Euroopa Ombudsman

Otsus juhtumi 552/2018/MIG kohta, mis käsitles Euroopa Komisjoni keeldumist anda üldsusele juurdepääs Saksamaa võrgustike täitemeetmete seadusega seotud dokumentidele

Otsus
Juhtum 552/2018/MIG - **Alguskuupäev: {0}** 22/03/2018 - **Soovitus** 11/06/2019 - **Otsuse kuupäev: {0}** 20/11/2019 - **Asjassepuutuvad institutsioonid** Euroopa Komisjon (Tuvastatud on haldusomavoli) |

Juhtum käsitles üldsuse juurdepääsu taotlust Euroopa Komisjoni valduses olevatele dokumentidele, mis käsitlevad Saksamaa võrgustike täitemeetmete seadust. See on riiklik seadus, mille eesmärk on võidelda võltsuudistega sotsiaalvõrgustikes.

Ombudsman esitas lahenduse ettepaneku, paludes komisjonil taaskaalutleda oma (osalist) keeldumist üldsusele juurdepääsu andmisest dokumentidele. Komisjon ei vastanud ombudsmani määratud tähtaja jooksul. Ombudsman esitas seejärel komisjonile soovituse.

Komisjon vastas, et ei nõustu ombudsmani soovitusega.

Ombudsman avaldab kahetsust, et komisjon ei järginud soovitust. Ombudsman jääb oma järelduse juurde, et see on haldusomavoli.

Background to the complaint and inquiry

1. Under EU rules [1] , Member States that intend to adopt technical legislation for products or online services have to notify the Commission. The Commission and the other Member States can then assess, within a ‘standstill period’ of three months, whether the draft law complies with EU law.

2. In March 2017, the German authorities notified the Commission of their intention to adopt a law aiming at combating ‘agitation’ and ‘fake news’ on social networks, the *Netzwerkdurchsetzungsgesetz* [2] (the ‘Network Enforcement Act’). The standstill period ended on 28 June 2017 without any comments being submitted by the Commission or other Member States.

3. In July 2017, the complainant, a German MEP, requested the Commission to give her public access to documents relating to the draft Network Enforcement Act and the German authorities' notification thereof. [3]

4. The Commission informed the complainant of twelve documents that were already publicly available and granted the complainant wide partial access to six other documents, redacting only personal data. However, the complainant contended that the Commission had not identified all documents that were relevant to her request for public access.

5. The Commission checked its archives again and identified **18 additional documents** . It granted partial access to 13 of these documents and no access to 5 documents. It justified the redactions by relying on the need to protect personal data, to protect its decision-making and to protect legal advice. [4]

6. The complainant then turned to the Ombudsman.

7. During the Ombudsman's inquiry, the complainant informed the Ombudsman of six more documents (e-mails) that she considered should have been disclosed to her following her request for public access.

8. The Ombudsman inspected the documents to which the Commission had denied full access, as well as the six e-mails identified by the complainant.

The Ombudsman's proposal for a solution

9. The Ombudsman found that the Commission's reading of the complainant's request for public access was overly restrictive. She concluded that the Commission had failed to identify at least five documents.

10. The Ombudsman proposed that the Commission should conduct a fresh assessment of the complainant's request for access, searching for documents concerning the draft law and Germany's notification of that law.

11. Regarding those documents that had already been identified, the Ombudsman proposed that, in the light of recent case law, the Commission should re-consider its partial refusal to grant full access. [5]

12. The Commission asked the Ombudsman for an extension of the deadline for its reply to her solution proposal but did not reply within the extended deadline.

The Ombudsman's recommendation

13. The Ombudsman found that the Commission's persistent misinterpretation of the scope of

the complainant's request for public access and its restrictive application of the exemption that aims to protect its decision-making and legal advice constituted maladministration. She recommended that the Commission should, taking into account recent EU case law, grant the complainant the broadest possible access to the documents already identified and to all documents that can reasonably be considered as falling within the scope of the complainant's request for public access. [6]

14. In its reply, the Commission maintained its previous position. Specifically, it said that it had informed the complainant in its initial decision that *"all identified documents were drafted in the framework of the [notification procedure]"* , and that the complainant had not challenged its reading of the scope of her request. It also reiterated that DG GROW was the Commission department responsible for the notification procedure and pointed out that there were some documents from other departments among the identified documents.

15. Regarding the recent EU case law to which the Ombudsman had referred, the Commission argued that, when taking its final decision on the complainant's access request, it had taken into account the legal and factual circumstances at the time, including the state of the case law as it was then. In addition, the relevant documents, to which the complainant sought access, are different from the documents at issue in the case before the EU courts. In particular, the documents at issue in the complainant's access request were not produced in the context of an impact assessment, but relate to a notification procedure. The Commission therefore took the view that this case-law is not applicable. [7]

16. The complainant responded that the Commission had misinterpreted the scope of her access request and therefore failed to identify all relevant documents. She also stated that the Commission's arguments are contradictory.

The Ombudsman's assessment after the proposal for a solution and the recommendation

17. It is clear to the Ombudsman that the Commission misinterpreted the scope of the complainant's request for public access.

18. Prior to the Ombudsman's inquiry the complainant had repeatedly stated that the Commission must be holding further documents falling within the scope of her access request. Given that the Commission did not inform the complainant of the way in which it had understood her request, the complainant could not have been more specific at the time. Notably, the complainant could not have known that the Commission had searched for documents only within DG GROW. As the Commission itself stated, there were also documents held by other Commission departments. In this context, the Ombudsman notes that the Commission is a single entity.

19. During the Ombudsman's inquiry, the complainant again clarified how her request had to be understood, namely that she was seeking access to documents concerning the notification of

the draft law and the draft law itself anywhere in the Commission, which is in line with the wording of her access request. In addition, the complainant identified six e-mails exchanged between different Commission departments. One of these e-mails constituted an attachment to one of the identified documents. The remaining five e-mails had indeed not been identified by the Commission. All of these e-mails clearly concern *the notification* of the draft law and can be classified as "Commission documents". It is thus clear that the Commission failed to identify at least these five e-mails.

20. Regarding the redactions made to protect the Commission's decision-making and legal advice, the Ombudsman disagrees with the Commission's view that the recent judgment in *ClientEarth* does not apply in this case.

21. The documents at issue in *ClientEarth* were documents relating to *"impact assessments carried out with a view to the potential adoption of legislative initiatives by the Commission"* . [8] While the documents at issue in this case do not relate to legislative initiatives *by the Commission* - they relate to a legislative initiative by a Member State to adopt national rules - the Ombudsman emphasises that the relevant factor in the *ClientEarth* case was that the documents related to *the adoption of legislation* . Citizens have, in a democracy, an enhanced interest in knowing why and how the legislation is adopted. Broader public access should always be granted to documents relating to the adoption of legislation since all citizens falling under the territorial scope of application of the legislation will be affected by the legislation. The fact that the legislation in question in the present case is national legislation, only applicable in Germany, does not alter this principle. Therefore, it was entirely correct to rely on *the principles* underpinning the *ClientEarth* case law.

22. In addition, the Commission argued that the documents at issue *"remain relevant for the preparation of an impact assessment"* concerning *"possible measures to improve further the effectiveness of the fight against illegal content online."* This impact assessment has led to a Commission proposal for EU law on preventing the dissemination of terrorist content online. [9] Thus, the documents at issue indirectly relate to a legislative initiative by the Commission. While they do not formally constitute 'impact assessment reports' within the meaning of the *ClientEarth* case-law, the principles underpinning the *ClientEarth* case law certainly apply for this reason also.

23. The Ombudsman is therefore disappointed that the Commission has rejected her recommendation and not taken the opportunity to be more transparent.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman notes the rejection of her recommendation and repeats her finding that the Commission should have granted the complainant the broadest possible access to the documents she requested.

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

Emily O'Reilly

European Ombudsman Strasbourg, 20/11/2019

[1] Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32015L1535 [Linki].

[2] See https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32015L1535 [Linki].

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN [Linki] .

[4] In accordance with Article 4(1)(b), 4(3) second indent and 4(2) second indent of Regulation 1049/2001.

[5] The Ombudsman's proposal for a solution is available at:

https://www.ombudsman.europa.eu/en/solution/en/114788 [Linki].

[6] The Ombudsman's recommendation is available at: https://www.ombudsman.europa.eu/en/recommendation/en/115002 [Linki].

[7] The full text of the Commission's reply to the Ombudsman's recommendation is available at: https://www.ombudsman.europa.eu/en/correspondence/en/118691 [Linki].

[8] Judgment of the Court of 4 September 2018, *ClientEarth v Commission* , C-57/16 P, paragraph 89: http://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=EN&mode=lst&dir [Linki].

[9] See: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1183598_en [Linki].