

Besluit in zaak 724/2019/MIG betreffende de weigering van de Europese Commissie om het publiek volledige toegang te geven tot documenten met betrekking tot audits van mogelijke belangenconflicten in Tsjechië

Besluiten

Zaak 724/2019/MIG - Geopend op 10/05/2019 - Besluit over 25/03/2020 - Betrokken instelling Europese Commissie (Opgelost door de instelling) |

De zaak had betrekking op een verzoek om het publiek toegang te geven tot een brief van de Europese Commissie aan de Tsjechische autoriteiten over audits in verband met mogelijke belangenconflicten in Tsjechië. De Commissie weigerde de brief openbaar te maken met als argument dat dit de voltooiing van de audits in gevaar zou brengen.

De Ombudsvrouw was van mening dat de Commissie gedeeltelijke toegang moest verlenen tot de brief, en zo het publiek geruststellen en bevestigen dat zij passende maatregelen nam met betrekking tot de bescherming van EU-fondsen.

De Commissie stemde in met deze oplossing en verleende de klager toegang tot die alinea's van de brief die de Ombudsvrouw voor vrijgave geschikt achtte. De Ombudsvrouw is van mening dat de Commissie op deze manier de klacht heeft afgehandeld. Daarom heeft de Ombudsvrouw het onderzoek afgesloten.

Background to the complaint

1. The European Union provides funding to Member States to support economic development and to strengthen social cohesion across the EU. The economic and social cohesion programmes are implemented by the Member States, which means they select, monitor and evaluate the projects that receive EU funding.
2. The Commission monitors each programme and may suspend payments if “ *there is clear evidence to suggest a significant deficiency in the functioning of the management and control system*” [1] or if “ *expenditure (...) is linked to an irregularity having serious financial consequences (...)*” [2] In this context, the Commission has the power to carry out audits to verify that Member State control mechanisms are adequate and if there are any



deficiencies and/or irregularities concerning EU funded projects.

3. In 2018, responding to allegations of potential conflicts of interest related to certain EU funded projects in Czechia, the Commission audited EU funds granted to Agrofert, a major holding company founded by the current Prime Minister of Czechia.

4. On 13 December 2018, the European Parliament issued a Resolution in which, amongst other points, it requested the Commission to *“publish all documents at its disposal related to the possible conflict of interest of the Czech Prime Minister and Minister of Agriculture, and to explain what steps it intends to take to remedy the situation .”* [3]

5. On 19 December 2018, the complainant, a member of the Senate of Czechia, requested the Commission to make public documents relating to the Commission’s audits. [4] These were a letter sent by Commissioner Oettinger to the Czech authorities on 29 November 2018 (the non-disclosure of which is the object of this inquiry) and four documents from December 2018 setting out the scope and the methodology of audits to be carried out in early 2019 (the non-disclosure of these four documents was the object of Ombudsman inquiry 721/2019/MIG [5]).

6. The Commission refused access. The complainant asked the Commission to review its decisions by making so-called ‘confirmatory applications’.

7. In January 2019, the Commission began the new series of audits relating to funding granted to Agrofert.

8. In February and March 2019 respectively, the Commission confirmed its decisions not to disclose the documents (it issued so-called ‘confirmatory decisions’). The Commission gave, in both cases, two reasons: it argued that releasing the documents would undermine the purpose of inspections, investigations and audits [6] and that it would undermine the privacy and integrity of the individual [7] . Regarding the letter sent by Commissioner Oettinger to the Czech authorities, the Commission also argued that disclosure would seriously undermine its decision-making. [8]

9. Dissatisfied with the Commission’s decisions to not disclose the documents, the complainant turned to the Ombudsman in April 2019.

The inquiry

10. In the course of the inquiry, the Ombudsman obtained from the Commission copies of the relevant documents.

Arguments presented

11. The Ombudsman first noted that the Commission’s position had been set out in its confirmatory response to the complainant. The Ombudsman informed the Commission that it could, if it wished, provide additional views. The Commission did not do so and the Ombudsman therefore based her assessment on the Commission’s confirmatory decision, the complainant’s views (as expressed in his complaint) and her own consideration of the content of the letter.



Arguments presented by the Commission

12. The Commission argued that the document concerns on-going audits and that disclosing it could endanger the completion of these audits. [9] Specifically, the Commission stated that disclosure of the document would expose the Commission to the risk of external pressure, which would be detrimental to the proper conduct of the audits and compromise cooperation between the Commission and the Czech authorities.

13. The Commission also argued that full disclosure of the document would undermine the privacy and integrity of individuals, as the document contains some personal data [10] , such as a signature.

14. In addition, the Commission argued that disclosure of the document could undermine the protection of Commission decision-making as the document contains sensitive preliminary conclusions regarding alleged conflicts of interest on which the Commission had not yet taken a final decision.

15. As regards whether there was a public interest which might justify disclosure, the Commission stated that it understands that there is a "*certain interest in the subject matter at hand*". Nevertheless, it concluded that this interest would not override the public interest in ensuring that the on-going audits, and the Commission's decision-making, are properly conducted, free from external pressure.

Arguments presented by the complainant

16. The complainant argued that the Commission incorrectly assessed the existence and importance of the public interest in obtaining access to the requested document. The complainant stated that the Commission had failed to provide any justification as to why there is no public interest in the disclosure of the requested document.

The Ombudsman's proposal for a solution

17. The Ombudsman considered that public awareness of the Commission's actions regarding the allegations of potential conflicts of interest involving a high-level public representative, and involving the use of significant EU funds, would serve a public interest. It would serve to inform the public whether the Commission, and the Czech authorities, were taking, in good time, all the relevant steps to protect the financial interests of the EU and to ensure that the rule of law is respected. The public interest was a significant one as the individual at the centre of the Commission investigation is the current Prime Minister of Czechia.

18. While the public interest in this matter was obvious, the key issue, nonetheless, was whether the release of the requested document, *at that stage of the Commission's audits* ,



would serve the public interest, or whether the public interest would be better served if the Commission were to release the document once it has completed its audits. In making this assessment, the Ombudsman understood that the completion of the Commission's audits is of vital importance in terms of clarifying precisely the extent, if any, of potential conflicts of interest and in terms of protecting EU public funds.

19. The document at issue in this case was a letter sent by the Commissioner for Budget and Human Resources, Günter Oettinger, to the Czech authorities on 29 November 2018. This letter concerned two substantive issues, one relating to the period prior to 2 August 2018 and one relating to the period after 2 August 2018. This date was relevant because on that date the new Financial Regulation [11], which grants the Commission greater powers of investigation, entered into force.

20. As regards the period *after* 2 August 2018, the letter contained very detailed information concerning an on-going audit which the Commission had *already* commenced, pursuant to Article 61 of the present Financial Regulation, when the letter was sent (namely, in November 2018). In the Ombudsman's view, revealing those details, while the audit was on-going, could have undermined the Commission's ability to complete its audit effectively.

21. As regards the period *prior* to 2 August 2018, however, the November letter described, very generally the legal framework requiring Member States to have control systems aimed at ensuring the proper implementation of the EU budget. The Ombudsman considered that this was not sensitive information. The letter then stated that the Commission would launch audits to review those control systems. The latter paragraph could not be considered to be confidential since the Commission had stated elsewhere that it would launch such audits.

22. The Ombudsman took the view that disclosing the two paragraphs containing this very general information would not undermine the Commission's audits. The Ombudsman also considered that granting access to these two paragraphs constituted meaningful partial access, since such disclosure would reassure and confirm to the public that the Commission was taking appropriate action regarding the protection of EU funds.

23. As regards meaningful access, the Ombudsman also considered that granting access to the first two paragraphs of the letter and the final paragraph of the letter, would aid the public in understanding the context and the importance of the letter, without compromising the Commission's on-going audits.

24. The complainant argued that there is a public interest in the disclosure of the entire letter. The Ombudsman emphasised that she considered there to be a public interest in reassuring the public that the Commission was taking appropriate measures to investigate and take action regarding allegations of potential conflicts of interest. The Commission should thus act in as transparent and as open a manner as possible. However, the Ombudsman also noted that there were other public interests that needed to be taken into



account, most notably, that in protecting the Commission's ability to conduct audits aimed at ensuring that EU funds are protected and that the rule of law is respected. In this context, the Ombudsman considered that the public interest was best served by granting partial access to the document.

25. In the above context, the Ombudsman also took due account of the fact that the Commission had made significant efforts to keep the public informed, for example, by providing regular updates on its audits to the European Parliament, and expected the Commission to continue these efforts.

26. Based on the principles set out above, the Ombudsman proposed the following solution: [12]

The Commission should grant the complainant partial access to the requested letter (as indicated in the proposal for a solution) in accordance with the principles set out above.

27. Following the Ombudsman's proposal for a solution, the Commission reconsidered its position. It agreed to give the complainant unrestricted access to those paragraphs of the requested letter which the Ombudsman had indicated should be disclosed. [13]

28. The complainant was given the opportunity to comment on the Ombudsman's proposed solution and the Commission's reply to it. He did, however, not provide any comments.

29. The Ombudsman welcomes the Commission's acceptance of her proposal for a solution and the appropriate partial disclosure of the (now former) Commissioner's letter. She considers the complaint to be resolved.

Conclusion

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

The European Commission has settled the complaint by giving significant partial access to the requested letter.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 25/03/2020



[1] Article 83(1)(a) of the Common Provisions Regulation 1303/2013:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1303&from=EN> .

[2] Article 142(1)(b) of the Common Provisions Regulation.

[3] European Parliament resolution of 13 December 2018 on conflicts of interest and the protection of the EU budget in the Czech Republic, Point 13,
http://www.europarl.europa.eu/doceo/document/TA-8-2018-0530_EN.pdf .

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

[5] The Ombudsman's decision is available at:
<https://www.ombudsman.europa.eu/en/decision/en/116978> .

[6] Article 4(2), third indent of Regulation 1049/2001.

[7] Article 4(1)(b) of Regulation 1049/2001.

[8] Article 4(3), first subparagraph of Regulation 1049/2001.

[9] Judgment of the General Court of 12 May 2015, *Technion v European Commission*, T-480/11:
<http://curia.europa.eu/juris/document/document.jsf?jsessionid=A27D2A0FF2D5ED9466FF5E824F4C2EDB?text=>
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[10] In the meaning of Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725> .

[11] Regulation 2018/1046 on the financial rules applicable to the general budget of the Union:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1046&from=en> .

[12] The proposal for a solution was not published on the Ombudsman's website as it refers to the content of the requested document and thus contains confidential information.

[13] The Commission's reply to the Ombudsman's proposal for a solution is available at:
<https://www.ombudsman.europa.eu/en/correspondence/en/124284> .

