by the complainant (see Para. 12). For this reason, the Ombudsman considers that it is not opportune to deal with these matters in this decision. The complainant however remains free to address them to the Commission. If the Commission were not to provide a satisfactory reply within a reasonable time, the complainant could then consider submitting a new complaint to the Ombudsman.

24. It is relevant to point out thatas regards the third of the above-mentioned arguments, the Commission seems to have informed the complainant of its decision to close the case only several months after that decision had been taken. The Ombudsman also notes that no apology for this omission seems to have been provided.

A. As regards the Commission's handling of the infringement complaint

Arguments presented to the Ombudsman

25. The complainant alleged that the Commission failed properly to handle its infringement complaint. In support of its allegation, the complainant put forward the supporting arguments indicated in paragraph 12 above.

26. The Commission gave a detailed account of the steps it took from receipt of the infringement complaint on 13 April 2010 until the adoption of the reasoned opinion on 28 February 2012. As regards the complainant's supporting argument (i), the Commission stressed that the time taken to issue the letter of formal notice of 17 February 2011 and the reasoned opinion of 28 February 2012 was due to the legal complexity of the case and to the need to

request information from and meet with the French authorities, which it considered indispensable in order to fully respect their rights of defence. The Commission added that the complainant failed to provide evidence of the alleged irreparable harm caused to wine spirit producers. However, on 2 December 2010, taking into account the seriousness of the matter, the Commission opened an audit investigation into the practice in question under the procedure established by Regulation 885/2006 [4] . At the time of submission of the Commission's opinion to the Ombudsman, the investigation was still ongoing. The Commission finally stated that, according to well-established case-law of the Court of Justice, it enjoys a wide margin of discretion to determine whether and when it is expedient to take action against a Member State for the infringement of EU law and that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under EU law and to avail itself of its rights of defence.

27. As regards the complainant's supporting argument (ii), the Commission emphasised that it took into consideration the harmful consequences of the practice in question for both the industries concerned and the consumers, as is evidenced by the fact that it adopted the letter of formal notice and the reasoned opinion as soon as this was possible in light of the circumstances of the case and that it launched the audit investigation referred to above. As for interim measures, the Commission made it clear that it has no power to adopt a temporary ban on trade in French wine spirits pursuant to Article 24(3) of Regulation 110/2008.

28. As regards the complainant's supporting argument (iii), the Commission confirmed that it had refused the complainant's requests for a meeting of 10 May 2011 and 8 September 2011 but also stressed that it had provided valid reasons for its refusals. In particular, in its letter of 23 May 2011, the Commission stated that its representatives had already met the complainant on 3 March 2011 and that no new information was available. The Commission also underlined that discussions with the French authorities were ongoing but that the details concerning these discussions had to remain confidential in order to avoid undermining the efforts to persuade France to put an end to the breach of EU law. The same considerations were expressed in the Commission's letter dated 23 September 2011, refusing the request for a meeting which the complainant had made on 8 September.

29. In its observations, the complainant pointed out that, as regards its supporting argument (i), the Commission failed to provide evidence that the case was legally complex. On the contrary, the competent Commissioner had already declared, in reply to a parliamentary question on 7 January 2011, that the French practice was in breach of EU law. The same Commissioner had then recognised, in reply to another parliamentary question on 10 November 2011, that the ongoing negotiations with the French authorities had solved the problem only in part (see paragraph 9 above). The complainant also underlined that the fact that the audit investigation was still ongoing showed the tardiness of the Commission's approach. Finally, as regards the Commission's margin of discretion in infringement proceedings, the complainant emphasised that this discretion has to be exercised in line with the principles of good administration, as shown by the decisions of the European Ombudsman on this point.

30. The complainant did not specifically refer to its supporting argument (ii). As regards its

supporting argument (iii), the complainant asserted that the reasons provided by the Commission to justify the refusal of its requests to hold a meeting were not convincing and that these refusals rather showed its reluctance to have direct contact with it. In support of its assertion, the complainant referred to a further request for a meeting to which the Commission had not replied.

The Ombudsman's assessment

31. Complaints from citizens constitute one of the most important sources of information on possible infringements of EU law by Member States. Such complaints enable the Commission better to fulfil its role as guardian of the Treaties.

32. It follows from case-law of the Court of Justice that the Commission enjoys a wide margin of discretion when assessing infringement complaints submitted by citizens and that it is not obliged to commence infringement proceedings in every instance where a Member State has breached EU law. Citizens are therefore not entitled to seek to require the Commission to adopt a particular position with regard to the substance of their infringement complaints. However, the Commission's discretion has to be exercised in line with principles of good administration. In particular, the Ombudsman notes that, in its Communication COM/2012/154 and in its earlier Communication COM/2002/141 [5] , the Commission undertook certain commitments as regards the handling of infringement complaints.

33. The Ombudsman also points out that the scope of her mandate in such complaints is limited to examining whether the Commission acted in accordance with the rules and the principles binding upon it when handling the infringement complaint. Her investigation does not involve a review of the question whether national legislation, practices and court decisions may be contrary to EU law. As a consequence, the Ombudsman's scope of review in that domain is limited to assessing whether the Commission has manifestly exceeded the limits of its discretion.

34. In its complaint, the complainant alleged that the Commission failed properly to handle its infringement complaint. In the following paragraphs, the Ombudsman will assess in turn the arguments brought by the complainant in support of its allegation.

35. As regards the complainant's first supporting argument (see paragraph 12 above), the Ombudsman notes that according to point 8 of Communication COM 2012/154, "[a] *s a general rule, the Commission will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. Where this limit is exceeded, the Commission will inform in writing the complainant upon his request* " [6] . The Ombudsman notes that the Communication does not set a definite time frame for the adoption by the Commission of the steps which follow the sending of a letter of formal notice and lead either to the referral of the case to the Court of Justice or to its closure. The Ombudsman nevertheless considers that during this phase of the pre-litigation procedure, the Commission remains bound by the general principle of good

administration that requires decisions to be taken within a reasonable time.

36. In the present case, the complainant submitted its infringement complaint on 13 April 2010. The Commission invited the French authorities to provide information on 8 June 2010 and its representatives met the complainant on 29 June 2010. On 17 September 2010, the Commission requested further clarifications from the French authorities and, on 16 February 2011, it sent the letter of formal notice. The Ombudsman notes, therefore, that the letter of formal notice was sent to the French authorities ten months and three days after the infringement complaint had been submitted to it. In light of the sequence of events outlined above, the Ombudsman considers that the period of time that passed between the lodging of the infringement complaint and the sending of the letter of formal notice was reasonable.

37. As regards the time it took the Commission to adopt the reasoned opinion, the Ombudsman notes that, after the Commission sent the letter of formal notice, its representatives met the complainant again on 3 March 2011. On 18 May 2011, the Commission received the French authorities' reply to its letter of formal notice. In that reply, the French authorities requested a meeting that was held on 6 September 2011. Finally, on 28 February 2012, just over one month after the complainant submitted its complaint to the Ombudsman, the Commission sent a reasoned opinion to the French authorities. The Ombudsman notes, therefore, that the Commission sent its reasoned opinion to the French authorities slightly more than one year after the adoption of the letter of formal notice. In particular, the Ombudsman considers that, in view of the request by the French authorities, it was reasonable for the Commission to deem the holding of a meeting indispensable to guaranteeing the latter's rights of defence, and therefore to wait until September 2011 before taking further action.

38. The Ombudsman also notes that, after the meeting with the French authorities took place, almost six additional months elapsed before the Commission sent the reasoned opinion. According to the Commission, this additional time was required due to the legal complexity of the case. The Ombudsman notes, however, that the Commission did not provide any more specific explanations as to why the case was particularly complex. [7] The Ombudsman therefore is not convinced that the legal complexity of the case could have justified the additional delay.

39. The Commission, however, also pointed out that, after the French authorities replied to the letter of formal notice, negotiations continued with a view to finding a friendly solution to the dispute. This is also confirmed by the declaration made on 10 November 2011 by the competent Commissioner in Parliament. The Ombudsman considers that, in light of the ongoing negotiations, the time that elapsed between the Commission's meeting with the French authorities and the adoption of the reasoned opinion was not excessive.

40. The complainant argued, however, that, the urgency of the matter required the Commission to act more rapidly. According to the complainant, any delays in the procedure were likely to cause damage to its members. In that regard, the Ombudsman points out that infringement proceedings are not primarily aimed at protecting the interests of private parties who may be affected by the alleged breach of EU law and who have available adequate judicial remedies to

seek redress at the national level. In the present case, the Commission acknowledged that the danger of irreparable harm to the interested parties could constitute an exceptional circumstance that justifies setting a shorter deadline for replying to a letter of formal notice. However, the Commission also explained that, in the case at hand, the complainant did not provide sufficient evidence in order to show that there was a risk that such irreparable harm might occur. The Ombudsman notes that the complainant limited itself to merely asserting the existence of a serious prejudice for the industry without providing specific evidence in support of this view. She therefore considers the Commission's conclusion in this regard to be reasonable.

41. The complainant also stressed that the Commission should have dealt with the infringement complaint more rapidly in light of the fact that it had on several occasions already acknowledged the unlawfulness of the French practice and that, in any event, it did not give reasons to justify the delay. In this regard, the Ombudsman notes that the first statement of the competent Commissioner to Parliament on the status of the infringement complaint was made on 11 November 2011, some three months before the reasoned opinion was sent to the French authorities. Moreover, the Ombudsman points out that the aim of the pre-litigation phase in infringement proceedings is twofold: First, it serves to allow the Member State concerned to fully exercise its rights of defence and, second, it aims at rapidly bringing to an end an alleged breach of EU law by pursuing an amicable settlement of the dispute and therefore avoiding the need to bring proceedings before the Court of Justice. It was therefore perfectly legitimate and reasonable for the Commission to enter into negotiations with the French authorities in order to find a solution to the issue raised by the complainant The Ombudsman considers that the time that elapsed between the sending of the letter of formal notice and the adoption of the reasoned opinion was not excessive. The Ombudsman therefore also takes the view that there was no need for the Commission to provide additional reasons for the time it took to deal with this case.

42. As regards the complainant's second supporting argument (see paragraph 12 above), the Ombudsman notes that Article 24(3) of Regulation 110/2008 entrusts the Commission with the task of ensuring, in consultation with the Member States, the uniform application of the Regulation. According to the Commission, this provision cannot be construed as allowing it to adopt a ban on the marketing of products in a case where a Member State fails to comply with the Regulation. The Ombudsman considers that the Commission's interpretation of the rule, which was not disputed by the complainant, appears to be reasonable.

43. As regards the complainant's third supporting argument (see point 12 above), the Ombudsman points out that the Commission's Communication does not oblige the Commission to arrange meetings with complainants and that, more generally, the Commission enjoys wide discretion in the handling of infringement complaints. The Commission therefore remains free to refuse a request for a meeting provided that it gives valid reasons for its decision.

44. In the present case, the complainant argued that the reasons provided by the Commission to refuse the requested meeting were not convincing and simply showed the Commission's reluctance to have direct contact with it. The Ombudsman notes, however, that in its letters of 23 May 2011 and 23 September 2011, the Commission noted that its representatives had already met the complainant on 3 March 2011 and that the complainant had not provided any

new information that would justify holding another meeting. In that regard, the Ombudsman underlines that the complainant did not specify why the Commission, in the circumstances of the case, would have been required to hold a further meeting with it. The Ombudsman therefore considers that no maladministration can be found as regards the Commission's decision not to organise a further meeting with the complainant.

45. In light of the above, the Ombudsman concludes that there has been no maladministration in the Commission's conduct in so far as the complainant's first allegation is concerned. Consequently, the Ombudsman considers that the complainant's second claim cannot succeed either. As regard the complainant's first claim, the Ombudsman notes that the Commission has in the meantime adopted a reasoned opinion against France and that, therefore, this claim has become devoid of purpose.

B. As regards the Commission's refusal to grant access to the requested documents

Arguments presented to the Ombudsman

46. In its complaint to the Ombudsman, the complainant alleged that the Commission unlawfully refused access to the requested documents. In support of its allegation, the complainant relied on the supporting arguments set out in paragraph 12 above.

47. As regards the complainant's supporting argument (i), the Commission referred in its opinion to the precedent set by the judgment of the General Court of 9 September 2011 in Case T-29/08 [8] . Pursuant to the general presumption identified by the General Court, the Commission was not required to carry out a specific and individual examination of the content of each document but could simply assume that the disclosure of any of these documents could undermine the objectives of the ongoing infringement investigation. The Commission also pointed out that the existence of that general presumption did not exclude the right of the complainant to present evidence demonstrating that the disclosure of a given document was not covered by it. However, the complainant did not put forward any argument to that effect in the present case.

48. As regards the complainant's supporting argument (ii), the Commission underlined that the declarations made by the competent Commissioner in his answers to several parliamentary questions could not affect its assessment of the complainant's confirmatory application. The Commission stressed that those declarations did not constitute any official confirmation that an infringement of EU law had taken place, since it is only for the Court of Justice to make such a finding.

49. As regards supporting argument (iii), the Commission emphasised that the interest in disclosure put forward by the complainant was purely private and therefore could not be taken into consideration. According to the Commission, the public interest in putting an end to a

possible infringement of EU law was better served by maintaining the climate of mutual trust between the Commission and the Member State concerned.

50. In its observations, the complainant proposed a different interpretation of the precedent set by the judgment of the General Court in Case T-29/08 and submitted that it could not be understood as authorising the Commission not to carry out a specific and individual examination of the requested documents or not to examine, with reference to the case at hand, whether the general considerations normally applicable to a particular type of document were indeed applicable to the documents requested. In particular, the complainant considered that the Commission failed to assess the applicability of the said presumption in the case at hand.

51. The complainant also disagreed with the Commission's position on the value to be given to the public declarations made by the competent Commissioner and stressed that accepting the Commission's argument would mean that parliamentary questions would become devoid of purpose.

52. Finally, the complainant stressed that the assessment as to the existence of an overriding public interest in disclosure constitutes an essential element of the evaluation leading to the decision not to disclose a document. In the present case, the Commission failed to perform such an assessment. The only public interest the Commission referred to was too broad and in fact could be invoked in relation to every activity of the Commission involving an exchange of views with Member States. Such a reading of the exception would, however, inevitably water down its intended content.

The Ombudsman's assessment

53. 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.

54. The Ombudsman points out that, according to settled case-law of the Court of Justice of the EU, the exceptions to the general right of access to documents must be interpreted and applied strictly [9] . The mere fact that a document concerns an interest protected by an exception cannot as such justify the application of that exception. Therefore, in order to be able lawfully to rely on an exception, the institution concerned is required to determine (i) whether access to the document would specifically and actually undermine the protected interest, and (ii) that there is no overriding public interest in disclosure. That assessment must be apparent from the reasons underpinning the decision [10] .

55. The Ombudsman also points out, 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 [11] .

56. 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 relation to procedures for reviewing State aid [12] , merger control procedures [13] and proceedings pending before the EU Courts [14] . The Ombudsman underlines that in its judgment of 14 November 2013 which confirmed the earlier decision of the General Court in Case T-29/08, the Court of Justice held that a similar general presumption can be relied upon in respect of documents relating to infringement procedures. In so doing, the Court of Justice confirmed the principle of law already identified by the General Court in its judgment in Case T-191/99 [15] .

57. In the present case, the Ombudsman notes that it is not in dispute that all the documents requested by the complainant and expressly identified by the Commission in its reply to the request for access were related to infringement procedure 2010/2162, which was ongoing at the time the request was made. It emerges from the general presumption recognised in the case-law of the Court of Justice and the General Court that, in such circumstances, the Commission was entitled to consider that disclosure of the requested documents could undermine the purpose of the ongoing procedure. The consequence of this finding is that the Commission was in principle not required to carry out a specific and individual examination of each of these documents [16] . The Ombudsman therefore considers that the complainant's first supporting argument cannot be upheld.

58. The next matter to be considered is whether the complainant has been able to demonstrate that one or more of these documents are not covered by that presumption, or that there is an overriding public interest justifying disclosure [17] .

59. In that regard, the complainant argued that the Commission should have taken into consideration the declarations made by the competent Commissioner in his answers to several parliamentary questions on the infringement procedure.

60. The Ombudsman considers that, in principle, if an institution has already completely or partially disclosed the content of a document, it can no longer be presumed that the disclosure of that document would undermine one of the interests protected by the exceptions provided in Regulation 1049/2001 [18] . In the present case, the Ombudsman notes that before the Commission replied to the request for access, the competent Commissioner replied to a parliamentary question concerning the status of the infringement complaint. In his reply, the Commissioner provided general information on the different stages of an infringement procedure and then gave some information on the stage at which the infringement procedure against France stood at the time. However, the information provided was limited. In fact, the Commissioner merely declared that the French authorities were ready to put an end to the practice of allowing the production of wine spirits from certain by-products of wine-making but that negotiations were still ongoing concerning other by-products. In the Ombudsman's view,

these statements are not such as to invalidate the general presumption against disclosure referred to by the Commission. It is true that somewhat more specific information was provided by the Commissioner on 31 January 2013 in his reply to a parliamentary question. However, this statement was made after the Commission had already decided on the complainant's request for access to documents. It is therefore not relevant to the assessment of whether that decision was wrong.

61. As regards the presence of a possible overriding public interest in disclosure, the complainant referred to the interests of the groups of persons concerned by the French practice, that is, members of the distillation and wine-making industries and consumers represented by it.

62. The Ombudsman agrees with the Commission's view that the said interest was private in nature. Thus, its assertion that the complainant did not establish the existence of an overriding public interest appears reasonable.

63. In light of the above, the Ombudsman concludes that there has been no maladministration in the Commission's conduct as far as the complainant's second allegation is concerned. Consequently, the Ombudsman also considers that the complainant's third claim cannot succeed either.

C. Conclusion

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

There has been no maladministration.

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

Emily O´Reilly

Done in Strasbourg on 14 February 2014

[1] Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks, OJ 2008 L 39, p.16.

[2] 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 Commissions documents, OJ 2001 L 145, p. 43.

[3] Communication from the Commission to the Council and the European Parliament updating

the handling of relations with the complainant in respect of the application of Union law of 2 April 2012, COM (2012)154 final.

[4] Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD, OJ 2006 L 171, p. 90.

[5] Communication COM/2012/154 was adopted by the Commission on 2 April 2012 and replaced the previous Communication COM/2002/141 of 20 March 2002. The new Communication confirmed the commitments previously assumed by the Commission and introduced only minor changes.

[6] It is useful to point out that the words " *upon his request* " were not included in the English version of this provision in the 2002 Communication.

[7] In fact, the competent Commissioner had on several occasions declared that, in the Commission's view, the French practice amounted to a breach of EU law.

[8] See Case T-29/08, *LPN v Commission* [2011] ECR II-6021.

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

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

[11] See joined Cases C-39/05 P and C-52/05 P cited in footnote 9 above, paragraph 50.

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

[13] See judgment of 28 June 2012 in Case C-404/10 P *Commission v Editions Odile Jacob* , not yet reported and judgment of 28 June 2012 in Case C-477/10 P *Commission v Agrofert Holding* , not yet reported.

[14] See joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and others v API and Commission* [2010] ECR I-8533.

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

[16] See Case T-29/08 cited in footnote 7 above, paragraph 127.

[17] See Case T-29/08 cited in footnote 7 above, paragraph 128 and Case C-139/07 cited in footnote 11 above, paragraph 62.

[18] The Ombudsman has however accepted that an unauthorised publication of a confidential

document by a third party should not, as such, be considered a sufficient reason to justify the disclosure of that document. In particular, the Ombudsman pointed out that 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 conclusion, however, cannot be applied in cases where the institution itself intentionally discloses, entirely or in part, the content of the requested document to the public. See the European Ombudsman's decision of 19 December 2012 in case 2161/2011/ER and the decision of 27 September 2013 in case 98/2012/ER.