Otsus, mis käsitleb seda, kuidas Euroopa Komisjon menetles üldsuse juurdepääsu taotlust COVID 19 pandeemia ajal turustatud meditsiiniliste maskide kvaliteedi dokumentidele (juhtum 790/2021/MIG)

Otsus
Juhtum 790/2021/MIG - **Alguskuupäev: {0}** 30/04/2021 - **Soovitus** 05/11/2021 - **Otsuse kuupäev: {0}** 25/05/2022 - **Asjaomased asutused** Euroopa Komisjon (Tuvastatud on haldusomavoli) | Euroopa Komisjon (Institutsioon nõustus soovitusega) |

Juhtum puudutas taotlust üldsuse juurdepääsu saamiseks dokumentidele, mis käsitlesid 1,5 miljonit meditsiinilist maski, mille komisjon ostis COVID¤19 pandeemia varajases etapis ja mis ei vastanud nõutud kvaliteedistandardile. Komisjon keeldus andmast juurdepääsu teatud taotletud dokumentidele (või nende osadele), tuginedes vajadusele kaitsta asjaomase tootja ärihuve.

Ombudsman leidis, et kõnealust teavet ei saa mõistlikult pidada äriliselt tundlikuks teabeks ja et isegi kui nõustuda, et komisjon võib asjakohasele erandile põhjendatult tugineda, on selle teabe avaldamise vastu suur avalik huvi.

Sel põhjusel järeldas ombudsman, et komisjoni keeldumine andmast üldsusele juurdepääsu oli selle juhtumi korral haldusomavoli. Ombudsman soovitas komisjonil oma seisukoht uuesti läbi vaadata, et võimaldada asjaomastele dokumentidele oluliselt laialdasem (kui mitte täielik) juurdepääs.

Komisjon vastas ombudsmani soovitusele positiivselt. Komisjon hindas oma otsust uuesti ja andis suurema juurdepääsu enamikule kõnealustest dokumentidest. Ombudsman avaldab siiski kahetsust, et komisjon ei ole ikka veel andnud juurdepääsu kolmele ülejäänud dokumendile tervikuna. Ta märkis ka, et kuigi kaebuse esitaja on nüüd saanud suurema juurdepääsu, ei ole avaldatud dokumentidest soovitud eesmärgi täitmiseks enam kasu, sest tema taotlusest on möödunud peaaegu kaks aastat.

Seetõttu kinnitas ombudsman oma järeldust, et toimunu oli haldusomavoli, ja lõpetas uurimise.

Background to the complaint
1. In spring 2020, to help tackle the COVID-19 pandemic, the European Commission purchased ten million medical masks, via the Emergency Support Instrument. [1] The Commission had already started to distribute 1.5 million of them to 17 Member States and the United Kingdom, when it turned out that the masks were of poor quality. The trader

agreed to mitigating measures.

2. In June 2020, the complainant, a journalist, asked [2] the Commission to give public access to the exchanges between the Commission and the Member States concerning the shipment of these masks.

3. On 26 October 2020, the Commission informed the complainant that it had identified 134 documents and granted wide public access. However, it refused access to (parts of) some of the documents, relying on a number of exceptions provided for under the EU legislation on public access to documents.

4. The complainant asked the Commission to review its decision to refuse access (by making a 'confirmatory application').

5. The Commission then granted the complainant wider access. However, it maintained parts of its decision, including that access to (parts of) 12 documents had to be refused based on the need to protect the commercial interests [3] of the manufacturer concerned.

6. Dissatisfied with the outcome in relation to these twelve documents, the complainant turned to the Ombudsman in April 2021.

The Ombudsman's recommendation

7. The Ombudsman considered that the Commission's argument, that disclosure of the withheld information would undermine the commercial interests of the manufacturer as it could be used to damage its reputation and thus jeopardise its market position, was not sufficient to establish the existence of a legitimate and actual risk. Specifically, it was unclear to the Ombudsman how the redacted information, particularly on the specific mitigating measures, could be used to harm the manufacturer's reputation.

8. Moreover, the Ombudsman considered that there was a strong public interest in knowing what steps have been taken to ensure that no faulty masks were brought into circulation and used.

9. The Ombudsman thus found that the Commission's refusal to give full public access to the twelve documents at issue constituted maladministration. She made the following recommendation [4] :

The Commission should reconsider its decision to refuse public access to (parts) of the twelve documents at issue based on the need to protect the manufacturer's commercial interests with a view to giving the complainant significantly increased, if not full, access to those documents.

10. In reply, **the Commission** [5] granted the complainant significant access to nine documents, including to the information on the proposed mitigating measures that they contain, redacting only limited personal data [6] . It considered that, almost one year after the adoption of the confirmatory decision, the factual and legal circumstances had changed and that these nine documents are therefore no longer covered by the exception for the

protection of commercial interests. As regards the remaining three documents, the Commission reiterated that these documents contained commercially sensitive information from an identified company with which it does not have a direct contract and maintained that disclosure would undermine the company's commercial interests.

11. In his comments, **the complainant** expressed discontent with the Commission's handling of his access request. He stated that it had taken nearly two years to receive access to the documents at issue and that this delay had made it impossible for him to carry out his work as a journalist. The complainant also contended that the Commission had failed to provide a clear and substantiated explanation for the existence of a risk to the commercial interest of the manufacturer concerned or why it considers that this risk has subsided.

The Ombudsman's assessment after the recommendation

12. The Ombudsman welcomes the Commission's positive response to her recommendation to reconsider its decision to refuse public access to (parts) of the twelve documents at issue.

13. The Ombudsman notes that, following a re-assessment, the Commission has granted greater public access to nine of the twelve documents at issue.

14. However, the Ombudsman maintains the view that the grounds on which the Commission had based its decision to refuse access to the relevant parts of these documents at the time of adoption of its confirmatory decision were not convincing.

15. Regarding the remaining three documents containing information on quality control tests, the Ombudsman reiterates her view that that information does not qualify as commercially *sensitive* simply because it relates to a company. She thus regrets that the Commission maintained its refusal to give access to these documents in their entirety.

16. The Ombudsman also regrets the time the Commission has taken in this case to provide access. While she acknowledged in her recommendation that the complainant's access request concerned one of the busiest parts of the Commission at the time, how the Commission dealt with this case was clearly at odds with the spirit of Regulation 1049/2001. This is illustrated by the fact that, due to the passage of time, the complainant cannot use the information that has now been disclosed to him for the purpose he had intended. The Ombudsman therefore once again emphasises the importance of transparency in times of crisis [7] , as well as the need to seek to adhere to the time limits set out in the EU legislation on public access. [8]

Conclusion

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

The Commission has reacted positively to the Ombudsman's recommendation by giving wider public access to the documents at issue. However, the Commission has still not given access to the three remaining documents in their entirety. Moreover, due to the passing of nearly two years, the complainant cannot use the information disclosed to him for the purpose he had intended. The Ombudsman therefore confirms her finding of maladministration.

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

Emily O'Reilly European Ombudsman

Strasbourg, 25/05/2022

[1] For information on the Emergency Support Instrument, visit: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/emergency-support-instrument_en .

[2] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049 .

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

[4] The full text of the recommendation and the assessment that led to it are available at: https://www.ombudsman.europa.eu/en/recommendation/en/148785 .

[5] The Commission's reply to the Ombudsman's recommendation is available at:

https://www.ombudsman.europa.eu/en/doc/correspondence/en/156129 .

[6] In accordance with Article 4(1)(b) of Regulation No 1049/2001.

[7] See the Ombudsman's letter to the Commission of 20 April 2020: https://www.ombudsman.europa.eu/en/doc/correspondence/en/127057 .

[8] See also the Ombudsman's own-initiative inquiry into the time taken by the European Commission to deal with requests for public access to documents: https://www.ombudsman.europa.eu/en/case/en/60766 .