

Decision in case 1398/2013/ANA on the European Commission's refusal to give access to documents relating to the US Foreign Account Tax Compliance Act ('FATCA')

Decision

Case 1398/2013/ANA - Opened on 13/08/2013 - Recommendation on 03/12/2014 - Decision on 31/03/2016 - Institution concerned European Commission (Draft recommendation accepted by the institution) |

This complaint arose following a request for public access to documents held by the European Commission relating to the negotiations between certain EU Member States and the United States of America on the consequences of the US Foreign Account Tax Compliance Act ('FATCA'). The complaint was made by the MEP, Ms Sophie In't Veld.

The main issues arising in the course of the Ombudsman's inquiry were (a) the Commission's efforts to find a fair solution regarding the assessment of a large number of documents, and (b) the Commission's refusal to give full public access to several documents concerning the FATCA.

The Ombudsman inquired into these issues and recommended to the Commission that it (a) make a new attempt to arrive at a fair solution, failing which, it would have to assess the documents covered by the MEP's request without undue delay, and (b) consider granting broader public access to certain documents concerning the FATCA.

The Ombudsman is now satisfied that the Commission has accepted and implemented her recommendations and has therefore closed the case.

The background

[1]

1. This complaint is about access to documents relating to the correspondence between the European Commission, certain EU Member States and the United States (US) authorities, on the consequences of the US Foreign Account Tax Compliance Act ('FATCA'). The complaint was brought by Ms Sophie In't Veld, a Member of the European Parliament.

2. FATCA was signed into US federal law in March 2010 [2] . The objective of FATCA is to



prevent cross-border tax evasion by natural and legal persons who are US nationals. FATCA requires financial institutions ('FFIs') outside the US to report to the US Internal Revenue Service about their clients. Because of concerns that FATCA was likely to create considerable difficulties for EU financial institutions due to the high compliance costs and the risk of infringement of Member States' laws (notably, on data protection), in 2011, the Commission, together with five Member States [3] , opened a dialogue with the US Treasury.

3. In 2012, the complainant made an application to the Commission under Regulation 1049/2001 [4] for public access to 'all the documents held by the Commission relating to the correspondence and talks between the Commission, the EU Member States concerned and the US authorities, on the consequences of FATCA, and particularly, the " *government to government* " solutions'.

4. The Commission identified **15** documents/sets of documents [5] and granted full access to Documents **4** and **5**.

5. Following the complainant's application for a review (known as a " *confirmatory application* "), on 28 August 2012, the Commission decided to give partial access to Documents **1, 2, 3, 6, 7(a - c) and (k), 8, 10 and 11** (the Commission's decision of 28 August 2012'). The Commission refused access to Documents **7(d - j) and (l), 9 , 12 and 13** in their entirety [6] .

6. Regarding the e-mails identified under Document Sets **14 and 15**, the Commission stated that these amounted to more than one thousand pages and contained over 200 and 4 000 e-mails respectively. The Commission proposed to seek a fair solution in accordance with Article 6(3) of Regulation 1049/2001 and asked the complainant to narrow the scope of her request [7] . In the alternative, the Commission asked the complainant to accept that the handling of her application would take more time and would consist in successive batches of documents being sent to her, as the analysis progressed.

7. Following the complainant's refusal to narrow the scope of her request concerning Documents **14 and 15**, the Commission argued that, in light of the General Court's judgment in *VKI* [8] , an individual assessment of each relevant e-mail would entail a very considerable administrative burden that would paralyse the work of the Commission's relevant service. The Commission considered that the complainant's request was disproportionate and invited her once again to narrow the scope of her request .

8. Following a number of exchanges, on 13 June 2013, the complainant asked the Commission to grant her access to Document Sets **14 and 15** before the end of June. The Commission proposed, in the spirit of Article 6(3) of Regulation 1049/2001, holding a meeting between the complainant and the senior officials of DG TAXUD who could answer the complainant's questions, provide context and background and a better insight into the matter so as to enable her to narrow down her request. In the alternative, the Commission proposed a process to narrow the scope of the complainant's request and stagger the process of its examination.

9. Dissatisfied with the Commission's proposal, on 19 July 2013, the complainant turned to the



European Ombudsman [9] .

10. On 13 August 2013, the Ombudsman opened an inquiry into the complaint and identified the following allegations and claims:

1) The Commission failed to handle the complainant's request for public access to documents in accordance with the applicable procedural rules.

In support of her first allegation, the complainant argued that, regarding Document Sets **14 and 15** , the Commission had not decided on her request for access and had, therefore, exceeded the reasonable time limits for response, infringing thereby Regulation 1049/2001 and Article 17 of the European Code of Good Administrative Behaviour ('ECGAB').

2) Contrary to the substantive rules enshrined in Regulation 1049/2001, the Commission failed to grant full public access to the requested documents.

The complainant argued that, regarding Documents **1 to 3** and **6 to 13** , to the extent that these documents or parts thereof had not been disclosed, the Commission had failed to justify the application of the exception in Article 4(1)(a), third indent.

3) The Commission should examine the complainant's request for access to Document Sets **14 and 15** without further delay.

4) The Commission should grant public access to the requested documents.

11. In the course of her inquiry, the Ombudsman inspected the relevant Commission file and sent a report of that inspection to the Commission and to the complainant.

12. On 3 December 2014, the Ombudsman made recommendations to the Commission. On 19 December 2014, the Commission wrote to the complainant providing more information about the e-mails falling within the scope of the complainant's request for access to Document Sets **14 and 15** . On 6 January 2015, the complainant replied that her request for access concerned all the documents falling within the scope of her request.

13. The Commission sent its reply to the Ombudsman's recommendations on 12 June 2015. In parallel, on 19 May 2015 and 23 July 2015, it sent additional replies to the complainant copied to the Ombudsman, making further disclosure of documents. The Ombudsman received comments from the complainant on 23 July 2015 and 29 September 2015.

14. In considering (below) the Commission's response to her recommendations, the Ombudsman includes a brief summary of the reasoning leading to the recommendations, a summary of the arguments presented to her, and then her final assessment.

Allegation that the Commission failed to handle the



complainant's request for public access to Document Sets 14 and 15 in accordance with the applicable procedural rules and the related claim

The Ombudsman's reasoning leading to the first recommendation

15. Regulation 1049/2001 contains specific rules that apply when dealing with requests for access to " *a very large number of documents* ". These rules allow EU institutions to derogate, in exceptional circumstances, from the normally applicable rules and provide for (a) the possibility, in accordance with Article 6(3) of Regulation 1049/2001, to " *confer with the applicant informally, with a view to finding a fair solution* " and (b) the possibility, in accordance with Article 8(2) of Regulation 1049/2001, of extending the generally applicable time limit of 15 working days to reply to a confirmatory application by another 15 working days.

16. In this case the Commission, in effect, suspended the time limit for replying to the complainant's confirmatory application in relation to Document Sets **14 and 15** and made that reply conditional on finding a fair solution. The Commission thereby linked these two procedural possibilities.

17. The Ombudsman pointed out, however, that the Commission is obliged to comply with the strict time limit of Article 8(2) of Regulation 1049/2001 while negotiating with the complainant with a view to finding a fair solution in accordance with Article 6(3) [10] .

18. On this specific issue, the Court of Justice of the European Union ('CJEU') held that Regulation 1049/2001 does not allow for a derogation from the applicable time limits [11] . The CJEU held that these time limits are determinative as regards the conduct of the procedure for access to documents held by the institutions, and that the time limits are intended to achieve a swift and straightforward processing of applications for access to documents [12] . Therefore, the possibility of a fair solution provided for in Article 6(3) " *can concern only the content or the number of documents applied for* " [13] .

19. The CJEU has also held as follows: " *it is true, ..., that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration [h]owever, reliance on the principle of proportionality cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed without creating a situation of legal uncertainty* " [14] . The Ombudsman reasoned that the Court's emphasis on the need for legal certainty is intended, in this context, to protect the position of applicants, namely, that their right to institute court proceedings or to make a complaint to the Ombudsman will not be compromised by any suspension of the time limit laid down in Article 8(2) of Regulation 1049/2001. Neither may these remedies be suspended or made conditional on the



Commission's efforts at finding a fair solution. However, this was the consequence of what the Commission –wrongly - did in the present case.

20. Regarding the Commission's proposals for a fair solution in this case, the Ombudsman took the view that the information it had provided did not give the complainant a sufficient understanding of the content of the requested documents and thus, a genuine opportunity to narrow the scope of her request [15] .

21. On the basis of the above, the Ombudsman considered that the Commission had failed to use all possible and reasonable means to negotiate a fair solution with the complainant. The Ombudsman considered that, as a minimum, the Commission's proposals should have contained a much more detailed description of the (categories of) documents covered by the

complainant's request, preferably, a table of contents, and, ideally, links to the Commission's register of documents [1] .

22. As regards the proposal for a staggered examination of the requested documents, the Ombudsman acknowledged that the Commission was justifiably concerned about the impact that a speedier processing of Document Sets **14 and 15** might have had on the treatment of the other parts of the complainant's request as well as on access requests from other applicants. However, when the Commission makes a proposal for a fair solution, it cannot refrain from proceeding with a request for access simply because the applicant does not agree to that proposal.

23. In light of the above findings, the Ombudsman concluded that, (a) by failing to make a suitable/reasonable proposal for a fair solution within the relevant time limit and (b) by making action on the complainant's confirmatory application conditional on finding a fair solution, the Commission had committed maladministration.

24. The Ombudsman considered that the principles of good administration dictate that, in order to enhance the protection of the fundamental right of citizens of access to documents, an EU institution should, notwithstanding the expiry of the statutory time limit, still explore reasonable ways to find a fair solution with the applicant. However, if a fair solution could not be found, even after the making of further efforts by the Commission, it would have to proceed to an individual examination of the requested documents.

25. Thus, the Ombudsman made the following recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman:

*" 1) The Commission should make a fresh attempt at a fair solution in relation to the complainant's request for access to Documents 14 and 15. In doing so, the Commission should provide sufficient detail to the complainant, along the lines identified [in the Ombudsman's analysis], that would enable the complainant to narrow the scope of her request if she so wishes. Such a proposal should be made within a maximum of 15 working days . **In the event that this proposal were not to be accepted by the complainant, the Commission should proceed***



to the assessment of the documents concerned without any further delay. "

The Commission's reply

26. In response to the Ombudsman's first recommendation in relation to Document Sets **14 and 15**, the Commission made a fresh attempt to find a fair solution, identifying six categories of documents falling within the scope of the request and inviting the complainant to narrow her request. The complainant did not however accept the Commission's proposal.

27. In its detailed opinion the Commission stated that it had exhaustively screened more than 5 000 e-mails and consolidated those e-mails by removing the duplicates. The Commission divided the documents into two categories: documents which contained important information of substance and documents which did not. The Commission then proceeded to the assessment of the first category of documents.

28. As a result, on 19 May 2015, the Commission sent the complainant a list of the documents falling within the two categories identified above and provided full or partial access to 253 documents. The Commission stated that it was working actively to complete the assessment of all the relevant documents and that a further, final reply would follow.

29. In parallel to the assessment of its own documents, the Commission consulted more than 25 third parties, including other EU institutions, Member States, third countries, business associations and other private parties to seek their views on the possible disclosure of the documents originating from them.

30. In its final reply of 23 July 2015, the Commission informed the complainant that it had assessed the remaining 85 documents in the first category. The responses of the authors of the documents ranged from failure to respond (the United States), to permitting different levels of public access, to refusing access, and to arguing that the documents in question do not fall within the scope of Regulation 1049/2001. The Commission, following this assessment, granted full access (subject to redaction of personal data) to 29 documents, partial access to 30 documents, and refused disclosure of 26 documents.

31. The main ground invoked by the Commission to justify its refusal was the exception relating to the protection of international relations (Article 4(1)(a), third indent of Regulation 1049/2001). After a detailed analysis of the documents or parts of the documents potentially falling within the scope of that exception, the Commission argued that it was unable to reveal the positions of the negotiating parties, such as the United States, the EU Member States or third countries. This was because it assessed that there was a clear risk that disclosure of those documents would undermine the public interest as regards international relations, not only in the context of the implementation of FATCA, but also with regard to any other future bilateral negotiations with the United States.

32. Regarding the exception relating to the protection of commercial interests (Article 4(2), first



indent of Regulation 1049/2001), the Commission stated that it had consulted the third party from which two documents originated and that that third party had agreed to wide disclosure subject to certain redactions. Moreover, the Commission consulted another third party concerning the lobbying strategy the latter pursued in 2011 in relation to the FATCA. Although that third party did not consent to the disclosure of the documents in their entirety, the Commission carried out an assessment and disclosed the documents subject to personal data redactions.

33. In her observations, the complainant emphasised the need to ensure full openness and argued that the Commission is too restrictive in disclosing (parts of) documents. The complainant stated that some documents are censored to such an extent that it is impossible to verify whether the secrecy is justified. Moreover, the complainant argued that the fact that the United States of America did not respond to the Commission's consultation should not automatically lead to a refusal of disclosure by the Commission of the US documents.

The Ombudsman's assessment

34. The Ombudsman is pleased to note that the Commission implemented her recommendation and made a fresh attempt to come to a fair solution within the timeframe provided. Despite the fact that the complainant did not accept the proposed solution, there is nothing to suggest that the Commission failed to show genuine determination to implement the Ombudsman's recommendation.

35. Next, the Commission did carry out a proper assessment of the relevant documents the result of which was a further disclosure of a significant number of documents.

36. In doing so, it is encouraging to note that the Commission followed the suggestion in the report of the Ombudsman's inspection which pointed out that there were significant overlaps between the e-mails in question. Many of these emails (and their attachments) were replicated within the documents falling within the scope of the request. By identifying the overlaps, the Commission eventually did what it was actually asking the complainant to do, that is, to reduce significantly the number of the documents covered by the complainant's request without the need for narrowing the scope of the request. This 'cleaning' operation enabled the Commission to carry out a thorough assessment of the relevant documents and to disclose many of them eventually.

37. In that regard, the Ombudsman acknowledges the considerable efforts made by the Commission to accept and implement her recommendation.

38. That being said, the complainant argued that the disclosure was (a) too restrictive and (b) that the Commission should not have refused to disclose the documents originating from the United States of America simply because the latter failed to respond to the Commission's consultation.



39. Regarding (a), it is important to clarify that the Ombudsman's inquiry is focused on the procedures followed by the Commission in seeking to find a fair solution to the complainant's application for public access to documents. Given that, as stated in the inspection report, the Ombudsman obtained only a sample of **Document Sets 14 and 15**, the Ombudsman is not in a position to assess whether the Commission's reliance on the exceptions claimed was justified. To do so would require further inquiries and a detailed assessment of a large volume of individual documents.

40. Regarding (b), based on a careful reading of the Commission's reply of 23 July 2015, it is clear that the failure of the United States of America to respond to the Commission's consultation did not 'automatically' lead to the latter's refusal to give access to these documents, as the complainant suggests. In fact, the Commission referred to the statement of the US authorities in the consultation prior to the decision of 28 August 2012,

, in which the US authorities had clearly withheld their consent to the disclosure of documents emanating from them. That refusal however was followed by the Commission's own assessment after which it decided to refuse access to the documents in question.

41. In light of these considerations, the Ombudsman finds that the Commission accepted the first recommendation and took adequate measures to implement it.

Allegation that, contrary to the substantive rules enshrined in Regulation 1049/2001, the Commission failed to grant full public access to Documents 1, 2, 3 and 6 to 13 and the related claim

The Ombudsman's reasoning leading to the second recommendation

42. The Commission refused access, or granted partial access only, to these documents on the basis of the exception relating to the protection of the public interest as regards international relations as provided for under Article 4(1)(a), third indent of Regulation 1049/2001.

43. In her recommendation, the Ombudsman referred to the relevant case-law [1], and notably to the fact that, as the Court has ruled, the particularly sensitive and essential nature of the interests protected by Article 4(1)(a), combined with the fact that access must be refused by the institution if disclosure of a document would undermine the protection of one of those interests, requires that great care must be taken in deciding on such cases. For the Court, such a decision therefore involves a degree of discretion. For that reason, the Court has ruled that the review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has



been a manifest error of assessment of the facts or a misuse of powers [2] .

44. In light of the case-law of the Court of Justice and after having carefully examined the relevant documents, the Ombudsman drew the following conclusions.

45. In the case of the documents identified as **Documents 7 (d) to 7 (j), 7(l), and Document 9** to which no access was given, and also in the case of **Document 2, Document 6** (from mid-page 10 to page 13), **Documents 7 (a), 7(b), 7(c) 7(l), and Document 10** , to which partial access was given, the Ombudsman found that those documents contained sensitive information pertaining to the international relations of the EU and its Member States. The Ombudsman found that the Commission did not, at the time it took the decision on the complainant's confirmatory application, commit a manifest error of assessment when refusing access to, or to parts of, those documents. She therefore considered that the Commission's refusal not to grant access to these documents was justified in substance.

46. Regarding the documents to which partial access was given and which were identified as **Document 1, Document 3 and Document 6** (only as regards pages 9 to mid-page 10) the Ombudsman considered, on the basis of the inspection of documents, that the deletions made by the Commission contained information that was already, to a large extent, disclosed (for instance, in **Document 4** or the disclosed parts of **Document 2**). The Ombudsman therefore found that the Commission had failed to give sufficient explanations to justify those deletions.

47. Regarding the documents identified as **Document 11** (partial access), and **Documents 12 and 13** (no access), which concern the exchanges and the work of the Article 29 Data Protection Working Party, and which detail the views and arguments about the impact of FATCA on the data protection rules of the Member States, the Ombudsman considered, on the basis of her inspection of documents, that they fall within the general scope of the exception relating to the protection of the public interest concerning international relations. However, the Ombudsman took the view that the Commission had not convincingly explained how the disclosure of these documents would actually, and to what extent, undermine the protection of the public interest as regards international relations. This is especially the case given that, in its decision of 28 August 2012, the Commission provided a link to a letter which contained the Article 29 Working Party's detailed position on the matter [3] . Moreover, in relation to **Documents 12 and 13**, to which access was denied in their entirety, the Commission had not explained why at least partial access to them was not possible. In view of this, the Ombudsman considered that the Commission had failed to give convincing explanations as to how disclosure of these documents or parts thereof might seriously harm the interests protected by the exception in question.

48. On the basis of the above, the Ombudsman found that the Commission had not given as broad access to **Document 1, Document 3 and Document 6** (only as regards pages 9 to mid-page 10) as it should have done. Moreover, the Commission failed to give satisfactory reasons for refusing access to **Document 11** (partial access), and **Documents 12 and 13** (no access). This constituted maladministration.



49. To remedy the maladministration, the Ombudsman made the following recommendation in accordance with Article 3(6) of the Statute of the European Ombudsman:

" 2) The Commission should re-examine the complainant's request for access to the non-disclosed documents or parts thereof as regards Document 1, Document 3, Document 6 (only as regards pages 9 to mid-page 10), Document 11, and Documents 12 and 13. "

The Commission's reply

50. The Commission stated that, after carrying out a re-examination of the documents, it could disclose **Document 3** and the relevant parts of **Document 6** as the reasons justifying the original refusal to disclose no longer applied.

51. Regarding **Documents 11, 12 and 13**, the Commission argued that it had attended the meetings of the Article 29 Working Party as an observer only and that, moreover, the DG TAXUD minutes kept do not constitute an official record of those meetings as they were not sent to the participants for verification. In addition, the opinions of the national representatives expressed in these meetings may not correspond to the official position of the relevant Member States vis-à-vis their negotiating partner, the United States of America. Because of the time that has elapsed since the discussions took place, the risk that the disclosure might not represent the position of a Member State concerned is higher given that it is no longer possible to check the accuracy of the minutes with the participants. The Commission added that although several Member States had in the meantime concluded FATCA agreements with the United States, there were some who had not. Even in the former case, however, the data protection aspects of these agreements are still controversial and subject to ongoing internal discussion and supervision by the national data protection authorities. Moreover, the Commission argued that, because the data protection aspects of the FATCA are also relevant to the OECD Global Standard on Automatic Exchange of Financial Account Information for Tax Purposes, disclosure of these early considerations might prejudice the ongoing negotiation for the implementation of the OECD Standard.

52. Against this background, the Commission argued that full disclosure of **Documents 11, 12 and 13** would undermine the public interest as regards international relations and also be harmful to the ongoing work of the Article 29 Working Party and that, therefore, their disclosure would seriously undermine the ongoing decision-making process of this expert group.

53. However, the Commission stated that the above considerations do not apply to the background information and to the position of the Commission expressed by its representatives at the said meetings or to the 'Next Steps' item included at the end of the minutes, as long as they do not reflect the position of the Member States. The Commission noted that developments since its decision of 28 August 2012 on the complainant's confirmatory application made it possible for it to grant wider partial access to **Document 11** and partial access to **Documents 12 and 13**.



54. Finally, regarding **Document 1**, the Commission stated that only point 5 of that document falls within the scope of the request. The Commission stated that it had already given access to the first paragraph, and that the following three paragraphs constituted an internal record of the positions expressed by three Member States in that meeting. As with its arguments relating to the views of the national representatives at the meeting of the Article 29 Working Party, the Commission stated that the statements recorded had not been verified with the participants. The Commission stated that, if disclosed, the statements of the national representatives would reveal the early negotiating positions of the relevant Member States and would undermine the further dialogue between these Member States and the United States concerning the implementation of FATCA and have a detrimental effect on their international relations. After observing that the complainant could contact the individual Member States if she wishes to obtain more information on the bilateral negotiations, the Commission stated that the disclosure of the relevant paragraphs would undermine the public interest as regards international relations.

55. Thus, the Commission disclosed the last two paragraphs of **Document 1** which record the Commission's proposal and the reaction of the Council Presidency.

56. In her observations, the complainant argued that the Commission is too restrictive in the disclosure of documents.

The Ombudsman's assessment after the second recommendation

57. The Ombudsman notes that, following her recommendation, the Commission re-examined the documents in question and granted access to **Document 3** and **Document 6** (only as regards pages 9 to mid-page 10) and wider public access to **Document 1**, **Document 11**, and **Documents 12 and 13**. Moreover, the Commission gave more detailed and convincing explanations for its refusal to give access to the remainder of the documents in question. The Ombudsman is satisfied, based on her inspection of the documents in question, that the Commission's decision on these documents, following its re-examination, is justified.

58. In light of the above, the Ombudsman finds that the Commission accepted and implemented the second recommendation.

Conclusion

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

The Commission has accepted and implemented the Ombudsman's recommendations.

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



Emily O'Reilly

Strasbourg, 31/03/2016

[1] Case T-301/10 *Sophie in 't Veld v European Commission* , ECLI:EU:T:2013:135, paragraphs 108-109.

[2] *Sison v Council* , cited above, paragraph 34.

[3]

http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_t

[1]

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=search&language=en&CFID=5964662&CFTOKEN=>
[Link]. The Ombudsman is well aware that compliance with the duty to register documents in accordance with Article 11 of Regulation 1049/2001 cannot be enforced by means of an application for access to documents (Case C-127/13 P *Strack* , cited above, paragraph 44) but this case serves as an example where, had the Commission inserted these documents in the public register, it would have been very helpful.

[1] The abridged version provided here summarises the background, the complainant's initial and confirmatory applications, the Commission's replies and the exchanges of correspondence leading to the complaint to the Ombudsman. For further information, please refer to the full text of the Ombudsman's draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/58452/html.bookmark>

[2] For more information on FATCA, see

http://en.wikipedia.org/wiki/Foreign_Account_Tax_Compliance_Act

[3] The EU Member States involved in these discussions were: the United Kingdom, France, Germany, Italy and Spain.

[4] 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.

[5] Document 1 (Section 5 of the summary record of the meeting of the Taxation Policy Group (TPG) on FATCA on 19 January 2011), Document 2 (Working document for the TGP meeting - " *FATCA state of play* "), Document 3 (Section on FATCA in the summary record of the meeting of the TGP on 6 February 2012), Document 4 (Letter from the Council of the EU and the



European Commission to the US authorities dated 24 March 2011), Document **5** (Working document for the meeting of Working Party IV (Direct Taxation), Document **6** (Agenda Item 2 of the summary record of the meeting of the Working Party IV entitled "*FATCA: latest state of play including data protection issues*"), Document **7** (Minutes of meetings involving the Commission, the Member States, the US Treasury and the OECD from 3 March 2011 to 27 April 2012 - 12 documents), Document **8** (letter from the Commission to the US authorities of 15 July 2011), Document **9** (e-mail from the US authorities to the Commission of 24 September 2011 plus an attachment), Document **10** (letter from the Commission to the US authorities of 23 November 2011), Documents **11** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 7 December 2011), Document **12** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 18 January 2012), Document **13** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 7 March 2012), Document **14** (e-mail correspondence between the Commission and the members of the Article 29 Working Party from December 2011 to April 2012 relating to the opinion of the Article 29 Working Party on the interaction of provisions of FATCA with Directive 95/46), Document **15** (e-mail correspondence between the Commission, the Member States, the US Treasury and the OECD from April 2011 to April 2012 relating to the implementation of FATCA).

[6] The Commission invoked the following exceptions under Article 4 of Regulation 1049/2001:

" 1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) the public interest as regards:

....

— *international relations,*

— *the financial, monetary or economic policy of the [Union] or a Member State;*

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

...

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. "

[7] Article 6(3) of Regulation 1049/2001 provides:

" *In the event of an application relating to a very long document or to a very large number of*



documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution. "

[8] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[9] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/58452/html.bookmark>.

[10] The Ombudsman has found that failure to comply with the statutory time limits for dealing with an access to documents request did not, in the circumstances of that case, amount to maladministration. In that case, the Commission had provided a full and detailed list of all the documents falling within the scope of the complainant's request, divided the request into four batches, given a detailed timetable for the handling of the request and, eventually, following the complainant's refusal to agree to the proposed fair solution, carried out an individual assessment of all the documents within the strictures of the timetable that the Commission had set itself. See, Decision of the European Ombudsman closing the inquiry into complaint 1869/2013/AN against the European Commission, paragraphs 16-30, available at <http://www.ombudsman.europa.eu/cases/decision.faces/en/58251/html.bookmark> [Link]

[11] Case T-392/07 *Guido Strack v European Commission* , ECLI:EU:T:2013:8, paragraphs 50-51, confirmed on appeal in Case C-127/13 P *Guido Strack v European Commission* , judgment of 2 October 2014, ECLI:EU:C:2014:2250.

[12] Case C-127/13 P *Guido Strack v European Commission* , paragraph 25 and Case C-362/08 P *Internationaler Hilfsfonds v Commission* , EU:C:2010:40, paragraph 53.

[13] Case C-127/13 P *Guido Strack v European Commission* , paragraph 26.

[14] Case C-127/13 P *Guido Strack v European Commission* , paragraphs 27-8.

[15] Paragraphs 45-50 of the Ombudsman's recommendations.