

Decision of the European Ombudsman closing the inquiry into complaint 725/2014/FOR against the European Commission

Decision

Case 725/2014/FOR - **Opened on** 01/09/2014 - **Decision on** 01/10/2015 - **Institutions concerned** European Commission (No maladministration found) | European Commission (Settled by the institution) |

The case concerned a request by a Norwegian company for public access to documents relating to contacts between the Commission and Italy aimed at verifying if Italy was in compliance with the rights of free movement of goods, namely in relation to limitations placed on the use of "snow socks" (snow socks are designed to serve the same purpose as snow chains).

The request was refused by the Commission on the basis that the disclosure of the documents could undermine an on-going investigation. The Ombudsman inquired into the issue. Access to the requested documents was then granted, leading the Ombudsman to conclude that the issue had been settled by the Commission.

The background to the complaint

1. The complaint concerns a refusal to grant public access to documents.
2. The complainant is a Norwegian company producing textile anti-skid devices for motor vehicles (snow socks).
3. Italy does not allow the use of snow socks on its roads under the same conditions as snow chains. The complainant believes this contravenes the free movement of goods under EU law. It thus filed a complaint to the Commission, which opened an EU Pilot procedure (4030/12/ENTR) in an effort to clarify the issue. The Commission's inquiry led it to conclude that Italy was in compliance with EU law. The Commission was satisfied with the explanation provided by Italy as to why snow socks cannot be regarded equivalent to snow chains. It noted that the technical standard for snow socks (Ö NORM 5121) is different from the standard for conventional snow chains (Ö NORM 5117). The latter provides for a specific test which demonstrates that the product can withstand a certain external load without cracking or deforming. No such test is required for the Ö NORM 5121 standard. Therefore, the snow socks cannot be lawfully used as a substitution for snow chains on sections of roads bearing "mandatory snow chains" signs,. The Commission concluded that in the area of road safety Member States may determine the degree of protection they wish to apply. Therefore, it found no breach of EU law by Italy.



4. After receiving the pre-closure letter, the complainant protested against this decision and asked the Commission on **21 March 2013** to be granted access to the file, including the correspondence between the Commission and the national authorities and institutions.

5. On **4 July 2013**, the Commission informed the complainant that it could not grant access to the requested documents. The Commission invoked Article 4(2), third indent of the Regulation 1049/2001 [1], which states that institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits. The requested documents in fact related to an on-going investigation, since the EU Pilot 4030/12/ENTR was not yet definitely closed.

6. In its reply of **26 July 2013**, the complainant reiterated its request for access to documents. It argued that the Commission failed to explain how access to the requested documents could specifically and effectively undermine the interest protected by the exception laid down in the invoked provision. Furthermore, the Commission failed to state whether it had assessed the possibility of granting the complainant partial access to the file. It furthermore notified the Commission of a recent judgment of the Rome Administrative Court which had found that the Ministry failed to state reasons for the non-equivalence of snow chains and the complainant's products. The complainant therefore claimed that the Commission should re-open the EU Pilot procedure.

7. As to the new judicial developments before the Italian courts, the Commission noted that it was primarily the competence of the national authorities to draw conclusions from those developments. It again refused on **16 August 2013** to grant access to the requested documents.

8. On **16 April 2014**, the complainant turned to the Ombudsman. It alleged that the Commission had failed to deal properly with its infringement complaint and its request for public access. The Ombudsman, however, did not find grounds for the first allegation. It agreed with the Commission's conclusion that the matter is primarily a competence of the Italian authorities and found that the possibility to pursue the issue at national level was a valid reason for closing infringement proceedings. The present inquiry therefore deals only with the complainant's allegation related to its access to documents request.

The inquiry

9. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

Allegation:

The Commission failed to deal properly with the complainant's request for public access to documents in relation to the EU Pilot procedure concerning Italy once that procedure had closed.

Claim:



The Commission should have granted such access once that EU Pilot procedure had closed.

10. In the course of the inquiry, the Ombudsman received the opinion of the Commission and, subsequently, the complainant's observations on the Commission's opinion.

Allegation of failure to deal properly with the request for access to documents

Arguments presented to the Ombudsman

11. In its **opinion**, the Commission explained that the EU Pilot procedure provides a means for the Commission and Member States to ensure that EU law is applied properly, thus avoiding the need for the Commission to open formal infringement procedures. The Commission insisted that the documents exchanged within an EU Pilot procedure benefit from the same presumption of confidentiality as documents exchanged within an infringement procedure. [2] Therefore, the Commission may only disclose the documents exchanged within an EU Pilot procedure once the procedure has been closed, provided all other conditions are met.

12. The Commission, however, noted that the complainant filed two similar complaints in relation to the sale of its products, in Italy and Austria respectively. The complainant argued, in both cases, that the snow socks it produces are equivalent to snow chains. The Italian authorities contacted the Austrian authorities to obtain further information regarding the standards with which the textile devices and snow chains must comply. The assessment of the Austrian authorities has been communicated to the Commission, by the Italian authorities, within the EU Pilot 4030/12/ENTR.

13. The procedure against Austria was not closed until 16 January 2014, meaning that on 16 August 2013, when the complainant's request was again refused, the procedure against Austria was still on-going. The procedure against Austria could, the Commission argued, have been jeopardised by the disclosure of the Italian documents, since they contained the Austrian position on the issue of the compliance of snow socks with product standards. The Commission, however, acknowledged that the letter of 16 August 2013 was not explicit enough as regards the fact that another procedure against Austria was on-going (and not the procedure against Italy) at the time and that it could be undermined by disclosure of the Italian documents.

14. The Commission then stated that the factual and legal situation has, in the meantime, changed (the Austrian procedure has now also been closed), meaning the requested documents could now be disclosed.

15. In its **observations**, the complainant argued that a mere link between two cases cannot in itself justify a refusal of access [3]. It insisted that a refusal to grant access to documents may only be justified when the access to the document would specifically and actually undermine the interest protected by the exemption [4]. The complainant argued that by merely relying on another on-going investigation, the Commission failed to meet these standards. It also pointed out that the Commission, in its letter of 16 August 2013, failed to specify whether it was referring to the investigation against Italy or Austria.



16. The complainant also referred to the Commission's obligation to grant at least partial access [5] . Finally, by not being granted access to the requested documents, the complainant was prevented from exercising its right of defence in the proceedings before the Italian authorities.

17.

The Ombudsman's assessment

18. As a preliminary point, the Ombudsman notes that the complainant has argued that it was prevented from exercising its right of defence, in proceedings before the Italian authorities, given that it did not have access to the documents in the possession of the Commission at the relevant time. The Ombudsman notes that **access to the file for the purposes of exercising rights of defence** is different from the right of **public access to documents** . The right of public access does not require the person seeking access to put forward any reasons as regards why it needs access. Indeed, the reason why access is needed is irrelevant to the analysis as to whether a person has a right to public access to a document. That analysis, as to whether a person has a right to public access to a document, concerns, exclusively, whether an exception to public access, set in Article 4 of Regulation 1049/2001, applies.

19. The Commission invoked, in order to justify not releasing the documents, Article 4(2), third indent of the Regulation 1049/2001, which states that institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits. It argued that the requested documents related to an on-going investigation, since the EU Pilot 4030/12/ENTR was not yet definitely closed. The Ombudsman notes, however, that when the Commission's decision on the confirmatory application was issued on 16 August 2013 the EU Pilot 4030/12/ENTR against Italy had already been closed.

20. The Commission then relied, in its opinion sent to the Ombudsman, on the argument that disclosure of the EU Pilot 4030/12/ENTR file would have undermined another on-going procedure against Austria.

21. The Ombudsman considers that the Commission's contention that another on-going procedure against Austria would have been undermined by the disclosure of the documents in the EU Pilot 4030/12/ENTR case against Italy, is, at least in principle, reasonable. This is especially the case because there is a strong factual link between the cases. Indeed, certain documents in the file concerning the Italian procedure related specifically to the position taken by the Austrian authorities.

22. It is regrettable, of course, that the Commission did not provide this explanation when the complainant first made its request for public access. There was, the Ombudsman notes, no indication in the letter of 16 August 2013 that the Commission based its decision to refuse access to the requested documents on another on-going procedure. Rather, the Commission's letter referred to EU Pilot 4030/12/ENTR only. The explanation provided to the complainant was thus clearly insufficient. The Ombudsman notes , in this respect, that an institution which refuses to grant access to documents must always provide a sufficiently detailed explanation as



to why access is denied. [6]

23. It is also regrettable that the Commission did not examine, at that time, if partial access to the documents was possible, at least as regards the disclosure of any documents the release of which would not undermine the on-going procedure involving Austria. While the above failures are regrettable, the Ombudsman has been informed, during the present inquiry, that the Commission has now granted access to all the requested documents. Specifically, it granted access to four documents from the EU Pilot 4030/12/ENTR file, containing its correspondence with the Italian authorities. After a further request from the complainant, the Commission also provided a list of documents in the file and granted access to additional documents specifically referred to by the complainant in its contacts with the Ombudsman (namely, documents 55 and 56 in the Commission's list of documents in the file). The Commission has, moreover, expressly stated that all the documents from the list, with the exception of correspondence with the complainant and the translations into English of documents provided by the complainant, have now been forwarded to the complainant. These included documents 16, 29 and 50, which reflect the Commission's internal approval circuit.

24. In light of the conclusions set out above, and in light of the fact that an inquiry by the Ombudsman serves not only to identify errors, but also serves as an opportunity to correct them, the Ombudsman finds that the Commission has taken the necessary steps to settle the matter.

25. In arriving at this conclusion, the Ombudsman has taken due account of the argument put forward by the complainant that the list of documents in the file, provided by the Commission to the complainant, was incomplete. The complainant notes that an e-mail, sent by it to the Commission in July 2013, was missing from the list of documents. It thus stated that a new and complete list of documents pertaining to the case should be drawn up and disclosed to it.

26. The Ombudsman is of the view that it is regrettable that the Commission seems not to have formally registered all the communications from the complainant and included them in the 'list of documents on the file'. However, the mere fact that one document, which was correspondence with the complainant, was not included in that list does not necessarily, on its own, call into question the Commission's explicit statement that the complainant received all the requested documents, that is to say, its correspondence with Italy and the relevant internal documents, with the exception of correspondence between the Commission and the complainant and the translations into English of the documents provided by the complainant [7] .

27. In this respect, the Ombudsman has considered whether there are circumstances which lead to the conclusion that any **other documents** were not registered and were thus not included in the list of documents. In particular, she has considered whether any correspondence between the Commission and Italy appears to be missing from the file.

28. The Ombudsman found that the Commission informed the complainant on **5 October 2012** that the EU Pilot case against Italy was opened and that the Italian authorities would be asked to provide clarifications on the issue. The Ombudsman has verified that questions to the Italian



authorities were then sent on **8 October 2012** . A reply was received on **28 November 2012** . The complainant was informed of this on **12 December 2012** and was consulted by the Commission regarding further questions that should be addressed to the Italian authorities. Additional questions were sent on **18 January 2013** and the reply was received on **28 January 2013** . Shortly thereafter, on **22 February 2013** , the Commission sent a letter to the complainant, informing it of its preliminary decision to close the EU Pilot procedure. The sequence of events is logical and the events follow one another in reasonable time intervals. This chain of events is also reflected in the **internal documents** of the Commission referring to the correspondence with Italy. The internal documents of the Commission in the file (documents 16, 29 and 50), which themselves appear complete and coherent in terms of their content and timing, refer specifically to "two rounds of questions" between the Commission and Italy.

29. Importantly, the content of the correspondence between the Commission and the Italian authorities is reflected in the Commission's pre-closure letter from **22 February 2013** and the subsequent closure letter from **4 July 2013** . The Commission in fact summarized the Italian explanation as to when the snow socks can be lawfully used on Italian roads and Italy's position as to why product standards Ö NORM V 5121 and 5117 cannot be regarded as equivalent. The rest of the text contains the Commission's analysis and conclusion. There is no additional information in the text that would point to the conclusion that some correspondence between Italy and the Commission was not disclosed to the complainant.

30. There is thus no indication that there was additional correspondence with Italy which was not registered by the Commission.

31. Therefore, the Ombudsman has no reason to doubt that, as regards the correspondence between the Commission and Italy, and the internal documents, that the file is complete and that, therefore, the complainant is now in possession of all the relevant documents. The Ombudsman also notes that the complainant has not identified any inconsistencies in the documentation, which would lead the Ombudsman to conclude that correspondence with Italy has not now been disclosed.

32. . The complainant also claimed, in its observations, that the Commission should re-open the infringement case against Italy. It based this claim on the fact that the Commission did not take into account the unregistered e-mail, sent on 3 July 2013. It therefore stated that the Commission did not take into account important arguments, namely further developments on the issue before the Italian courts and authorities.

33. There is no doubt that the complainant's e-mail of **3 July 2013** was not taken into account in the closure letter of **4 July 2013** . The Ombudsman has already explained, however, in her letter to the complainant of 1 September 2014, that the Commission was only compelled to take into account documents obtained during the **one-month** period after the pre-closure letter (that is, until the end of March). In any event, the complainant put forward the same arguments, presented in its e-mail from **3 July 2013** , in a letter to the Commission on **26 July 2013** . The Commission addressed them in the letter of **8 August 2013** . The Ombudsman has already stated that she agrees with the Commission's contention, presented in that letter, that the issue



is primarily a matter for the Member State. The Ombudsman thus did not find, at the time, that there were grounds to open an inquiry into the allegation on the Commission's failure to deal properly with the complainant's infringement complaint. There is no reason to alter than conclusion.

Conclusion

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

The Commission, by providing an explanation as to why access to the documents was initially refused, and by now releasing the requested documents, has taken the necessary steps to settle the matter.

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

Emily O'Reilly

Strasbourg, 01/10/2015

[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 L 145, p. 43

[2] To support this claim, the Commission relied on Case T-306/12 *Darius and Mihaela Spirlea v Commission*, judgment of 25 September 2014 (not yet published), paragraph 56.

[3] Case T-36/04 *Association de la presse internationale ASBL (API) v Commission* [2007] ECR II-3201, paragraphs 106, 110 and 141

[4] Case T-36/04 *Association de la presse internationale ASBL (API) v Commission*, paragraphs 54-58

[5] Joined Cases C-514/11 P and C-605/11 P *Liga para a Protecção de Natureza (LPN) and Finland v Commission*, judgments of 14 November 2013 (not yet published), paragraph 67

[6] Joined Cases T-110/03 T and T-405/03 *Jose Maria Sison v Council* [2007] ECR I-1233, paragraph 61

[7] It should be noted that while the complainant initially asked for access to the file, the Commission interpreted this as a request for access to documents other than correspondence exchanged between itself and the complainant and translations of documents submitted by the complainant. The complainant did not object to this approach. In any event, the Commission's



approach was entirely reasonable, given the fact that the complainant already had copies of the relevant documents.