Euroopa Ombudsman

Otsus juhtumi 1463/2005/TN kohta - Juurdepääs kasvuhoonegaaside saastekvootide eraldamist puudutavatele dokumentidele

Otsus
Juhtum 1463/2005/TN - **Alguskuupäev: {0}** 29/04/2005 - **Otsuse kuupäev: {0}** 12/12/2006

Kaebus puudutas komisjoni keeldumist juurdepääsu andmisest dokumentidele, mis olid seotud riiklike kavadega eraldada kasvuhoonegaaside saastekvoodid, millest teavitasid komisjoni Ühendkuningriik, Prantsusmaa ja Slovakkia. Komisjon keeldus vaidlusalustele dokumentidele juurdepääsu lubamast üldsuse juurdepääsu käsitleva määruse 1049/2001 [1] artikli 4 lõike 2 kolmanda taande alusel ja artikli 4 lõike 3 esimese punkti alusel, väites, et komisjoni läbirääkimised liikmesriikidega olid pooleli ning et vaidlusalustele dokumentidele juurdepääsu lubamine nõrgestaks komisjoni positsiooni läbirääkimistel.

Kaebuse esitaja väitis, et kuna kõiki kavasid hinnati individuaalselt ja ilma kaalutlusõiguseta, siis ei saa komisjoni seisukoht ühe kava osas mõjutada tema seisukohta teise kava osas. Kaebuse esitaja väitel keeldus komisjon õigusvastaselt vaidlusalustele dokumentidele juurdepääsu andmisest.

Komisjoni arvamuse kohaselt toimub kavade hindamine uurimise vormis, mille eesmärk on kindlaks määrata, kas need on kooskõlas direktiiviga 2003/87/EÜ [2] , milles käsitletakse kasvuhoonegaaside saastekvootidega kauplemise süsteemi. Nimetatud menetlus eeldab suuremahuliste läbirääkimiste pidamist, et leida ühenduse õigusega kooskõlas olev lahendus ja võtta arvesse iga liikmesriigi olukorda.

Ombudsman märkis, et kaebuse esitajale võimaldati juurdepääs taotletud dokumentidele pärast seda, kui kõigi liikmesriikide kavade heakskiitmismenetlus oli lõpetatud. Seoses komisjoni keeldumisega anda kavadele juurdepääs läbirääkimiste ajal, tõi ombudsman välja, et hea halduse põhimõtete kohaselt tuleb oma seisukohti küllaldaste ja veenvate argumentidega põhjendada.

Määruse 1049/2001 artikli 4 lõike 3 esimene lõik kehtib dokumentide kohta, mille institutsioon on koostanud sisekasutuseks. Taotluses sooviti juurdepääsu teatud liikmesriikide ametivõimude vahelisele teabevahetusele. Ombudsmani arvates ei saanud neid dokumente pidada sisekasutuseks mõeldud dokumentideks.

Määruse artikli 4 lõikes 2 sätestatakse, et juurdepääsust keeldumiseks peab olema kindlaks tehtud, et dokumentide avalikustamine kahjustaks uurimise eesmärgi kaitset. Käesoleval juhul oli uurimise eesmärk teha kindlaks liikmesriikide kavade vastavus ühenduse õigusele. Artikli 4 lõikes 2 sätestatud erandi rakendamiseks pidi komisjon kindlaks tegema, et vaidlusaluste dokumentide avalikustamine seda eesmärki kahjustab. Käesoleval juhul ei ole seda tehtud. Seetõttu leidis ombudsman, et komisjon on vääralt keeldunud dokumentidele juurdepääsu andmisest läbirääkimiste ajal ja et komisjoni keeldumine on haldusomavoli. Ombudsman tegi selle kohta kriitilise märkuse.

[1] Euroopa Parlamendi ja nõukogu 30. mai 2001. aasta määrus (EÜ) nr 1049/2001 üldsuse juurdepääsu kohta Euroopa Parlamendi, nõukogu ja komisjoni dokumentidele, EÜT 2001 L 145, lk 43.

[2] Euroopa Parlamendi ja nõukogu 13. oktoobri 2003. aasta direktiiv 2003/87/EÜ, millega kehtestatakse ühenduses kasvuhoonegaaside lubatud heitkogustega kauplemise süsteem ja muudetakse nõukogu direktiivi 96/61/EÜ, ELT 2003 L 275, lk 32.

Strasbourg, 12 December 2006
Dear Mr X,

On 4 April 2005, you made a complaint to the European Ombudsman concerning the European Commission's refusal to accede to your request for access to documents, made under Regulation 1049/2001. The documents concerned relate to the national plans notified to the Commission by the UK, France and the Slovak Republic for the allocation of greenhouse gas emission allowances.

On 29 April 2005, I forwarded the complaint to the President of the Commission. After an extension of the deadline in question, the Commission sent its opinion on 3 August 2005. I forwarded it to you with an invitation to make observations, which you sent on 24 October 2005.

On 12 April 2006, I wrote to the Commission, asking for further information in relation to your complaint. The Commission sent its reply on 29 June 2006. I forwarded it to you with an invitation to make observations, if you so wished, by 31 August 2006. No observations have been received from you.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the time it has taken to deal with your complaint.
THE COMPLAINT
According to the complainant, the relevant facts are, in summary, the following:

On 19 November 2004, he submitted to the European Commission, the European

Parliament and the Council of the European Union a request for access to documents relating to the national plans notified to the Commission by the UK, France and the Slovak Republic for the allocation of greenhouse gas emission allowances. He requested access to those documents reference to which had been made in the limited number of documents regarding the issue that were posted on-line.

Parliament informed him that the documents in question only involved the Council and the Commission. The Council informed him that the documents were in the possession of the Commission.

On 15 December 2004, the Commission explained that it needed an extension of 15 working days to reply to the request for access. On 17 January 2005, the complainant contacted an official in the Commission's Directorate-General for the Environment ("DG Environment") to inquire about the status of his request. He exchanged several e-mails with the official in order to clarify the request. On 18 January 2005, the official provided him with a list of documents falling under one of the categories of documents covered by his request. The list contained 22 communications. However, it was possible that several more communications might also fall under his request.

On 21 January 2005, the Commission replied to the request for access, granting access to less than two pages of excerpts from the Minutes of the Climate Change Committee. The Commission argued that, although public access to documents is important, in the complainant's case the right thereto was overridden by the need to protect the Commission's decision-making process with regard to the national allocation plans on which it had not yet adopted decisions. The Commission referred the complainant to information available on its website, which, however, he was already aware of.

On 28 January 2005, the complainant made a confirmatory application to the Commission, requesting a re-evaluation of his request for access to documents, such as those listed by the Commission official in the e-mail of 18 January 2005. In his confirmatory application, he argued that disclosure of the requested documents would not undermine the Commission's decision-making process. He pointed out that Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (1) ("Directive 2003/87") requires Member States to develop national allocation plans based on objective and transparent criteria. The Commission is required to evaluate, objectively and individually, each national allocation. He argued that, while the Member States must respect the obligation to base their allocations on objective and transparent criteria and to consult with both public and private parties when doing so, the Commission is not held accountable in any way, making observations and issuing decisions after having conducted undisclosed, non-transparent and possibly biased negotiations.

On 17 March 2005, the Commission replied to the confirmatory application, granting access to two documents concerning the Climate Change Committee. However, these documents were merely meeting agendas and contained no information on the issue of

national allocation plans for the UK, France or the Slovak Republic. As regards the other documents, access was denied on the grounds that negotiations between the Commission and certain Member States were still ongoing. The Commission argued that to provide access to the documents in question would compromise its position when negotiating with the Czech Republic, Greece and Italy. Access was therefore once more denied, on the basis of Article 4(2), third indent, and Article 4(3), first paragraph, of 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 (2) ("Regulation 1049/2001").

In his complaint to the Ombudsman, the complainant argued, however, that the negotiations in question were not like negotiations that take place in an international forum, in which case the Commission's refusal to provide access would be understandable. The discussions in question were between the Commission and its Member States and the Commission had to apply the same criteria in an objective and transparent manner to all national allocation plans. Furthermore, since all national allocation plans had to be assessed individually, he failed to see how the Commission's position on one national allocation plan could affect its position on another national allocation plan. The questions and answers exchanged were based on data submitted by the public or data obtained under the funding of public revenue. The draft and final national allocation plans submitted by the Member States were public documents. Directive 2003/87 makes several references to the possibility for the public to make comments and to have access to information. For instance, Annex III(9) states that *"[t]he plan shall include provisions for comments to be expressed by the public, and contain information on the arrangements by which due account will be taken of these comments before a decision on the allocation of allowances is taken"* . During the evaluation and decision-making process, a number of Member States consulted parties that would be affected by any modifications to the submitted plans.

If the Commission's justifications would be accepted, the documents in question should be released immediately after the last national allocation plan had been approved.

The complainant alleged that the Commission had wrongly refused access to the requested documents, and claimed that the Commission should grant access to the requested documents.

THE INQUIRY **The Commission's opinion**

In its opinion, the Commission made, in summary, the following comments:

Background

On 19 November 2004, the complainant made a request for access to a number of documents concerning the process of approval by the Commission, in accordance with Directive 2003/87, of national plans for the allocation of greenhouse gas emission allowances ("NAPs"). This initial request, which was addressed simultaneously to Parliament, the Commission and the Council, covered three categories of documents:

(a) All internal communications between the Commission and the Council regarding COM(2004) 681 "Communication from the Commission to the Council and to the European

Parliament on Commission Decisions of 20 October 2004 concerning national plans of greenhouse gas emission allowances of Belgium, Estonia, Finland, France, Latvia, Luxembourg, Portugal and the Slovak Republic in accordance with Directive 2003/87/EC (the "Commission Communication");

(b) A series of communications between the Commission and the authorities of France, the United Kingdom and the Slovak Republic respectively, made between July and October 2004 (May and June 2004 in the case of the United Kingdom); and

(c) Documents created by the Climate Change Committee or exchanged between this Committee and the Commission regarding the French, the British and the Slovak NAPs.

On 14 December 2004, DG Environment extended the time-limit for the reply by 15 working days. Since some of the documents requested by the complainant could not be identified, the scope of his application was further clarified in a telephone conversation and successive e-mails on 17, 18 and 20 January 2005. In particular as regards category (b) of the requested documents, and since the original request did not state the subject, it was agreed that this concerned the communications exchanged between the Commission Services and the three Member States respectively on the subject of NAPs. The complainant and the Commission eventually agreed on a list of 22 communications that were covered by the request.

On 21 January 2005, DG Environment replied to the complainant's initial application. The only document that could be identified as pertaining to category (a) of the requested documents, namely, the Council's cover note 13953/04 of 26 October 2004 accompanying the Commission Communication, had already been sent to the complainant by the Council on 23 November 2004. As regards category (b), access to the 22 identified documents was refused, based on the exception in Article 4(3), second subparagraph, of Regulation 1049/2001. DG Environment explained, however, that this assessment might change once the Commission has taken decisions on all NAPs. Concerning category (c), DG Environment identified two documents corresponding to the request, namely, the minutes of the meetings of the Climate Change Committee held on 24-25 June 2004 and on 15-16 September 2004. The complainant was granted access to the annexes of these minutes, which concern the respective NAPs.

On 24 January 2005, the complainant submitted a confirmatory application, considering that the two disclosed documents did not provide any added information value and arguing that DG Environment's refusal to disclose the other documents was not justified under Regulation 1049/2001. Given that the Commission should make an individual evaluation of each NAP based on objective and transparent criteria, the complainant considered that the disclosure of the requested documents could not jeopardise its decision-making process.

On 18 February 2005, the Secretariat-General of the Commission extended the time-limit for replying to the confirmatory application by 15 working days, that is, until 11 March

2005. The reply was further delayed until 17 March 2005, for which the Secretariat-General sent an apology by e-mail on 14 March 2005.

In reply to the confirmatory application, the Secretariat-General explained that no further documents were identified as falling under category (a). As regards category (b), DG Environment's refusal to disclose the documents in question was upheld.

At the time of considering the complainant's confirmatory application, three out of 25 NAPs had not yet been approved by the Commission. The assessment of the NAPs submitted by the Member States takes the form of an investigation, the purpose of which is to ascertain whether the NAPs comply with Directive 2003/87. The exchanges between the Commission and the Member States are similar to those that take place within infringement proceedings under Article 226 of the EC Treaty. Moreover, the 25 NAP decisions are to be considered as part of a single EU-wide greenhouse gas allowance trading scheme, for which the decision-making process had not been closed at the time of the complainant's request. Disclosure of the requested documents would have seriously undermined the decision-making process with regard to the three remaining Member States by putting them in a privileged and better informed position in comparison to the Member States for which the individual NAP decisions had already been adopted. This would also be contrary to the principle of equality between Member States, which is one of the general principles of Community law.

As a consequence, access to the requested communications was refused based on both Article 4(2), third indent, and Article 4(3), first subparagraph, of Regulation 1049/2001. The possibility of granting partial access was considered but excluded.

As regards category (c) of the requested documents, the agendas of the meetings of the Climate Change Committee held on 24-25 June and 15-16 September 2004 were also disclosed, and it was confirmed that the previously disclosed annexes constituted the only format in which the Committee's deliberations on the NAPs were documented.

On 4 April 2005, the complainant submitted a complaint to the Ombudsman regarding the matter.

The present complaint

As regards the complainant's argument that the documents in category (c) are not informative, the Commission states that it can only repeat that the disclosed annexes to the minutes in question are the only existing format documenting the deliberations of the Climate Change Committee. The Commission holds no other documents corresponding to the request as regards this category.

As regards the complainant's arguments pertaining to alleged secrecy and non-accountability of the proceedings, the Commission does not agree, because, in its view, the process of allocation of greenhouse gas emissions is very transparent. The criteria of the assessment are objective and public. The stakeholders in the Member States are consulted at the various stages of the procedure. At the moment of their notification,

the draft NAPs presented by the Member States are published on the Commission's website. The same applies for the subsequent Commission decisions approving, conditionally or unconditionally, each NAP. The Member States are supposed to publish the final version of the NAPs as agreed with the Commission. During the process of assessing their NAPs, the Member States are associated through their participation in the Climate Change Committee, which also has to approve the Commission's decisions. These decisions are subject to judicial review.

The only limitations placed on the open and complete publication of the proceedings are due to the need to protect the discussions between the Commission and the Member States prior to the approval of their NAPs. These restrictions are justified under the exceptions laid down in Article 4 of Regulation 1049/2001, but they are temporary, as they are meant to ensure equal conditions for all Member States during the NAP approval procedure.

The complainant argues that the NAP assessment procedure under Directive 2003/87 is different from negotiations carried out with third countries in international fora. The Commission argues, however, that it did not rely on an exception protecting international negotiations. In its decision on the complainant's confirmatory application, the Commission noted the similarity between the NAP approval procedure and the investigations and exchanges with the Member States within the framework of infringement proceedings pursuant to Article 226 of the EC Treaty. Both procedures aim at ensuring compliance by Member States with Community law and in both cases the rules to be followed are objective and public. Nevertheless, both proceedings involve a substantial amount of negotiations between the Commission and the Member States concerned with a view to finding a solution which is consistent with the criteria clearly set out by Community law and at the same time takes into account the specific situation of the Member State. In both contexts, the spirit of dialogue and the protection of the co-operation and mutual trust between the Member State and the Commission require the relevant exchanges to be kept out of the public domain until the proceedings are closed. The Commission therefore considers that the case-law concerning access to documents drawn up in the framework of infringement proceedings can be transposed, by analogy, to the exchange of communications under the NAP assessment procedure under Directive 2003/87.

The Commission agrees with the complainant's statement that all NAPs are assessed individually. The proceedings are indeed carried out separately for each of the 25 individual decisions. However, all the NAP proceedings have a single objective of creating a Community-wide scheme, allowing the control of the greenhouse gas emissions and trade in allowances. As already explained, this process, although based on objective and transparent criteria, is not a purely mechanical exercise but involves an amount of flexibility and negotiations. The principle of non-discrimination requires that all Member States should be given equal chances in these proceedings.

The draft NAPs submitted by the Member States, the final NAPs approved by the Commission, and the successive Commission decisions relating to these plans are made

publicly available. This practice provides a significant amount of information regarding the parallel approach and strategy followed by the Commission in all cases. Disclosing the requested communications at a time where the decisions with regard to the Czech, Italian and Greek NAPs had not yet been adopted would have put these three Member States in a privileged situation in the process in comparison to the other Member States and would have therefore undermined the objectivity of the allocation process on a Community-wide scale.

However, since the decisions on the NAPs of the Czech Republic, Italy and Greece had been adopted on 12 April, 25 May and 20 June 2005 respectively, the Commission no longer opposed disclosure of the requested communications. The Commission therefore disclosed 11 communications addressed respectively to the British, French and Slovak authorities, as requested by the complainant. However, these three authorities needed to be consulted as regards disclosure of their communications to the Commission, pursuant to Article 4(5) of Regulation 1049/2001. On 20 July 2005, the Commission informed these authorities of its decision to disclose its own documents on the subject and asked them to state their position as regards the disclosure of documents originating from them. A decision on the disclosure of the 12 documents concerned was to be taken after having received the replies from the Member States. The Commission was to send directly to the complainant all documents that the national authorities accept to disclose.

The complainant's observations

In his observations, the complainant made, in summary, the following comments:

Directive 2003/87 establishes a procedure under which the Member States develop plans setting out their intentions as to the precise amount of emission allowances to be allocated to individual installations. The procedure requires the Member States to notify their NAPs to the Commission for approval. It is clear that under this procedure, the Member States may not legally implement their NAPs without first having notified them to the Commission and received the Commission's approval, whether in the form of an immediate decision not to raise any objection or in the form of a decision accepting amendments to an NAP that was previously rejected.

In its reply to his confirmatory application, the Commission expressly confirmed that the purpose of the negotiations was to enable the approval of the NAP on the basis of changes made prior to the Commission's decision or subject to changes to be made subsequently, and that *"the Member State cannot proceed to take a final allocation decision before receiving the approval from the Commission"* . The Commission thus possesses the power of approval and the Member States are under a standstill obligation, being prevented from implementation of the NAPs, prior to receiving the Commission's approval.

It is therefore clear that the procedure under Directive 2003/87 establishes a framework in which the Member States may not legally implement their NAPs without first having notified them to the Commission and received the Commission's approval. Furthermore, this framework requires that Member States' allocation decisions implementing the NAPs must, legally, be in accordance with the Commission's decisions approving the NAPs.

The Commission's attempt to compare the NAP approval procedure to proceedings under Article 226 of the EC Treaty is unsustainable. Unlike in the Article 226 procedure, in the NAP approval procedure the Commission is exercising an approval power arising from a procedure involving mandatory notification, a standstill obligation and imposing legal restrictions. If anything, the NAP approval procedure is similar to merger control under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (3) and/or the state aid control procedure under Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC)No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (4) . Both these procedures involve a similar notification requirement, a similar standstill obligation and a similar requirement that only a concentration or a state aid that has been approved may be implemented.

Moreover, decisions under Article 9(3) of Directive 2003/87 do not involve any "prosecution discretion" relating to the political appropriateness of initiating proceedings against a Member State for a particular infringement. It is this factor - political appropriateness - which is central to the non-reviewability of Commission decisions under Article 226 of the EC Treaty (5) . Under Article 9(3) of Directive 2003/87, the Commission has no such discretion - it is obliged to apply the criteria laid down in Annex III and in Article 10 of the same Directive. Furthermore, the review of the provisional NAPs' compatibility with Annex III and Article 10 of Directive 2003/87 does not, in any way, suggest that the Member States have acted illegally. If an NAP is incompatible with these provisions, it may be rejected, but this does not mean that the Member State has acted illegally since the Member State has fully complied with its legal obligations by seeking the Commission's prior approval of the NAP. The Commission's comparison with the infringement proceedings and its argument that the case law concerning access to documents drawn up in the framework of such proceedings can be transposed, by analogy, to the exchange of communications under the NAP assessment procedure is therefore entirely misplaced.

As regards the Commission having consulted the French, British and Slovak authorities as to whether they would authorise disclosure of the requested documents that were produced by them, the Commission went on to state that *"[a] decision on the disclosure of these twelve documents indicated hereafter shall be taken after receiving the replies from the Member States"* . This suggests that, irrespective of whether France, the United Kingdom and the Slovak Republic grant access to the documents drawn up by them, the Commission may decide not to grant access. The Commission does not provide any explanation for this possible interference. If the Member States authorise access to be given, the documents in question should be disclosed. The complainant therefore requested the Ombudsman to continue monitoring the matter since it was not clear whether the release of the documents emanating from the Member States in question depends on the Commission's approval. If the Commission fails to provide access to documents the release of which has been authorised by the national authorities, the complaint about maladministration shall remain outstanding.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman noted that he had no information concerning the national authorities' possible response to the Commission's query as to whether they would agree to the Commission's providing public access to the documents emanating from them. Nor did he know whether the Commission had decided on the disclosure of the documents in question. The Ombudsman further noted that the complainant had asked him to continue monitoring the matter in order to make sure that the Commission's decision regarding the matter did not constitute an instance of maladministration. The Ombudsman therefore asked the Commission to answer the following questions and request:

Has the Commission made a decision on the disclosure of the documents originating from the British, French and Slovak authorities, and in that case, on what grounds was the decision made? In case of a decision, I would be grateful to obtain a copy.

In case there has not yet been a decision, could the Commission please explain the reasons therefore?

The Commission's reply

In reply to the Ombudsman's further inquiries, the Commission stated that the British, French and Slovak authorities had given their consent to disclose the documents emanating from them and it had therefore sent the remaining documents covered by the request for access directly to the complainant on 31 May 2006. The Commission expressed its regret for the fact that the consultation with the national authorities had taken more time than expected.

The complainant's comments

The complainant was invited to submit comments on the Commission's reply, if he so wished. No comments were received from him.

THE DECISION **1 The allegedly erroneous refusal to grant access and the related claim**

1.1 The complaint concerns the European Commission's refusal of a request for access to documents made under 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 (6) ("Regulation 1049/2001"). The documents concerned related to the national plans notified to the Commission by the UK, France and the Slovak Republic for the allocation of greenhouse gas emission allowances. Following a clarification of the request, 22 communications between the Member States and the Commission were identified in one of the categories of documents to which access had been requested. However, the Commission refused access to these communications. The complainant made a confirmatory application, but the Commission upheld its decision to refuse access to the communications on the ground that negotiations between the Commission and certain Member States were still ongoing. The Commission argued that to provide access to the documents in question would compromise its position when negotiating with the Czech Republic, Greece and Italy, whose plans had not been dealt with yet. Access was therefore once more denied, on the basis of Article 4(2), third indent, and Article 4(3), first paragraph, of Regulation 1049/2001.

1.2 In his complaint to the Ombudsman, the complainant argued, however, that the negotiations in question were not negotiations such as those in an international forum, in which case the Commission's refusal to provide access would be understandable. The discussions in question were between the Commission and its Member States and the Commission had to apply the same criteria in an objective and transparent manner to all national allocation plans. Furthermore, since all national allocation plans had to be assessed individually, he failed to see how the Commission's position on one national allocation plan could affect its position on another national allocation plan. The questions and answers exchanged were based on data submitted by the public or data obtained under the funding of public revenue. The draft and final national allocation plans submitted by the Member States were public documents. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (7) ("Directive 2003/87") makes several references to the possibility for the public to make comments and to have access to information. For instance, Annex III(9) states that *"[t]he plan shall include provisions for comments to be expressed by the public, and contain information on the arrangements by which due account will be taken of these comments before a decision on the allocation of allowances is taken"* . During the evaluation and decision-making process, a number of Member States consulted parties that would be affected by any modifications to the submitted plans. If the Commission's justifications were to be accepted, the documents in question should be released immediately after the last national allocation plan had been approved. The complainant alleged that the Commission had wrongly refused access to the requested documents and he claimed that the Commission should grant access to these documents.

1.3 The Commission argued that, at the time of considering the complainant's confirmatory application, three out of 25 national plans for the allocation of greenhouse gas emission allowances ("NAPs") had not yet been approved by it. The assessment of the NAPs submitted by the Member States takes the form of an investigation, the purpose of which is to ascertain whether the NAPs comply with Directive 2003/87. The exchanges between the Commission and the Member States are similar to those that take place within infringement proceedings under Article 226 of the EC Treaty. Moreover, the 25 NAP decisions are to be considered as part of a single EU-wide greenhouse gas allowance trading scheme, the decision-making process for which had not been closed at the time the complainant's request was submitted. Disclosure of the requested documents would have seriously undermined the decision-making process with regard to the three remaining Member States, by putting them in a privileged and better informed position in comparison to the Member States for which the individual NAP decisions had already been adopted. This would also be contrary to the principle of equality between Member States, which is one of the general principles of Community law. As a consequence, access to the requested communications was refused based on both Article 4(2), third indent, and Article 4(3), first subparagraph, of Regulation 1049/2001. The possibility of granting partial access was considered but excluded.

1.4 The Commission argued, in more detail, that the process of the allocation of greenhouse gas emissions is very transparent. The criteria of the assessment are objective and public. The stakeholders in the Member States are consulted at the various stages of the procedure. At the moment of their notification, the draft NAPs presented by the Member States are published on the Commission's website. The same applies for the subsequent Commission decisions approving each NAP conditionally or unconditionally. The Member States are supposed to publish the final version of the NAPs as agreed with the Commission. The only limitations to the open and complete publication of the proceedings are due to the need to protect the discussions between the Commission and the Member States prior to the approval of their NAPs. These restrictions are justified under the exceptions laid down in Article 4 of Regulation 1049/2001, but they are temporary, as they are meant to ensure equal conditions for all Member States during the NAP approval procedure. There is a similarity between the NAP approval procedure and the investigations and exchanges with the Member States within the framework of infringement proceedings, pursuant to Article 226 of the EC Treaty. Both procedures aim at ensuring compliance by Member States with Community law and in both cases the rules to be followed are objective and public. Nevertheless, both proceedings involve a substantial amount of negotiation between the Commission and the Member States concerned with a view to finding a solution which is consistent with the criteria clearly set out by Community law and, at the same time, takes into account the specific situation of the Member State. In both contexts, the spirit of dialogue and the protection of the co-operation and mutual trust between the Member State and the Commission require that the relevant exchanges be kept out of the public domain as long as the proceedings are not closed. The Commission therefore considers that the case-law concerning access to documents drawn up in the framework of infringement proceedings can be transposed, by analogy, to the exchange of communications under the NAP assessment procedure under Directive 2003/87. All the NAP proceedings have a single objective of creating a Community-wide scheme, making possible the control of the greenhouse gas emissions and trade in allowances. This is not a purely mechanical exercise but involves an amount of flexibility and negotiations. The principle of non-discrimination requires that all Member States should be given equal chances in these proceedings. Disclosing the requested communications at a time when the decisions with regard to the Czech, Italian and Greek NAPs had not yet been adopted would have put these three Member States in a privileged situation in the process in comparison to the other Member States and would have therefore undermined the objectivity of the allocation process on a Community-wide scale.

1.5 However, since the decisions on the NAPs of the Czech Republic, Italy and Greece were adopted on 12 April, 25 May, and 20 June 2005, the Commission no longer opposed disclosure of the requested communications. It therefore disclosed 11 communications addressed respectively to the British, French and Slovak authorities, as requested by the complainant. However, the Commission considered that, pursuant to Article 4(5) of Regulation 1049/2001, these three authorities needed to be consulted as regards disclosure of their communications to the Commission. The Commission had therefore asked them to state their position as regards the disclosure of documents originating from them. The Commission envisaged taking a decision on the disclosure of the 12 documents

concerned after having received the replies from the Member States.

1.6 In his observations on the Commission's opinion, the complainant argued that the procedure under Directive 2003/87 establishes a framework in which the Member States may not legally implement their NAPs without first having notified them to the Commission and received its approval. Furthermore, this framework requires that the Member States' allocation decisions implementing the NAPs must, legally, be in accordance with the Commission's decisions approving the NAPs. The Commission's attempt to compare the NAP approval procedure to proceedings under Article 226 of the EC Treaty is therefore unsustainable. Unlike in the Article 226 procedure, in the NAP approval procedure the Commission is exercising an approval power arising from a procedure involving mandatory notification, a standstill obligation and imposing legal restrictions. If anything, the NAP approval procedure is similar to merger control under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (8) and/or to the state aid control procedure under Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (9) . Moreover, decisions under Article 9(3) of Directive 2003/87 do not involve any "prosecution discretion" relating to the political appropriateness of initiating proceedings against a Member State for a particular infringement. It is this factor - political appropriateness - which is central to the non-reviewability of Commission decisions under Article 226 of the EC Treaty (10) . Under Article 9(3) of Directive 2003/87, the Commission has no such discretion - it is obliged to apply the criteria laid down in Annex III and in Article 10 of the same Directive. Furthermore, the review of the provisional NAPs' compatibility with Annex III and Article 10 of Directive 2003/87 does not, in any way, suggest that the Member States have acted illegally. If an NAP is incompatible with these provisions, it may be rejected, but this does not mean that the Member State has acted illegally since the Member State has fully complied with its legal obligations by seeking the Commission's prior approval of the NAP.

1.7 The complainant further argued that the Commission's opinion suggested that, having consulted the French, British and Slovak authorities as to whether they would authorise disclosure of the requested documents that were produced by them, the Commission may still decide not to grant access irrespective of these Member States' reply. The complainant considered that if the Member States were to authorise access, the documents in question should be disclosed. The complainant therefore asked the Ombudsman to continue monitoring the matter since it was not clear whether the release of the documents emanating from the Member States in question depends on the Commission's approval.

1.8 Following the Ombudsman's further inquiries into the matter, the Commission explained that the British, French and Slovak authorities had given their consent to disclose the documents emanating from them and it had therefore, on 31 May 2006, sent the remaining documents covered by the request for access directly to the complainant.

1.9 Before moving on to an analysis of the Commission's refusal of the complainant's request for access, the Ombudsman would like to recall that the present inquiry does not

cover the issue of the delays that appear to have occurred in the Commission's handling of the request for access.

1.10 As regards the complainant's request for access, the Ombudsman notes that the documents concerned consist of communications between the Commission and certain Member States under the NAP approval procedure. The complainant does not appear to dispute that the documents identified by the Commission in this regard are the ones to which he wished to be given access.

1.11 The Ombudsman notes that, in its opinion on the present complaint, the Commission explained that since it had finalised the NAP approval procedure for all Member States, it could provide access to its own communications regarding the matter. The communications in question were enclosed with its opinion. As regards access to the documents emanating from the French, British and Slovak authorities, the Commission considered that these three authorities needed to be consulted, pursuant to Article 4(5) of Regulation 1049/2001. The Commission had therefore asked these three states to declare their position as regards the disclosure of documents originating from them. The Commission envisaged that a decision on the disclosure of the 12 documents concerned could be taken after the replies from the Member States had been received. In his observations, the complainant asked the Ombudsman for continued monitoring of the issue of access to the documents covered by his complaint since, in his view, it was not clear from the Commission's opinion whether it may decide not to grant access, even though these Member States may have agreed to disclosure. Following the Ombudsman's further inquiries into the matter, it appears that the national authorities agreed to disclose the 12 documents concerned and that the Commission therefore unconditionally sent the remaining documents covered by the request for access directly to the complainant on 31 May 2006. The complainant does not appear to question the Commission's action in this regard.

1.12 In view of the above, it appears that that the complainant was granted access to all the requested documents, after the NAP approval procedure for all Member States had been finalised. However, in view of the arguments brought forward in the complainant's observations, it is clear that he considers that the Commission should have provided access to the documents at the time the NAP procedure was still ongoing. On the basis thereof, the Ombudsman considers that the question remains whether the Commission was right to refuse access during an ongoing procedure. Principles of good administration require that valid and convincing arguments are provided where a request for access to documents made under Regulation 1049/2001 is rejected.

1.13 The Ombudsman recalls that the Commission refused access to the documents concerned on the basis of Article 4(2), third indent, and Article 4(3), first sub-paragraph, of Regulation 1049/2001.

1.14 The Ombudsman is not convinced by the Commission's reference to Article 4(3), first sub-paragraph, of Regulation 1049/2001, which applies to documents draw up by an

institution for internal use . The Ombudsman notes that the documents covered by the request for access were communications sent to and received from the authorities of certain Member States. In the Ombudsman's view, they cannot, therefore, be considered as documents meant for internal use. The Commission has therefore not established that the exception in Article 4(3), first sub-paragraph, of Regulation 1049/2001 entitled it to refuse to grant access to the documents in question.

1.15 As regards Article 4(2), third indent of Regulation 1049/2001, this provision stipulates that access to a document shall be refused *"where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure"* . The Ombudsman considers that the documents in question clearly do not relate to inspections or audits. He notes, however, that the Commission has argued that they relate to investigations, namely, the Commission's assessment of the Member States' proposed NAPs. In this context, the Commission submitted that the assessment it carried out concerning the NAPs can be compared to the investigations it undertakes in the framework of examining possible infringements of Community law under Article 226 of the EC Treaty.

1.16 Even if one were to accept that the documents in question relate to investigations, regard would have to be had to the fact that the relevant section of Article 4(2) of Regulation 1049/2001 requires that, in order for access to be refused, it has to be established that disclosure would undermine the protection of the purpose of such investigations. The Ombudsman notes in this regard that the purpose of the investigation in the present context, that is, the Commission's assessment of the NAPs, was to make sure that the Member States' NAPs are in conformity with Community law. In order for the exception to access in Article 4(2) to be applicable, it has to be established that the disclosure of documents relating to the assessment of other Member States' NAPs would undermine this purpose. In the Ombudsman's view, this has not been established by the Commission. The Ombudsman further considers that the Commission's argument that the principle of non-discrimination requires that all Member States should be given equal chances in the NAP proceedings does not relate to the Commission's assessment of the NAPs, but to the information available to the Member States. The Commission has therefore not established that the relevant exception in Article 4(2) of Regulation 1049/2001 applied to the documents in question.

1.17 In view of the Ombudsman's conclusions in points 1.14 and 1.16 above, that is, that the Commission has not established that Article 4(2) and Article 4(3), first sub-paragraph, of Regulation 1049/2001 applied to the documents in question, it appears that the Commission wrongly refused access to the requested documents in its decision of 17 March 2005. This constitutes an instance of maladministration and the Ombudsman will make a critical remark in this regard.

1.18 Since the complainant now appears to have been granted access to all the requested documents, the Ombudsman finds his claim to have been fulfilled.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

Principles of good administration require that valid and convincing arguments are provided where a request for access to documents made under Regulation 1049/2001 is rejected. The Commission refused access to the documents concerned on the basis of Article 4(2), third indent, and Article 4(3), first sub-paragraph, of Regulation 1049/2001.

Article 4(3), first sub-paragraph, of Regulation 1049/2001 applies to documents draw up by an institution for internal use . The Ombudsman notes that the documents covered by the request for access were communications sent to and received from the authorities of certain Member States. In the Ombudsman's view, they cannot, therefore, be considered as documents meant for internal use.

Article 4(2) of Regulation 1049/2001 requires that, in order for access to be refused, it has to be established that disclosure would undermine the protection of the purpose of investigations. The purpose of the investigation in the present context, that is, the Commission's assessment of the NAPs, was to make sure that the Member States' NAPs are in conformity with Community law. In order for the exception to access in Article 4(2) to be applicable, it has to be established that the disclosure of documents relating to the assessment of other Member States' NAPs would undermine this purpose. This has not been established by the Commission. In view of the above, the Commission has not established that the exceptions to access in Article 4(2) and Article 4(3), first sub-paragraph, of Regulation 1049/2001 applied to the documents in question. It therefore appears that the Commission wrongly refused access to the requested documents during ongoing NAP procedure. That constitutes an instance of maladministration.

Given that this aspect of the case concerns procedures relating to specific events in the past and that the complainant now appears to have been granted access to all the requested documents, it is not appropriate to pursue a friendly settlement of the matter.

The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2003 L 275, p. 32.

(2) OJ 2001 L 145, p. 43.

(3) OJ 2004 L 24, p. 1.

(4) OJ 2004 L 140, p. 1.

(5) See, for example, Case C-87/89 *Sonito v Commission* [1990] ECR I-1981, paragraph 6; Case T-182/97 *Smanor and Others v Commission* [1998] ECR II-271, paragraph 27.

(6) OJ 2001 L 145, p. 43.

(7) OJ 2003 L 275, p. 32.

(8) OJ 2004 L 24, p. 1.

(9) OJ 2004 L 140, p. 1.

(10) See, for example, Case C-87/89 *Sonito v Commission* [1990] ECR I-1981, paragraph 6; Case T-182/97 *Smanor and Others v Commission* [1998] ECR II-271, paragraph 27.