

Deċiżjoni fil-każ 1010/2008/(AL)DK - Dewmien fit-trattament ta' applikazzjoni għal aċċess għad-dokumenti

Deċiżjoni

Każ 1010/2008/(AL)DK - **Miftuħa fil-** 29/04/2008 - **Deċiżjoni fil-** 02/12/2009

F'Settembru 2007, il-kwerelant applika għall-aċċess għad-dokumenti mizuma mill-Kummissjoni Ewropea, b'konformità mar-Regolament 1049/2001 rigward l-aċċess pubbliku għad-dokumenti tal-Parlament Ewropew, tal-Kunsill u tal-Kummissjoni. Il-Kummissjoni wiegbet fl-4 ta' Marzu 2008, billi tat aċċess parzjali għad-dokumenti mitluba.

Il-kwerelant irrikorra għall-Ombudsman sabiex jilmenta dwar l-allegat nuqqas tal-Kummissjoni li tittratta kif xieraq, u twieġeb għat-talba dwar l-aċċess għad-dokumenti. Il-kwerelant ilmenta, b'mod partikolari, dwar id-dewmien eċċessiv u mhux ġustifikat tal-Kummissjoni sabiex tittratta din it-talba.

Fid-deċiżjoni tiegħu, l-Ombudsman identifika diversi nuqqasijiet fil-mod kif il-Kummissjoni ttrattat it-talba tal-kwerelant għall-aċċess għad-dokumenti. Dawn in-nuqqasijiet ġraw b'konnessjoni mar-registrazzjoni tat-talba, il-konformità mal-limiti taż-żmien applikabbli, u l-għoti tar-raġunijiet għall-estensjoni tal-limiti taż-żmien.

Madankollu, l-Ombudsman innota li nuqqasijiet simili kienu diġà okkorrew fl-ilment 3697/2006/PB, u li, f'dik l-okkażjoni l-Kummissjoni kienet irreaġixxiet pożittivament għall-kritika u r-rimarki tal-Ombudsman. Fil-fatt, il-Kummissjoni sostniet li l-applikazzjonijiet għall-aċċess għad-dokumenti normalment jiġu rreġistrati mar-riċeviment tagħhom jew fl-ewwel jum tax-xogħol wara r-riċeviment tagħhom, u li kwalunkwe dewmien fir-registrazzjoni jkun biss minħabba ċirkostanzi eċċezzjonali. Barra minn hekk, hija qablet illi, meta l-applikant ikun irid jiġi infurmat li l-limitu ta' żmien inizjali jkollu jiġi estiż, il-Kummissjoni għandha tagħmel dan qabel fil-fatt jiskadi l-limitu ta' żmien rilevanti. Hija għarfet ukoll li għandhom jingħataw raġunijiet dettaljati għall-estensjoni tal-limiti ta' żmien.

Fid-dawl ta' dawn l-istqarrijiet, u l-fatt li huma ddataw in-nuqqasijiet identifikati fl-ilment preżenti b'data awanzata, l-Ombudsman ma ħassx li kien hemm bżonn li joħroġ rimarka kritika.

Fir-rigward tad-deċiżjoni sostantiva tal-Kummissjoni li ma tagħtix aċċess sħiħ



għad-dokumenti kkonċernati, l-Ombudsman sab illi l-Istituzzjoni applikat b'mod korrett id-dispożizzjonijiet rilevanti tar-Regolament 1049/2001 dwar il-konsultazzjoni ta' parti terza, u l-protezzjoni tal-interess pubbliku fir-rigward tar-relazzjonijiet internazzjonali.

THE BACKGROUND TO THE COMPLAINT

1. The Ignalina International Decommissioning Support Fund (IIDSF) was established in 2000 to support the decommissioning of the Ignalina nuclear power plant in Lithuania. The administration of the IIDSF was entrusted to the European Bank for Reconstruction and Development (EBRD). The European Commission, together with 14 bilateral donor countries, made the initial contributions to the IIDSF. Before Lithuania's accession to the EU, funding was made available under the PHARE programme. Following accession, much greater funding became available through a new programme, called the Ignalina Programme, established in Protocol 4 of the Accession Treaty.

2. Under the Financial Regulation [1], 'joint management' is the term given to an arrangement whereby contributions are made from the Community budget to multi-donor funds which are administered by international organisations. Joint management normally arises where aid is given to third countries. The Commission continued its contribution to the IIDSF even after Lithuania's accession to the EU, and after the creation of the Ignalina Programme. It will continue to contribute to the IIDSF, as foreseen in the financial perspective 2007-2013. Where there is joint management, the Commission is obliged to sign a 'contribution agreement' with the international organisation concerned. The purpose of such an arrangement is to ensure that Community requirements are met in accordance with the provisions of the Financial Regulation relating to transparency, the principle of sound financial management, the eligibility of actions and participation, the visibility of the use of Community funding, and access to the Court of Auditors. The contribution agreement determines the key elements of the programme, such as the selection of projects, tendering agreements, the applicable legal framework, the obligations of project beneficiaries, as well as the relationship between the Commission and, in the present case, the EBRD. At national level, Lithuania was required to sign a Framework Agreement with the EBRD in order to have access to IIDSF funding. The involvement of an intermediary organisation in a joint management for a Community programme within the EU means that the Commission and the authorities of the Member State concerned do not have direct control over the programme. By choosing the EBRD, which is not a Community institution, the Commission places the management of the programme beyond the scrutiny of the European Parliament and the European Ombudsman. The Commission, therefore, has a particular responsibility to ensure complete transparency and correct implementation of the programme.

3. On 11 September 2007, the complainant, acting on behalf of a law firm, applied to the European Commission for public access to documents in accordance with Regulation (EC) No 1049/2001 [2] ('Regulation 1049/2001'). The complainant requested access to copies of " *the Contribution Agreements, including all annexes, for Community funding to the Ignalina International Decommissioning Support Fund (IIDSF) managed by the European Bank for Reconstruction and Development (EBRD)* ". The complainant requested access to two specific



agreements; a contribution agreement made before Lithuania's accession to the EU, and a post-accession contribution agreement.

4. By e-mail of 18 September 2007, the Commission acknowledged receipt of the complainant's initial application for access to documents, informing it that, in accordance with Regulation 1049/2001, it would receive a reply within 15 working days.

5. On 11 October 2007, in the absence of a reply from the Commission, the complainant sent an e-mail to the Commission stating that the deadline indicated in the Commission's above letter had expired, and that, "[t] *herefore, in line with Article 7(4) of Regulation 1049/2001, this message constitutes our **confirmatory application*** " (emphasis in original).

6. On 6 November 2007, the Commission informed the complainant that it needed to extend the deadline for a reply for another 15 working days, since it could not obtain all the information necessary to carry out a proper analysis of the complainant's request and take a final decision.

7. By e-mail of 27 November 2007, the Commission informed the complainant that it was still unable to make a final decision regarding its request. It stated that, in accordance with Article 4(4) of Regulation 1049/2001, it had to consult the EBRD about the disclosure of the requested documents.

8. On 4 March 2008, the Commission replied to the complainant's confirmatory application. It first identified the documents concerned as (i) a Contribution Agreement dated prior to Lithuania's accession to the EU ('the 2002 Agreement'); and (ii) a post-accession Contribution Agreement ('the 2006 Agreement').

9. As regards the 2002 Agreement, the Commission explained that it included: (i) an exchange of letters between the Commission and the EBRD from January 2001, regarding the EUR 115 million European Community commitment to the IIDSF; and (ii) a Financing Memorandum, concluded in 2002 between the European Community and the beneficiary country, regarding the EUR 80 million European Community contribution to the IIDSF.

10. As regards the 2006 Agreement, the Commission explained that it consisted of the Special Conditions and four Annexes (Annexes I - IV).

11. The Commission concluded that full access could be granted to the 2002 Agreement, and Annex II of the 2006 Agreement. It could, however, grant only partial access to the Special Conditions and Annex IV of the 2006 Agreement. Access was refused to the remaining parts of the 2006 Agreement.

12. On 8 April 2008, the complainant submitted a complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

13. On 29 April 2008, the Ombudsman opened an inquiry into the following allegation and claim:



The Commission failed properly to deal with, and respond to, its request for access to documents.

The complainant claimed that the Commission should:

- grant it access to Annex 1 to the 2002 Financing Memorandum; and
- grant full access to the documents of the 2006 Agreement.

THE INQUIRY

15. On 29 June 2008, the Ombudsman asked the Commission to submit an opinion. The Commission sent its opinion on 23 July 2008. The Commission's opinion was forwarded to the complainant with an invitation to submit observations. The complainant sent its observations on 13 October 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation that the Commission failed properly to deal with and respond to the complainant's request for access to documents

Arguments presented to the Ombudsman

16. The complainant alleged that the Commission failed properly to deal with, and respond to, its request for access to documents because (i) there were excessive and unjustified delays in the Commission's handling of its application; (ii) it provided wrong and incomplete documents; and (iii) it failed to respect Community legislation specifically regarding access to documents in relation to the 2006 Agreement. The complainant explained that it sent its request for access to the said documents on 11 September 2007, but the Commission registered it only on 18 September 2007. On 11 October, the complainant made a confirmatory application. On 6 and 27 November 2007, the Commission sent two holding replies. Only on 4 March 2008, did it send its substantive reply. The complainant considered that the consultation of the EBRD was unjustified and too lengthy, and that it contradicted Article 5(5) of Commission Decision C(2001) 3714 [3]. Furthermore, the Commission provided documents that actually related to Slovakia and not Lithuania (wrong document). In addition, the Commission did not provide the complainant with the *Rules of the Fund* [4], which forms an integral part of the Financing Memorandum (incomplete provision of documents). Finally, the Commission made inappropriate use of the provision in Regulation 1049/2001 relating to third-party consultation and protection of the public interest as regards international relations. It, therefore, failed to respect the relevant Community legislation.

17. In its opinion, the Commission first pointed out that the requested documents are bilateral, contractual documents signed by the Commission and a third party. Since they are co-authors of the documents, Article 4(4) of Regulation 1049/2001 applied. Moreover, given that, as pointed out in the Commission's reply of 4 March 2008, the EBRD explicitly



objected to the disclosure of the requested documents, the Commission decided to analyse the contents of each of the documents to assess which parts could be disclosed without undermining the legitimate interests of the EBRD. This assessment involved consulting various Commission services. This approach was in line with Commission Decision C(2001) 3714. Furthermore, the Commission stressed that the EBRD is an international organisation established by a number of sovereign states and failure to respect its legitimate interests would inevitably damage EU relations with this international organisation. As regards the complainant's argument that " *it could not find any derogation under Community law allowing the Commission to prolong the legally-prescribed deadlines* ", the Commission stated that it never claimed that such derogation existed. In its letter of 27 November 2007, the Commission informed the complainant that it was unable to meet the deadline, gave reasons, and presented its apologies. The Commission's delay did not infringe the complainant's right, guaranteed in Article 8(3) of Regulation 1049/2001, to bring proceedings before the Court, or to complain to the Ombudsman, if the institution fails to reply within the prescribed time limit, which shall be considered as a negative reply. The Commission concluded by saying that, notwithstanding the EBRD's objections, it used the additional time in an effort to grant the complainant the widest possible access to the documents concerned.

18. In its observations, the complainant stated that it was unacceptable for the Commission to take seven days to register its application. Further, contrary to Article 7(1) of Regulation 1049/2001, the Commission did not answer its initial application within 15 working days from the date of registration. In view of the fact that the Commission claimed that it granted full access to the documents relating to the 2002 Agreement, the complainant considers that it could, therefore, have released these documents separately from the documents relating to the 2006 Agreement, avoiding the further delay caused by the pending consultation procedure regarding the 2006 Agreement. Irrespective of whether it was correct to enter into consultation with the EBRD, the Commission should, in accordance with Article 2 of Commission Decision C(2001) 3714, have respected the deadline of 30 working days to decide upon the application. The Commission argued that the complainant could have brought proceedings before the Court or complained to the Ombudsman. In response, the complainant pointed out that both Article 19 of the Code of Good Administrative Behaviour and Article 8(1) of Regulation 1049/2001 require that: " *in the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her* ". However, the Commission did not inform the complainant about its immediate possibilities of appeal. Finally, the complainant stated that the Commission sent its final reply three months after its previous letter, and that almost six months had elapsed since the initial application was made.

The Ombudsman's assessment

The allegedly excessive and unjustified delays in the handling of the complainant's application

19. On 11 September 2007, the complainant submitted an application for access to documents. On 18 September 2007, the Commission registered the application and



informed the complainant accordingly by e-mail sent on the same day.

20. As regards the registration of initial applications for access to documents, Article 7 of Regulation 1049/2001 provides that:

" 1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant ".

21. The Ombudsman recalls that Regulation 1049/2001 does not establish any specific rules regarding the time required to register a request for access to documents. However, the Ombudsman considers that there should not be undue delays in the registration of such requests, since the purpose of the above obligation to handle applications *promptly* could not be attained, if the Commission had discretion as to when an application should be registered. (In turn, such discretion would affect the deadline for dealing with such an application.). In the Ombudsman's view, the obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally take places, at the latest, on the first working day following receipt of an application. In view of the fact that it took the Commission five working days to register the complainant's initial application, the Ombudsman considers that the Commission failed to respect the above obligation.

22. As regards the handling of initial applications, Article 7 of Regulation 1049/2001 further provides that:

"... Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal ... 4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application. "

23. The Ombudsman notes that the complainant does not dispute that the Commission's failure to reply within 15 working days from the registration date (18 September 2007) of the initial application constituted an implicit rejection of the said application, and that this fact entitled the complainant to submit a confirmatory application.

24. On 11 October 2007, the complainant submitted a confirmatory application. On 12 October 2007, the Commission registered it and informed the complainant accordingly by e-mail the same day. On 6 November 2007, however, the Commission wrote to inform the complainant that:

" Your application is currently being handled. However, since we still have not gathered all the elements we need to carry out a proper analysis of your request in order to take a final decision, we will not be able to reply to your confirmatory request within the prescribed time limit. Therefore, we need to extend this period by another 15 working days in accordance with Article 8(2) of Regulation 1049/2001. The new deadline expires on 27 November 2007. I apologise for



any inconvenience this delay may cause. "

25. As regards confirmatory applications, Article 8 (Processing of confirmatory applications) provides that:

" 1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access... 2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "

26. In the Ombudsman's view, it is clear that the tight deadlines foreseen in Regulation 1049/2001 are meant to ensure that the right of access is fully respected. Any failure to respect these deadlines thus constitutes an instance of maladministration. Since the complainant submitted the confirmatory application on 11 October 2007, the Commission was to decide on it on 2 November 2007, at the latest. However, it was only on 6 November 2007, that it informed the complainant about the extension of the initial deadline. The Ombudsman finds that, although this delay was limited, the fact remains that the Commission failed to inform the complainant in advance of the extension of the deadline for replying to its confirmatory application.

27. Following its decision to extend the deadline for replying to the confirmatory application, the Commission should have made a decision, at the latest, by 27 November 2007. However, on 27 November 2007, the Commission wrote to the complainant:

" (...) the time limit for replying to your confirmatory request was extended by 15 working days, pursuant to Article 8(2) of the Regulation. This extended time limit expires today. Unfortunately, we still have not been able to finalise the analysis of your request and are, therefore, not yet in a position to provide you with a final reply. This is in particular due to the fact that, in order to correctly assess the matter, and in accordance with Article 4(4) of Regulation 1049/2001, we have consulted the EBRD with regard to their position as to the disclosure of the requested documents. However, I can assure you that we are doing our utmost to provide you with a final reply as soon as possible. I regret this additional delay and sincerely apologise for any inconvenience this may cause. "

28. Similarly to Articles 7 and 8 of Regulation 1049/2001, Article 2 of Commission Decision C(2001) 3714 provides that *" the Commission shall answer initial and confirmatory access applications within fifteen working days from the date of registration of the application. In the case of complex or bulky applications, the deadline may be extended by fifteen working days. "*

29. The Ombudsman points out that neither Regulation 1049/2001 nor Commission Decision C(2001) 3714 provide for a further extension to an already extended deadline for a decision on an (initial or confirmatory) application for access to documents. Since the Commission extended the deadline for replying to the complainant's confirmatory



application on two occasions, the Ombudsman finds that the Commission failed to respect both the Regulation and the Commission Decision referred to above.

30. Furthermore, Article 8(2) of Regulation 1049/2001 requires the Commission to provide the applicant with " *detailed reasons* " for extending the deadline. What constitutes sufficiently " *detailed* " reasoning, within the meaning of the above provision, may differ from case to case, depending on the relevant circumstances. Nevertheless, a simple reference, formulated in general terms, to the fact that the Commission has not " *gathered all the elements [it] need [ed] to carry out a proper analysis of [the complainant's] request in order to take a final decision* " cannot satisfy the foregoing requirement. Similarly, the statement that the Commission " *still [has] not been able to finalise the analysis of [the complainant's] request and [is], therefore, not yet in a position to provide [it] with a final reply , [especially because] in order to correctly assess the matter,... [it has] consulted the EBRD with regard to their position as to the disclosure of the requested documents* " cannot satisfy the above obligation. Such statements do not contain adequate elements to enable a review of whether the extension is justified in the specific case. Rather, explanations as to why the Commission could not obtain the information necessary for the analysis of the application, or why a third party had to be consulted, and why the consultation could not have been completed earlier, would be appropriate. In the present case, the Ombudsman considers that the Commission's statements do not amount to " *detailed reasons* " within the meaning of Article 8(2) of Regulation 1049/2001.

31. In addition, the Ombudsman points out that Article 5(5) of Commission Decision C(2001) 3714 provides that:

" The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. "

32. It is clear that the Commission cannot justify a delay in its handling of an application for access to documents on the grounds that it needs to consult third parties. Since the Commission did not provide its final reply to the complainant's confirmatory application of 11 October 2007, until 4 March 2008, that is, almost five months after it was made, the Ombudsman finds that the Commission failed to respect the provisions of Regulation 1049/2001 on the prompt handling of applications for access to documents.

33. More generally, the Ombudsman finds that, for the reasons outlined below, there were excessive and unjustified delays in the Commission's handling of the complainant's request for access to documents. In particular, he finds that the Commission:

- breached Article 7 of Regulation 1049/2001, by taking five working days to register the complainant's initial application;
- breached Article 8 of Regulation 1049/2001, by failing to inform the complainant in



advance of the extension of the deadline for replying to its confirmatory application;

- contradicted the above two articles of Regulation 1049/2001, by extending the already extended deadline for a decision on the confirmatory application;
- breached Article 8(2) of Regulation 1049/2001, by failing to provide detailed reasons for the extension of the deadlines; and that it
- provided its final reply to the complainant's confirmatory application of 11 October 2007, only on 4 March 2008, that is, almost five months later, constituted an excessive and unjustified delay.

34. In this context, the Ombudsman refers to complaint 3697/2006/PB, which concerned similar circumstances. In his decision closing that complaint, he also found instances of maladministration regarding the Commission's failure to respect the above provisions. Therefore, in his decision of 22 October 2007, he made pertinent critical and further remarks. By letter dated 19 January 2009, the Commission replied to the Ombudsman regarding his critical and further remarks concerning complaint 3697/2006/PB. In its reply, it stated that applications for access to documents are normally registered upon receipt, or on the first working day following receipt, and any delay in registration could only be due to exceptional circumstances. The Commission agreed with the Ombudsman that an applicant for access to documents should be informed of an extension of the time limit to reply before it actually expires. Finally, it also agreed that it should give the applicant concerned more detailed explanations as to the reasons for extending a time limit.

35. In view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, which is available on the Ombudsman's website and which postdates the shortcomings identified above, the Ombudsman trusts that the Commission will handle future applications for access to documents in accordance with the practices to which it referred to in that response. In view of these circumstances, the Ombudsman does not consider it necessary to issue a critical remark, with respect to his findings in paragraph 33 above.

The provision of wrong documents

36. According to the complainant, the Commission provided it with Annex A to the Financing Memorandum ("General Conditions Relating to the Financing Memorandum"), which names the Government of Slovakia as the recipient. The complainant's request, however, concerned Lithuania. The Commission expressed regret for this inaccuracy in its opinion. It pointed out, however, that the document in question is a standard document listing general conditions. Its content remains the same, regardless of the recipient country. The complainant observed that, despite the above explanations, it has yet to receive the correct documents.

37. The Ombudsman notes that, on 23 October 2009, further to his specific request, the Commission sent him a copy of the General Conditions Relating to the Financing Memoranda concluded with Lithuania [5]. It also explained that, since this document contains general conditions for the standard financing memoranda, these are the same for



Lithuania and for Slovakia. It added that it provided the complainant with the document relating to Slovakia because Annex A to the document relating to Lithuania was incomplete, namely, page 7 onwards was missing, and an electronic version does not exist. It underlined that the only difference between the Slovakian and Lithuanian versions was the definition of "the Recipient" in the first line of the document. In view of the provision of this document, and of the above explanations, the Ombudsman considers that the Commission has taken the relevant steps to settle this aspect of the complaint.

The incomplete provision of documents

38. The complainant points out that, in its reply dated 4 March 2008, the Commission claimed that it had granted full access to the 2002 Agreement. The latter includes the Special Conditions (Annex C), which refer to an additional annex, the *Rules of the Fund*. The complainant was not, however, provided with the *Rules of the Fund*. The Commission, therefore, did not provide full access to the requested documents. In its opinion, the Commission explained that it considered that the issue of access to the *Rules of the Fund* was covered by its response to the request for access to the 2006 Agreement. Since full access to the Special Conditions of the 2006 Agreement was explicitly refused, the complainant wrongly concluded that the Commission first implicitly granted access, and then explicitly refused access to the *Rules of the Fund*.

39. The Ombudsman notes that, in its reply of 4 March 2008, the Commission stated that the 2002 Agreement consisted of:

- an exchange of letters between the Commission and the EBRD from January 2001, regarding the EUR 115 million European Community commitment to the IIDSF; and
- a Financing Memorandum concluded in 2002 between the European Community and the beneficiary country, regarding the EUR 80 million European Community contribution to the IIDSF Fund.

The Commission granted full access to these documents.

40. The Ombudsman also notes that in the same reply, the Commission defined the 2006 Agreement as a bi-lateral contractual document between the Commission and the EBRD signed in 2006. The contract is based on a standard contribution agreement with an international organisation, which is publicly available on the internet [6]. The Special Conditions, to which the complainant referred, are based on a standard text with variables, which are specific to individual agreements. Since it contains "*particular conditions agreed between the parties and contains information specific to the EBRD*" and, since the EBRD refused access to the document due to its nature, the Commission "*preferred non-disclosure*".

41. In light of the foregoing, the Ombudsman understands the complainant's argument to be that the Commission was wrong to claim that it had granted *full* access to the 2002 Agreement, because it did not grant access to the *Rules of the Fund*, which is clearly part of that Agreement. The Ombudsman considers that this argument is not without merit,



assuming that the *Rules of the Fund*, to which access was not granted, are to be considered part of the 2002 Agreement. However, the Commission appears to argue that the issue of public access to the *Rules of the Fund* was dealt with when the request to grant access to the 2006 Agreement was examined, since the said rules are part of both the 2002 and the 2006 Agreement. The response to the complainant's application for access could undoubtedly have been clearer in this respect, but, since the Ombudsman will assess the substantive aspect of access in more detail below, he does not consider it necessary to inquire further into this aspect of the case.

Non-respect of Community legislation specifically regarding access to documents in relation to the 2006 Agreement

42. The complainant argued that the Commission was not required to consult the EBRD, since the 2006 Agreement and all its annexes were authored by the Commission, and some of them were even drawn up by the Commission. In fact, under Regulation 1049/2001, consultation is only required if the document concerned originates from, or was authored by, a third party. Since this is not the case with regard to the Special Conditions, the Commission did not respect the relevant provisions of Community legislation. Furthermore, regardless of whether the Commission was right to consult the EBRD, the Commission wrongly invoked the exception provided under Article 4(1) of Regulation 1049/2001, namely, that disclosure of the 2006 Agreement would undermine the protection of the public interest as regards international relations. Moreover, the Commission's argument that disclosure would reduce the EBRD's willingness to cooperate with the European Community, and would be prejudicial to the Community's strategy in its relations with this international body, is questionable. The EBRD is an international organisation which, under the agreement establishing it, has to work in close cooperation with its members, including the European Community.

43. In its opinion, the Commission acknowledged that its services drafted the Special Conditions and Annex II (to which full access was granted). It pointed out, however, that the remaining documents originated from the EBRD. Furthermore, it stated that the Special Conditions reflect the outcome of negotiations with the EBRD and consist of what the contracting parties agreed upon. The EBRD is thus a co-author of the contractual agreement. The Commission, therefore, considered that the EBRD had a right, under Regulation 1049/2001, to be consulted. In addition, the complainant itself admitted that the *Rules of the Fund* is a document authored by the EBRD. As regards the protection of public interest, the Commission argued that the EBRD is an important partner of the European Community. They work together in a number of countries, contributing to economic development, and managing programmes on behalf of the Community. Relations with it are based on mutual trust and cooperation. It would go against these principles, and prove detrimental to relations with the EBRD, if the Commission were to disclose documents, disregarding the former's wishes. In fact, by introducing the exception provided under Article 4(1) of Regulation 1049/2001, the Community legislator indicated that the opinion of third parties must be taken into account. The Commission considers that the EBRD is better placed to assess whether disclosure of documents originating from, or co-authored



by it, would prejudice its legitimate interests.

44. As regards consultation, the Ombudsman first notes that Article 4(4) (Exceptions) of Regulation 1049/2001 provides:

" 4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. "

In this respect, the Ombudsman points out that Community institutions have an obligation, and not the option, to consult third parties where requests for access to third-party documents are received, unless it is clear to the institution whether access should or should not be given. Moreover, even if the requested document is, strictly speaking, not a third party document, the Ombudsman does not see why Community institutions, when handling a request for access to such a document, should not be able to consult other bodies regarding their own assessment of the request, without the strict application of Article 4(4) of Regulation 1049/2001. Such consultation would certainly increase the possibility that Community institutions, including the Commission, will be able to give a more objective opinion when assessing the applicability of an exception provided for in Article 4(4) of Regulation 1049/2001. The Ombudsman notes, however, that such potential consultations cannot be used to justify delays in the Commission's decision-making procedure.

45. In view of the above considerations, the Ombudsman finds that the Commission did not infringe Regulation 1049/2001 when it consulted the EBRD for the possible disclosure of the 2006 Agreement.

46. With regard to the protection of the public interest as regards international relations, the Ombudsman notes that Article 4(1) (Exceptions) of Regulation 1049/2001 provides:

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

(a) the public interest as regards:

... - international relations ... of the Community or a Member State. "

47. The Ombudsman notes that the exceptions provided for by Article 4(1) (a) of Regulation 1049/2001 are framed in mandatory terms. Hence, the institutions are obliged to refuse access to documents falling under any one of the exceptions, once the relevant circumstances are shown to exist [7]. The Ombudsman further notes that the Commission enjoys wide discretion in the context of a decision refusing access founded on the basis of the protection, *inter alia*, of the public interest concerning international relations [8]. Consequently, the scope of review, in this context, has to be limited to verifying whether the procedural rules, and the duty to state reasons, have been complied with, whether the



facts have been accurately stated, and whether there has been a manifest error of assessment, or a misuse of power [9] . As to the duty to state grounds, the Ombudsman recalls that, although it is for the institution concerned to demonstrate, in each individual case, that the documents to which access is sought, do indeed fall within the exceptions listed in Regulation 1049/2001, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document, without disclosing the content of the document and, thereby, depriving the exception of its very purpose [10] .

48. With respect to the foregoing, the Ombudsman notes that, in its reply of 4 March 2008, the Commission explained that:

" The remaining parts of the concerned bi-lateral agreement (i.e. Annexes I and III, as well as the non-disclosed parts of the Special Conditions and Annex IV) cannot be disclosed since they relate to the particular conditions agreed between the parties and contain information specific to the EBRD. Public disclosure of these parts would clearly damage the European Community's relationship with the EBRD, given the latter's referred explicit opposition to disclosure. Indeed, on the one hand, it would reduce the willingness of the EBRD to cooperate with the European Community and, on the other hand, it would be prejudicial to the Community's strategy in its relations with this international body. This would not only affect current agreements but might also interfere with future negotiations on similar issues with the [EBRD]. Furthermore, it would also have a negative impact on the Community's relations with third countries where the EBRD operates with the support of Community funds. For these reasons, the release of the concerned parts would seriously affect current and future relations with both the EBRD and the referred third countries, thereby undermining the protection of public interests as regards the EC's international relations with both these actors. "

49. In light of the above circumstances, the Ombudsman considers that the Commission provided sufficiently precise explanations for its challenged refusal to grant access to the requested document. Further, the Ombudsman finds that the Commission, after consulting the EBRD, and having been informed of the latter's explicit opposition to disclosure [11] , was right to conclude that disclosure of the 2006 Agreement could indeed undermine the protection of public interest as regards its international relations with the EBRD. Finally, the contested decision is not vitiated by a manifest error of assessment as to the protection of the public interest concerning international relations.

50. For the above reasons, the Ombudsman finds that the Commission correctly applied the relevant provisions of Regulation 1049/2001 regarding its consultations with the EBRD and the protection of public interest as regards international relations. The Ombudsman, therefore, finds no corresponding instance of maladministration.

51. In light of all of the foregoing, the Ombudsman finds no instance of maladministration in connection with the complainant's arguments relating to the provision of wrong and incomplete documents, the non-respect of Community legislation regarding the consultation of third-parties, or the protection of public interest as regards international relations. Consequently, the complainant's claim cannot be upheld.



C. Conclusions

On the basis of his inquiries into this complaint and as set out more specifically in paragraph 33 of his decision, the Ombudsman identified several shortcomings in the Commission's procedural handling of the complainant's request for access to documents. Under normal circumstances, the identification of such shortcomings would have led the Ombudsman to issue a critical remark.

However, in view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, which postdates the shortcomings identified in the present decision, the Ombudsman trusts that the Commission will handle future applications for access to documents in accordance with the practices to which it referred in that response. In light of these circumstances, the Ombudsman does not consider it necessary, in the present case, to issue a critical remark with respect to his findings in paragraph 33 of the decision.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 2 December 2009

[1] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006.

[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] Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714) OJ 2001 L 345 p. 94, concerning the application 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.

[4] As referred to in the Special Provisions, Annex C, of the Financing Memorandum.

[5] A copy of which is forwarded to the complainant together with this decision.

[6] On the website of the EuropeAid Co-operation Office (



http://ec.europa.eu/europeaid/index_en.htm).

[7] See Case T-110/03 *Sison v Council* [2005] ECR II-1429, paragraph 51.

[8] See Case T-110/03 *Sison v Council* , paragraph 46.

[9] See Case T-110/03 *Sison v Council* , paragraph 47 (concerning the CFI's scope of review).

[10] See Case T-110/03 *Sison v Council* , paragraph 60.

[11] The Ombudsman agrees with the Commission's statement that the EBRD was in a better position to assess whether disclosure of documents, originating from, or co-authored by it, should be disclosed or whether such disclosure would prejudice its legitimate interests.