Sprendimas byloje 2293/2008/(BB)(FOR)TN - Neteisėtas atsisakymas leisti susipažinti su dokumentais, susijusiais su Jungtinės Karalystės sprendimu netaikyti Pagrindinių teisių chartijos

Sprendimas
Byla 2293/2008/(BB)(FOR)TN - **Atidaryta** 08/10/2008 - **Rekomendacijos** 21/07/2011 - **Sprendimas** 17/12/2012

Skundas susijęs su Europos Komisijos atsisakymu leisti skundo pareiškėjui viešai susipažinti su dokumentais, susijusiais su Jungtinės Karalystės sprendimu netaikyti Pagrindinių teisių chartijos.

Nustatęs, kad Komisija nesugebėjo nurodyti pakankamai išsamių savo atsisakymo leisti viešai susipažinti su dokumentais motyvų, ombudsmenas pateikė Komisijai rekomendacijos projektą, kuriame prašė Komisijos apsvarstyti galimybę leisti susipažinti su atitinkamais dokumentais arba, pasirinktinai, nurodyti pagrįstus tokio atsisakymo motyvus.

Komisija atmetė ombudsmeno rekomendacijos projektą ir nenurodė jokių tinkamų tokio atmetimo motyvų. Todėl ombudsmenas baigė nagrinėti bylą pareikšdamas griežtą kritinę pastabą. Jis nurodė, kad Komisija, neteisėtai atsisakydama leisti susipažinti su dokumentais, susijusiais su Jungtinės Karalystės sprendimu netaikyti Pagrindinių teisių chartijos, ją pažeidė. Šiuo atžvilgiu jis pabrėžė, kad Komisija nesugebėjo nurodyti pagrįstų savo atsisakymo leisti viešai susipažinti su dokumentais motyvų. Ombudsmenas taip pat nurodė, kad Komisija, pripažindama tam tikras dokumentų dalis nesvarbiomis, suklydo neatsižvelgdama į skundo pareiškėjo prašymą gauti leidimą susipažinti su visais dokumentais ir taip išvengė pareigos nurodyti pagrįstus atsisakymo suteikti leidimą susipažinti su visais dokumentais motyvus. Galiausiai ombudsmenas nurodė, kad Komisija, nepaisydama minėtų dokumentų reikšmės ES piliečių teisėms, nesugebėjo tinkamai atsižvelgti į išsamią ir konstruktyvią ombudsmeno analizę.

The background to the complaint

1. The complaint concerns the European Commission's refusal to grant a request, made by an NGO, the European Citizen Action Service (ECAS), for public access to documents drafted by the Commission's services in the context of the Intergovernmental Conference leading up to the signing of the Lisbon Treaty by the Member States. Specifically, the subject matter of the documents concerned the UK opt-out from the Charter of Fundamental Rights. [1]

2. ECAS made the initial application for public access to the documents pursuant to Regulation 1049/2001 [2] on 27 October 2007. The Commission sent its reply to the initial

application on 19 December 2007. It identified five documents as falling within the scope of the ECAS request:

1. Document JUR(2007)30329,

2. A supplementary note to Document JUR(2007)30329,

3. Document JUR(2007)55081,

4. Document JUR(2007)30464, and

5. A note of the Secretary General of the European Commission of 15 October 2007.

3. The Commission provided partial access to documents 1 and 2. It refused any access to documents 3, 4 and 5.

4. The Commission considered that parts of documents 1 and 2, and all of document 3, were covered by the exception to public access which is set out in Article 4(2), second indent, of Regulation 1049/2001, namely, the exception concerning the protection of legal advice. Specifically, it argued that it was essential to preserve their confidentiality in order to guarantee that the opinions set out in these documents would be delivered in complete independence and objectivity.

5. The Commission argued that documents 4 and 5, which were internal notes relating to the negotiations of a new Treaty, were covered by the exception to access set out in Article 4(3), second paragraph, of Regulation 1049/2001, namely, the exception concerning the protection of the decision making process. It argued that its services must be free to submit advice and opinions to their hierarchy. It pointed out that the capacity of its services to express their views freely would be curtailed if, when drafting documents such as those here concerned, they would have to take into account the possibility that their opinions and assessments could be disclosed to the public.

6. The Commission finally concluded that there was no indication of a public interest in the further disclosure of the documents in question that would outweigh the interest of the Commission and its services.

7. ECAS submitted a confirmatory application for access on 11 January 2008, which the Commission registered on 16 January 2008. The Commission replied by a letter dated 5 March 2008, confirming its earlier decision to refuse public access to the documents concerned, except for parts of documents 1 and 2.

8. In its letter it stated that the purpose of documents 1, 2 and 3 was to provide the Commission with advice as to "the different legal options" available to it in the context of the negotiations leading up to the adoption of the Lisbon Treaty. The documents enabled the Commission to support those options that were compatible with EU law and also to pursue discussion of other legal issues. It stated that the Commission needed to "preserve its

capacity to receive frank and objective legal advice". In the Commission's view, full disclosure of the documents would reduce its margin of manoeuvre in the future with regard to the matters discussed in these documents, be it in the context of decision-making or in the context of Court cases. The Commission went on to argue that full disclosure of the documents would also seriously undermine its capacity to obtain independent legal advice in the future. Full disclosure of the documents would henceforth oblige the Commission's Legal Service to exercise self-restraint and to draft its advice in very cautious terms, thereby affecting the Commission's ability to operate effectively in potential future revisions of the Treaties or in other fields of activity.

9. The Commission argued that it did not refuse access to the documents in question only on the basis of their nature as "legal opinions". Rather, the documents were assessed on a case by case basis.

10. As regards documents 4 and 5, the Commission argued that their disclosure would put in the public domain the views and assessments of its representatives at the meeting of the Group of Legal experts and the meeting held at the level of Ministers for Foreign Affairs in the context of the Intergovernmental Conference. These documents do not necessarily reflect the institution's position, but merely the perception of the points discussed held by Commission's representatives. They were never drafted with the intention of communicating them to the negotiating parties, and *a fortiori* to the public. Public disclosure of these documents would put in the public domain the way in which the Commission operates in such negotiations, thus revealing the institution's negotiating strategy. Such disclosure would be highly detrimental to the Commission's negotiating strategy in future negotiations. The purpose of having invoked the exception to access is to protect the institution's decision-making process in similar future cases. Disclosure of the documents would induce members of staff to refrain from putting in writing opinions and ideas that may contribute to defining the institution's position on a given subject. This would severely affect the free exchange of views on a matter of major importance such as the subject-matter at hand. It would thus also be highly detrimental to the Commission's decision-making process, in particular with respect to the need to find a common understanding between its services.

11. As regards the public interest in disclosure, the Commission acknowledged the relevance of the argument which ECAS put forward in its confirmatory application, about the right of citizens to understand the basis of the opt-out. It argues, however, that the disclosure of these documents would not shed any light on the reasons and arguments on the basis of which the UK government made its decision concerning the opt-out, since they simply do not refer to these reasons.

The subject matter of the inquiry

12. In its complaint to the Ombudsman, ECAS alleged that:

(1) The Commission failed to respect the deadline in Regulation 1049/2001 for its reply to the confirmatory application; and

(2) The Commission wrongly refused to give full access to the documents concerned.

The inquiry

13. The complaint to the Ombudsman was made on 12 August 2008. On 8 October 2008, the Ombudsman informed the Commission about the complaint and requested it to submit an opinion. The Commission submitted its opinion on 3 February 2009. ECAS submitted its observations on 25 May 2009 and on 15 December 2009, the Ombudsman's services carried out an inspection of the documents concerned. On 21 July 2011, the Ombudsman made a draft recommendation to the Commission in respect of the complaint, asking for the Commission's detailed opinion by 30 November 2011. Following an extension of the deadline as well as further delays, the Commission submitted its detailed opinion on 30 March 2012. The detailed opinion was forwarded to ECAS, which submitted its observations on 1 June 2012.
The Ombudsman's analysis and conclusions

A. The alleged failure to respect the deadline

Arguments presented to the Ombudsman

14. ECAS argued that the time-limit for the Commission to respond to the confirmatory application expired on 27 February 2008. However, the Commission's reply is dated 5 March 2008.

15. The Commission stated that it sent ECAS a letter acknowledging its inability to meet the deadline set in Regulation 1049/2001 and presented its apologies for the delay.

The Ombudsman's assessment

16. Regulation 1049/2001 requires that initial applications, as well as confirmatory applications, shall be handled "promptly". Regulation 1049/2001 also sets out time limits for the processing of applications for access to documents: the initial application and the confirmatory application must be processed within 15 working days; this time limit may, in exceptional circumstances, be extended by 15 working days for the initial application and for the confirmatory application. [3]

17. ECAS submitted a confirmatory application for access on 11 January 2008, which was registered by the Commission on 16 January 2008. The Commission extended the time limit for providing a reply and eventually replied in a letter dated 5 March 2008, that is, 35 working days after the registration of the confirmatory application. Accordingly, the Commission exceeded by five days the time limit for providing a reply.

18. The Ombudsman found that although it was commendable that the Commission informed ECAS of its inability to meet the deadline for replying to the confirmatory application, the fact remained that the Commission replied to the confirmatory application after the legal deadline. This constitutes an instance of maladministration. However, given that the instance of maladministration here identified relates to a specific event in the past which cannot now be rectified, the Ombudsman did not find it appropriate to pursue the

matter further in the context of his Draft Recommendation.

B. The allegation that the Commission wrongly refused full access to the documents concerned and related claim that access should be granted

Arguments presented to the Ombudsman

19. ECAS argued that it is not clear from the Commission's arguments in what precise way disclosing the documents would be detrimental to the future decision-making process of the Commission.

20. ECAS considered the Commission's view that the public should not have access to the way in which it operates internally during the negotiating process of an Intergovernmental Conference to be very controversial. In ECAS's view, the Commission's reasoning would imply that, potentially, it would never be possible for the public to gain access to documents relating to an Intergovernmental Conference. ECAS concludes that the Commission's stance is that its "internal kitchen" is always to be protected and that no public interest can justify the disclosure of documents pertaining to the negotiating and the legislative process. ECAS wishes to avoid the eventuality in which a whole class of documents is kept secret on the grounds that the documents constitute part of a negotiation. The Commission has not, in ECAS's view, interpreted and applied the exceptions to public access strictly.

21. ECAS also argued that the Commission failed to fulfil its obligation to balance genuinely the interest of citizens in gaining access to documents held by the institution, against any interest of the institutions in maintaining the confidentiality of their deliberations. [4] ECAS stated that the UK opt-out is undoubtedly of public interest: the public has a considerable interest in ascertaining the position, or lack thereof, of the UK Government, the other Member States and the institutions in relation to the opt-out. ECAS stated that European citizens have the right to know the reasons why they will not have the same fundamental rights in the UK as they have in the other Member States. The mere fact that the views and assessment of the Commission's representatives will be put in the public domain in this case does not override that interest. It stated that the manner by which the Commission concluded that the public interest in disclosure does not outweigh the interest in protecting the provision of independent legal advice to the Commission was not transparent. ECAS also found no evidence that the Commission had actually carried out a balancing test.

22. The Commission, in its opinion, considered that it has explained extensively the reasons that led it to decide that disclosure of the documents concerned would seriously undermine both its capacity to receive full and independent legal advice, as well as its ability successfully to participate in negotiations in future intergovernmental conferences, without, at the same time, generating a commensurate gain in the understanding of circumstances and reasons underpinning the decision of the UK government to opt-out of the Charter of Fundamental

Rights. The Commission again emphasised that the documents concerned do not shed any light concerning the reasons or arguments which led the UK government to made its decision. The Commission stated that it did not deny access to a whole category of documents related to the negotiations in intergovernmental conferences. Rather, its decision was based on a specific and individual analysis of the documents concerned.

23. The Commission stated that it is aware of the judgement of the Court of Justice in the *Turco* case [5] , in which the Court stated that increased openness of the legislative process enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system. However, as indicated above, the Commission considered that the documents concerned do not shed any light as regards the reasons or arguments on the basis of which the UK government made its decision. Furthermore, the documents concern not an ordinary legislative process but negotiations in an intergovernmental conference. It recalled that in the *Turco* case, the Court held that the institution may refuse to disclose " *a specific legal opinion [...] being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question* " [6] .

24. In its observations in relation to the opinion of the Commission, ECAS noted the Commission's reference to the *Turco* judgement and to the right to refuse access to " *a specific legal opinion [...] being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question* " [7] . ECAS considers, however, that the Commission has failed to show how this would apply to the documents concerned.

25. ECAS also reiterated that it has found no evidence that the Commission carried out a balancing test. ECAS pointed out that the Court, in the *Turco* judgement, stated that " *it is incumbent on the [* institution *] to ascertain whether there is any overriding public interest justifying disclosure* " [8] and that " *it is for the [* institution *] to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble of Regulation 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.* " [9] The Court added that this is of particular relevance where the institution is acting in its legislative capacity. ECAS considers that the reasoning in favour of broader disclosure applies also to legislation emanating from intergovernmental conferences and not only to what the Commission refers to as an " *ordinary legislative process* ".

26. ECAS further argues that the public interest in disclosure goes beyond an understanding of the circumstances and reasons underpinning the decision of the UK government to opt out of the Charter. It is for the citizens to decide whether the documents are relevant or not.

The Ombudsman's assessment leading to a draft recommendation

Preliminary remarks

27. According to the case-law, a three stage examination must be carried out to determine if Article 4 of Regulation 1049/2001 justifies the non-disclosure of requested documents. [10]

28. First, it has to be determined if the documents do indeed fall within the category covered by the invoked exceptions. In the present case, the Commission relied on the exception in Article 4(2), second indent, and on the exception in Article 4(3), second paragraph. Article 4(2), second indent, can only apply if the documents contain " *legal advice* ". Article 4(3), second paragraph, can only apply if the documents contain " *opinions for internal use* ".

29. Second, it has to be determined if disclosure of the documents containing legal advice, and disclosure of the documents containing opinions for internal use would, respectively, undermine the protection of legal advice (Article 4(2), second indent), or seriously undermine the institution's decision-making process (Article 4(3)). In sum, a "harm test" must be carried out.

30. Third, if it is established that public disclosure of a document would harm the interests concerned, the institution must ascertain, by carrying out a balancing exercise whether any overriding public interest in disclosure nevertheless exists.

31. The Ombudsman underlined that, when an institution responds to requests for access to documents relating to the adoption of EU legislation, and especially where it analyses whether there is an overriding public interest in disclosure of documents relating to the adoption of EU legislation, the institution must bear in mind the very special importance which obtaining access to documents relating to the adoption of EU legislation can have for citizens in a democratic legal order such as that of the EU. Openness in respect of access to documents relating to the adoption of EU legislation contributes to strengthening democracy by allowing citizens to follow in detail the decision-making process within the institutions taking part in legislative procedures, and thereby to scrutinise all the relevant information which has formed the basis of a particular legislative act. Doing so provides them with knowledge and understanding of the various considerations underpinning legislation which will affect their lives. [11] Such openness is, in sum, a precondition for the effective exercise of the democratic rights of EU citizens. For the sake of clarity, the Ombudsman also underlined that the special importance of transparency as regards legislation cannot, obviously, be used as an argument for lesser transparency as regards the administrative application of legislation.

32. The Ombudsman found the above considerations to be of the greatest importance in respect of documents forming the basis of the EU Treaties, which are sometimes referred to as “primary legislation” or, indeed, as being a constitutional charter. [12] In the present case, the documents in question relate to the adoption of the Lisbon Treaty, and in particular to the legal status of the Charter of Fundamental Rights. The Ombudsman considered that

access to documents showing how the Lisbon Treaty came about is important for the citizens' understanding of the Treaty and enhances the legitimacy, vis-à-vis the citizens, not only of the Charter itself, but also of EU law and of the EU in general. The General Court has also pointed out that the importance, for EU citizens, of the matter to which the requested documents relate plays a role when it comes to determining whether disclosure of the said documents would really cause harm. [13] The Lisbon Treaty is, beyond doubt, of greatest importance to the citizens.

33. The Ombudsman also recalled, in respect of the above, that Recital 2 of Regulation 1049/2001 states that openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Recital 2 of Regulation 1049/2001 also states that openness also contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

34. Furthermore, Article 12 of Regulation 1049/2001 emphasises the special importance of providing access to documents drawn up in the course of procedures for the adoption of acts, such as the Lisbon Treaty, which are legally binding in or for the Member States, by stating that, subject to the rules on exception to access, such acts be made directly accessible to the public in electronic form or through a register.

35. On the basis of the above, the Commission's argument, when referring to the *Turco* case [14] , that the documents in question concern not an ordinary legislative process, but negotiations in an intergovernmental conference, is an argument in favour of - and not an argument against - public access. On the same note, whether or not the documents here concerned may shed light on the very specific question of *why* the UK Government decided to opt out of the Charter of Fundamental Rights is not a relevant consideration. What is relevant rather is that the documents here concerned shed light on various aspects of the process by which EU legislation, in this case primary EU legislation, is adopted.

36. As regards the balancing exercise determining whether there is an overriding public interest in the disclosure of a document, the Ombudsman pointed out that it is certainly the case that an applicant can and should bring issues of public interest in disclosure to the attention of the institution concerned, in order to assist the institution in determining if there is an overriding public interest in disclosure. However, this does not exclude the institution concerned from taking into consideration, *ex officio* , other possible issues of public interest when carrying out the balancing exercise. This is all the more important since the applicant will not know, when making an application for public access, the specific content of the documents. However, the institution holding the documents does know the specific content of the documents. The institution is thus in a better position to evaluate all possible issues relating to the public's interest in disclosure of the documents. In sum, if the institution takes the view that disclosure of a document would harm an interest protected by Regulation 1049/2001, it is good administration for the institution to address itself *ex officio* to the question whether there is an overriding public interest justifying disclosure. [15]

37. It must be underlined that it is unnecessary to proceed to the second stage (the harm test) if the first stage (document falling within a protected category) is not complied with, and it is unnecessary to proceed to the third stage (the balancing exercise) if the second stage is not complied with.

The protection of legal advice - Article 4(2), second indent

38. The Ombudsman, having inspected documents 1-3, first clarified that document 1 in fact consists of two documents: The first (document 1) is a note dated 6 June 2007, mainly setting out the Commission's agenda in view of the approaching Intergovernmental Conference. The second (document 1a) is a note attached to document 1, analysing different aspects of the proposed treaty, including the Charter. The Ombudsman considered that documents 1a, 2 and 3 can certainly be considered to contain legal "advice". However, the Ombudsman remained to be convinced that this is the case for document 1.

39. As regards the harm test, that is, the question whether disclosure of the documents would undermine the protection of legal advice, the Ombudsman underlined that the fact that the legal service marked the document as "confidential" when it was drafted is relevant, but not decisive. It should be underlined, in this respect that, while it is important and relevant that the legal service marked certain of the documents as "confidential" when they were drafted, the analysis of whether harm to a legitimate interest will occur as a result of public access to the documents must be undertaken each time a request for public access is made. Such analysis must be based on the harm that would result from public disclosure of the documents at that time the request for public was made and analysed, and not at the time the documents were drafted. It must be underlined that a document which may be confidential at the time it is drafted, because for example it relates to on-going negotiations, may cease to be confidential at a later point in time, such as when the negotiations in question have ended.

40. The Ombudsman did agree that Article 4(2), second indent encompasses the need to ensure that an institution can receive frank, objective and comprehensive legal advice. [16] However, the Court of Justice has pointed out that, in order to be able to invoke the risk of an interest being undermined as grounds for denying public access, such risk must be reasonably foreseeable and not purely hypothetical. [17] It is not sufficient, in that regard, to submit in a general and abstract way, and without substantiated arguments, that the institution's interest will be harmed by public disclosure of a document containing legal advice.

41. The Commission argued that full disclosure of documents 1-3 would reduce its " *margin of manoeuvre* " in the future with regard to " *the matter discussed in these documents* ", be it in the context of decision-making or in the context of Court cases [18] . The Ombudsman noted that, in the *Turco* case, the Court stated that access to a legal opinion relating to a legislative process may not be refused unless the legal advice is of " *a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question* ". [19] The logic of the Court's position is particularly convincing and powerful. The

formulation of different opinions, including legal opinions, is inherent in a legislative process. It cannot be deemed to be harmful to the legislative process that such views are expressed and made public. Indeed, making public such legal opinions strengthens and legitimises the legislative process. As such, the Court implicitly recognised, in the *Turco* case, that legal advice provided in respect of the *formulation* of legislation (the legislative process itself) should be distinguished from, for example, legal advice concerning the future *application* of that legislation in concrete situations (legal advice beyond the scope of the legislative process). [20] The documents in the present case concern advice in respect of the *formulation* of legislation. While the legal advice in the documents certainly concerns an issue of broad significance - the Lisbon Treaty - it is not evident that the legal advice goes " *beyond the context of the legislative process in question* ".

42. Even if certain aspects of the legal advice were to be deemed to go " *beyond the context of the legislative process in question* ", the Ombudsman could not, in any case, see how, specifically, the release of documents to the public relating to the adoption of a Treaty would reduce the Commission's " *margin of manoeuvre* " in the future, even as regards any issues relating to the concrete application of those rules [21] . Nor had the Commission put forward any argument suggesting that the documents in question are, in the words of the *Turco* case, of a particularly sensitive nature.

43. As regards the Commission's concern that its staff would have to exercise self-restraint and draft advice in (overly) cautious terms if documents in which their views are put down are released to the public, the Ombudsman noted that this concern seems to be based on the erroneous *presumption* that documents will be released *even though* they contain views which would cause damage to legitimate interests if released to the public. If, indeed, a document were to contain anything the release of which would cause harm to legitimate interests, Regulation 1049/2001 would allow public access to that document to be refused. The solution to the concern that staff would not express themselves freely is thus inherent in Regulation 1049/2001. The Commission can and should take steps to reassure its staff that Regulation 1049/2001, correctly applied, protects their ability to express their views freely. By properly informing its staff of the applicable rules on access to documents, as well as of the legal limits to public access inherent therein, the Commission would be able to avoid the risk of self-restraint by its staff. [22]

44. On the basis of the above, the Ombudsman considered that, in the present case, the Commission had yet to provide sufficiently concrete and substantiated arguments that would warrant the invocation of Article 4(2), second indent, to refuse access to all of the non-disclosed elements of documents 1, 1a, 2 and 3.

Opinions for internal use - Article 4(3), second paragraph

45. Having inspected documents 4 and 5, the Ombudsman concluded that they do contain opinions for internal use as part of deliberations and preliminary consultations within the Commission.

46. With respect to opinions for internal use, the harm test must, in order for access to be

refused, also conclude that the risk of the protected interest being undermined is reasonably foreseeable and not purely hypothetical. [23] The Ombudsman did not consider that the Commission had explained in what way disclosure of documents that " *do not necessarily reflect the institution's position* " but merely " *the Commission's representatives' own perception of the points discussed* ", would undermine its decision-making process. Documents containing opinions for internal use as part of deliberations and preliminary consultations never " *necessarily reflect* " an institution's opinion.

47. Further, as pointed out by the General Court, a document drawn up at the proposal stage of legislation is designed to be discussed and is not designed to remain unchanged. Public opinion is perfectly capable of understanding that an institution that produces such a document is likely to amend its content subsequently. [24] It is also in the nature of democratic debate that views put forward at the proposal stage of legislation can be subject to both positive and negative comments on the part of the public and the media. [25]

48. In addition, if the Commission's reasoning regarding documents which do not necessarily reflect the institution's position were to be deemed sufficient to refuse access, this would imply that all opinions for internal use, irrespective of their specific content, would never be disclosed. Such a view would clearly run counter to the wording and meaning of Article 4(3), second paragraph, of Relation 1049/2001, which only allows for the non-disclosure of such opinions if and when disclosure would seriously undermine the institution's decision-making process.

49. It should also be borne in mind that the very purpose of Regulation 1049/2001 is to allow citizens to become aware, to the greatest extent possible, of how the EU public administration, which works on behalf of citizens, functions. As such, its very aim is to allow access to various points of view, from within and outside the institutions, which enable an institution to adopt an eventual position. As such, the argument that disclosure would reveal " *the Commission's representatives' own perception of the points discussed* " cannot constitute a reason for non-disclosure. Rather, the Ombudsman again underlined, revealing such perceptions is the very aim of disclosure.

50. The Ombudsman found the same to apply for the Commission's argument that the documents reveal its negotiating strategy. First, it must be strongly underlined that the very objective sought by the rules on public access is to reveal how the institutions operate, thereby allowing citizens to understand the way decisions are taken, on their behalf. Such openness generates and maintains the legitimacy of the institutions and of the EU in the eyes of citizens.

51. The Ombudsman did not exclude that revealing a negotiating strategy (especially while negotiations are on-going) may be harmful to the interests of the EU, and by extension its citizens, when such negotiations concern international agreements between the EU and third countries. However, it must be underlined that, in the present case, the "negotiations" in question related to the negotiation leading to the adoption of primary and/or constitutional EU law. As such, the negotiations in question should, correctly classified, be considered as forming part of the legislative process. As noted in points 34 and 35 above, it is of particular

importance that documents drawn up in the context of such a process be made public. The Ombudsman considered that it makes even more sense to allow access to documents leading to the adoption of legislation that *opens up* the legislative process. Indeed, the Lisbon Treaty itself recognises the benefits of opening *up* the legislative process. It sets out, for instance, that the Council shall meet in public when considering and voting on a draft legislative act [26] .

52. Furthermore, the Commission's argument that the documents were never drafted with the intention of communicating them to the negotiating parties and *a fortiori* to the public does not constitute a valid reason to refuse access. If only those documents that were drafted "with the intention" of being communicated to the public had to be released, there would be no need for Regulation 1049/2001.

53. As regards the Commission's argument that disclosure of the documents would deter members of staff from putting in writing opinions and ideas that may contribute to defining the institution's position on a given subject, the Ombudsman referred to point 43 above and to his explanation that this concern is based on a presumption that Regulation 1049/2001 would not be correctly applied. In respect of the exception to access set out in Article 4(3), second paragraph, the Ombudsman further developed this reasoning by referring to his decision in case 355/2007/(TN)FOR. [27] In that case, the Ombudsman gave examples of particular situations in which access may be denied on the basis of the exception in that article, using as a starting point the reasoning by the Court of First Instance in the *MyTravel* case. [28] The Ombudsman concluded that a risk to an institution's decision-making ability may arise if the institution were to disclose documents containing self criticism, as in the *My Travel* case, but possibly also when disclosing documents containing speculative or controversial views. [29]

54. In the present case, the Ombudsman did not consider the Commission to have provided any properly reasoned arguments, to the effect, for example, that the documents contain self-critical, speculative or controversial views, that would warrant an exception to access under Article 4(3), second paragraph. It should be underlined in this respect that an exception to access under this article is possible only when it can be shown that the institution's decision-making process would be *seriously* undermined by the disclosure.

55. Finally the Ombudsman considered that the methodology used by the Commission when considering the possibility of granting partial access appeared to be incorrect. The Commission appeared to have released only the parts of the documents that it found to be obviously innocuous (such as its decision to release the letter head of document 1). In the Ombudsman's view, the Commission should have sought to identify those parts of the documents that would *cause harm* if released, and then blanked out those specific words or sentences. It should then have granted access to all the remaining parts of the documents.

56. The Ombudsman again underlined that, for any exception to public access to be applicable, the institution involved must provide properly detailed reasoning. The Commission had not done so in the present case [30] .

57. In light of the above, the Ombudsman found that the Commission had committed an instance of maladministration in handling ECAS' application for access to documents. He therefore made the following draft recommendation to the Commission:

The Commission should consider giving access to the documents in question or provide valid reasons for not doing so.

The arguments presented to the Ombudsman after his draft recommendation

58. In its detailed opinion on the draft recommendation, the Commission argued that not all five documents fell, in their entirety, within the scope of the confirmatory application. In the Commission's view, only parts of documents (1), (4) and (5) are relevant for the complainant's request. Therefore, in respect of these documents, and in response to the Ombudsman's recommendation, the Commission only considered whether the refusal to grant access to the relevant parts of these documents was justified or not. The Commission also stated that it had reassessed entirely the withheld parts of documents (2) and (3).

59. Having re-examined all of documents (2) and (3), and the "relevant" parts of documents (1), (4) and (5), the Commission maintained that it was justified in refusing access to the "relevant parts" of document (1), to parts of document (2), as well as to document (3) in its entirety. The Commission argued that their disclosure would undermine its capacity to receive full and independent legal advice, as well as its margin of manoeuvre in the future with regard to the matter discussed in these documents, be it in the context of decisions it will have to adopt, or in the context of court cases.

60. In respect of the Ombudsman's finding that a part of document (1), consisting of a note dated 6 June 2007, does not contain "legal advice", the Commission argued that this part of document (1) falls outside the scope of the confirmatory application, as explained in its confirmatory decision of 5 March 2008.

61. As regards the withheld relevant parts of document (4), consisting of one bullet point, and of document (5), consisting of one paragraph, the Commission considered that, in light of the judgment by the Court of Justice in Case C-506/08 P [31] , access could no longer be refused on the basis of Article 4(3), second paragraph, of Regulation 1049/2001. The Commission also noted that some parts of the first page of document (5) are also relevant as they relate to the Charter. Therefore, as far as these "relevant parts" of documents (4) and (5) are concerned, the Commission accepts the Ombudsman's draft recommendation by granting the complainant access.

62. In its observations on the Commission's detailed opinion, ECAS argued, in summary, that, despite the fact that the Ombudsman's analysis and detailed reasoning led him to conclude that the Commission should reconsider giving access to the documents in question, or provide valid reasons for not doing so, the Commission, with the exception of documents (4) and (5), merely reiterated the position rejected by the Ombudsman in his draft

recommendation. According to ECAS, with the exception of one paragraph, the Commission failed to make any reference to the Ombudsman's arguments or to explain its reasons for rejecting them. In particular, there is no evidence to suggest that the Commission carried out the three stage examination set out by the Ombudsman.

63. ECAS argued that the position put forward by the Commission in respect of its "margin of manoeuvre" is the same argument that it used in its confirmatory decision of 5 March 2008. The Commission nevertheless persists on this issue, despite the Ombudsman having found this argument unjustified due to its purely hypothetical nature.

64. According to ECAS, the last step of the three stage examination is particularly relevant to the present case. In ECAS' view, the Commission did not show that it has performed the balancing exercise to establish that, even though the documents concerned are covered by an exception to access, there is or is not an overriding public interest in disclosure. In its judgement in Case T-233/09, the General Court observed that " *if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information* ". ECAS argued that, if this is the case for secondary legislation, this argument is even more relevant in respect of primary EU legislation. It is therefore difficult for the Commission to justify how it is more important to restrict access to the documents concerned than to inform EU citizens why their rights under the Charter have no effect in the UK.

65. According to ECAS, the Commission's decision partially to disclose two documents is of little or no essential value, given that the disclosed paragraphs provide information that is inadequate for understanding anything at all about the proceedings. In ECAS' view, if no conclusion can be reached from the disclosed information, it is essentially not a partial release, but a gesture.

66. In respect of documents (1) and (1a), ECAS is confused by the Commission's argument that it did not fall within the scope of the confirmatory application, given that the Ombudsman's analysis of the document suggests that it was indeed relevant to ECAS' request for access. Finally, ECAS states that the amount of time that it has taken the Commission to act at every stage of the process is an issue of serious concern.

67. Subsequent to sending its observations on the Commission's detailed opinion, ECAS wrote to the Ombudsman to inform him that it wishes to obtain a definitive decision from the Ombudsman regarding the matter.

The Ombudsman's assessment after his draft recommendation

68. The Ombudsman recalls that, in principle, all documents held by the institutions should be accessible to the public. Regulation 1049/2001 is intended to give the fullest possible effect to this right of public access to documents. [32] As already set out in the

Ombudsman's draft recommendation (points 31 and 32 above), openness in respect of access to documents relating to the adoption of EU legislation is of very special importance. In the present case, the documents in question relate to the adoption of the Lisbon Treaty, and in particular to the legal status of the Charter of Fundamental Rights. Access to documents showing how the Lisbon Treaty came about is important for the citizens' understanding of the Treaty and enhances the legitimacy, vis-à-vis the citizens, not only of the Treaty and the Charter, but also of EU law and of the EU in general.

69. The Ombudsman further recalls that the exceptions to public access must be interpreted and applied strictly. [33]

70. The Ombudsman appreciates that the Commission has decided to grant additional access to documents (4) and (5). However, the approach used by the Commission when analysing these documents, as well as document (1), raises a serious procedural point of concern . The Commission has allowed itself, in respect of documents (1), (4) and (5), unilaterally to determine which parts of these documents are "relevant" for the complainant's request. The Ombudsman points out in this regard that, under Regulation 1049/2001, there is no such thing as "relevant parts" of a document in those cases where the documents to which access was requested were clearly identified. In principle, all documents held by the institutions shall be accessible in their entirety.

71. The Ombudsman notes that, if a request is not sufficiently precise so as to enable the institution to identify which documents are - *in their entirety* - relevant to the request [34] , the institution should consult with the applicant on the matter [35] . The Commission does not appear to have brought any such concern to the complainant's attention in respect of the request for access at issue in the present case [36] .

72. In addition, if an application for access relates to a very long document, the institution may again consult with the applicant, with a view to finding a fair solution [37] . In the Ombudsman's view, such a solution might be that the institution would, on the basis of justified reasons agreed upon with the applicant, only have to analyse parts of the very long document. The Ombudsman underlines, however, that such a solution has to be found in cooperation with the applicant. The Ombudsman notes that the documents in the present case are not very long.

73. Having excluded the applicability of the above to the present case, the Ombudsman points out that the only remaining valid ground for refusing access to a part of a document is if one of the exceptions to access, set out in Article 4 of Regulation 1049/2001, is applicable. Accordingly, the fact that parts of a document may be considered "irrelevant" in the eyes of the institution does not constitute a valid reason for refusing access to these parts . The Ombudsman notes that the Commission has not argued that an exception to access would be applicable to the "irrelevant" parts of documents (1), (4) and (5). The Commission's refusal to provide access to "irrelevant" parts of the documents is therefore wrong.

74. In respect of the substantive aspects of the case, the Ombudsman notes that, in his draft recommendation to the Commission, he made an in-depth analysis of the Commission's

arguments for refusing access in the present case, providing detailed and constructive reasons, based on applicable case law, for his finding that these arguments were not sufficiently concrete and substantiated to warrant an exception to public access. The Ombudsman called upon the Commission to give access to the documents in question, or to provide valid reasons for not doing so.

75. The Ombudsman therefore notes with serious disappointment that, in its detailed opinion, the Commission merely reiterates its earlier insufficient reasons for applying the exception to access in respect of the protection of legal advice to documents (1) [38] , (2) and (3): it restates that full disclosure of these documents would undermine its capacity to receive full and independent legal advice, as well as its margin of manoeuvre in the future with regard to the matter discussed in these documents.

76. The Ombudsman considers it unnecessary to repeat the detailed reasoning already provided to address the Commission's arguments in this respect (see paragraphs 41-43 above). However, he would like to clarify one important point of concern in relation to the fact that the Commission's arguments appear to be based on the fear of setting a precedent for documents to be drafted in the future, rather than only on the content of the present documents. Given that the documents concerned do not, in the Ombudsman's view, appear to contain anything the disclosure of which would directly undermine the protection of the legal advice in question, the Commission again appears to base its reasoning on a concern that, if these documents are disclosed, it will also have to disclose, in the future, documents containing sensitive legal advice, that is, legal advice which, if disclosed, might actually cause harm to the protected interest. The Ombudsman, again, points out (see paragraph 43 above) that such reasoning is based on a fundamental misconception of the functioning of Regulation 1049/2001. The fact that public access previously has been granted to documents falling within the category of legal advice has no bearing on the question whether a particular document containing legal advice will be released to the public in the future. The question whether one of the exceptions to access set out in Article 4 of Regulation 1049/2001 is applicable is determined through an analysis of the content of the particular document concerned, at the point in time of the request. There is thus no risk of setting a precedent in the way in which the Commission appears to view the matter.

77. To conclude, the Ombudsman again underlines that this case concerns the fundamental right to public access to documents [39] . Failure to respect this fundamental right is all the more important in this case, given that the documents asked for concern all fundamental rights, that is, they relate to the adoption of the Charter of Fundamental Rights. The Ombudsman therefore takes the strongest view of the Commission's position. He notes with the greatest regret that the Commission has failed to take this opportunity to address his detailed and constructive reasoning in respect of when and how the exceptions to public access should be applied, thereby disregarding, or deliberately refusing to engage with the Ombudsman's arguments concerning the case-law of the EU Courts. This justifies the Ombudsman's conclusion that, in this particular case and for the specific reasons mentioned above, the Commission's position constitutes a substantive violation of the fundamental right of access to documents foreseen in Article 42 of the Charter.

78. The Ombudsman considers that the present case is of such importance that it would normally merit making a Special Report to the European Parliament. However, in order to comply with the express wish of the complainant to obtain a definitive decision from the Ombudsman regarding the matter, the Ombudsman closes the case with a critical remark which reflects the seriousness of this issue.

C. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission has breached the Charter of Fundamental Rights by wrongfully refusing to give public access to documents concerning the UK opt-out from the Charter of Fundamental Rights.

The Commission failed to give valid reasons for its refusal to give public access.

By categorising parts of the documents as irrelevant, the Commission wrongly disregarded the complainant's request to obtain access to the full documents and thereby evaded the obligation to give valid reasons for refusing full access.

In view of the importance of the documents concerned for the rights of EU citizens, and the fact that the Commission failed to engage constructively with the detailed analysis put forward by the Ombudsman, this constitutes a serious instance of maladministration.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 17 December 2012

[1] The UK "opt-out" was eventually included in Protocol No 30 to the Treaty on the Functioning of the European Union. Article 1 of the Protocol reads as follows

" *1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable

rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. "

[2] 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.

[3] Article 7(1) and 7(3), and Article 8(1) and 8(2) of Regulation 1049/2001.

[4] Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765.

[5] Joined cases C¤39/05 P and C¤52/05 P *Sweden and Turco v Council* [2008] ECR I-4723.

[6] Idem, at paragraph 69.

[7] Idem, at paragraph 69.

[8] Idem, at paragraph 44.

[9] Idem, at paragraph 45.

[10] Idem, at paragraphs 37-44.

[11] Idem, at paragraph 46. See also Case T-233/09 *Access Info Europe v Council* , judgment of 22 March 2011, not yet published in the ECR, paragraph 69.

[12] See e.g. Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23 and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 281.

[13] Case T-233/09 *Access Info Europe v Council* , judgment of 22 March 2011, not yet published in the ECR, paragraph 74.

[14] Joined cases C¤39/05 P and C¤52/05 P *Sweden and Turco v Council* [2008] ECR I-4723.

[15] Idem, at paragraph 44.

[16] Idem, at paragraph 42.

[17] Idem, at paragraph 43.

[18] The Ombudsman considers the specific argument that full disclosure of the documents in question would affect the Commission's ability to operate effectively as regards possible future revisions of the treaty to be closely linked to its argument about the negotiating strategy, which is being dealt with in points 50 and 51 below.

[19] Joined cases C¤39/05 P and C¤52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 69.

[20] Idem, at paragraph 69.

[21] The mere fact that the legal advice goes *beyond* the context of the legislative process does not, necessarily, mean that release thereof would cause harm. As set out by the Court in the *Turco* case, in such an eventuality, it is incumbent on the institution concerned to give a detailed statement of reasons for refusing access.

[22] The Ombudsman has stated, in previous cases, that disclosure might undermine the decision-making process if an institution were forced to reveal views, expressed by its services, which were, for example, self-critical, speculative or controversial. See, for instance, case 355/2007/(TN)FOR (available at the Ombudsman's website: http://www.ombudsman.europa.eu/cases/decision.faces/en/5515/html.bookmark) point 49.

[23] Case T-121/05 *Borax Europe Ltd v Commission* [2009] ECR II-27, paragraph 63.

[24] Case T-233/09 *Access Info Europe v Council* , judgment of 22 March 2011, not yet published in the ECR, paragraph 69.

[25] Idem, at paragraph 78.

[26] Article 15 of the Treaty on the Functioning of the European Union.

[27] Available at the Ombudsman's website: http://www.ombudsman.europa.eu/cases/decision.faces/en/5515/html.bookmark

[28] Case T-403/05 *My Travel Group plc. v Commission* [2008] ECR II-2027.

[29] See the Ombudsman's decision in case 355/2007/(TN)FOR, point 49.

[30] The Ombudsman notes in this respect that the Commission has provided no reasons, whatsoever, as to why access has been refused to those parts of the documents that do not concern the Charter of Fundamental Rights.

[31] Case C-506/08 P *Sweden v MyTravel and Commission* , judgment of 21 July 2011, not yet published in the ECR.

[32] Recitals 11 and 4 in the preamble and Article 1 of Regulation 1049/2001; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 33; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 51; Joined Cases C-514/07 P, C-528/07 P and C-52/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 69.

[33] Sison v Council, paragraph 63; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v*

Council [2008] ECR I-4723, paragraph 36; Joined Cases C-514/07 P, C-528/07 P and C-52/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 73.

[34] Article 6(1) of Regulation 1049/2001.

[35] Article 6(2) of Regulation 1049/2001.

[36] The Ombudsman notes that the Commission had the opportunity to consult with the complainant in this way in respect of document (1), instead of a arguing that it is one document, parts of which are "irrelevant".

[37] Article 6(3) of Regulation 1049/2001.

[38] Which in the Ombudsman's view consists of two documents, see paragraph 38 above.

[39] Article 42 of the Charter of Fundamental Rights of the European Union.