

Besluit in zaak 1302/2009/TS - Vertraging bij de beantwoording van een initieel verzoek om toegang tot documenten

Besluiten

Zaak 1302/2009/TS - Geopend op 22/07/2009 - Besluit over 15/12/2010

Corporate Europe Observatory (CEO) is een niet-gouvernementele organisatie die tot doel heeft transparantie in de werking van de Europese instellingen te bevorderen. CEO heeft bij de Commissie verzoeken ingediend om toegang tot documenten en informatie over handelsbesprekingen tussen de EU en India, tussen de EU en de ASEAN en tussen de EU en Korea. De Commissie registreerde de verzoeken in februari 2008. In december 2008 gaf de Commissie het publiek gedeeltelijke toegang tot de gevraagde documenten.

In de klacht die CEO bij de Ombudsman heeft ingediend, beweerde CEO dat de Commissie onnodig traag had geantwoord op de initiële verzoeken en daarmee Verordening (EG) nr. 1049/2001 had geschonden.

In zijn besluit merkte de Ombudsman op dat Verordening (EG) nr. 1049/2001, die de toegang tot documenten regelt, een procedure in twee fasen instelt voor de behandeling van verzoeken. Als de instelling niet binnen een termijn van vijftien werkdagen reageert op een initieel verzoek, heeft de verzoeker het recht een confirmatief verzoek in te dienen. Als het confirmatief verzoek wordt geweigerd, of als binnen een termijn van vijftien werkdagen geen antwoord wordt ontvangen, heeft de verzoeker het recht beroep in te stellen tegen de instelling en/of een klacht in te dienen bij de Europese Ombudsman. In het onderhavige geval heeft klager geen confirmatief verzoek ingediend, maar ervoor gekozen het besluit van de Commissie over de initiële verzoeken af te wachten. In de loop van de behandeling van de initiële verzoeken heeft de Commissie klager meerdere keren geïnformeerd dat deze verzoeken vanwege hun complexiteit niet binnen de in Verordening (EG) nr. 1049/2001 gestelde termijn konden worden behandeld. Aangezien klager ervoor koos geen confirmatief verzoek in te dienen, ook al had hij daartoe het recht, heeft de Ombudsman geconcludeerd dat klager op het moment van het lopende onderzoek tevreden was met de toelichtingen van de Commissie. De Ombudsman was daarom van mening dat geen verder onderzoek nodig was.

De Ombudsman merkte echter op dat de Commissie klager geen indicatie had gegeven van de tijd die het zou kosten om het initiële verzoek te behandelen. De Ombudsman was van mening dat het passend zou zijn als de Commissie in toekomstige gevallen een dergelijke indicatie wel geeft, zodat een klager een geïnformeerd besluit kan nemen over de voordelen van het



onmiddellijk indienen van een confirmatief verzoek. De Ombudsman maakte in dit verband een verdere opmerking. Hij nodigde de Commissie ertoe uit om hem binnen zes maanden in te lichten over de actie die de Commissie neemt naar aanleiding van zijn bevindingen.

The background to the complaint

1. The complaint concerns alleged delays by the European Commission in providing a reply to applications for access to documents.
2. The complainant is the Corporate Europe Observatory ('CEO'), a Brussels-based NGO. On 7 February 2008, CEO asked the European Commission's Directorate-General for Trade ('DG Trade') for access to documents regarding the EU-India, EU-ASEAN, and EU-Korea trade negotiations. On the same day, DG Trade sent the complainant an acknowledgement of receipt, also informing it that the Commission had registered its requests as applications for access to documents, and access to information. It also informed CEO that, given the significant number of documents requested (in a total of twelve separate requests), and the length of those documents, the Commission would need some time to identify and analyse them. Therefore, the Commission could not guarantee that it would be able to handle the requests within the time limits [1] provided for in Regulation 1049/2001.
3. By letter of 14 February 2008, DG Trade asked the complainant to submit further clarifications concerning its initial applications. CEO sent further clarifications by letter dated 19 February 2008. By letter dated 20 February 2008, DG Trade replied, stating that the information submitted by the complainant was helpful. DG Trade assured CEO that it would provide a reply as soon as it was able to identify and review all the documents concerned, in accordance with Regulation 1049/2001.
4. By letter dated 6 August 2008, CEO requested information from DG Trade regarding the handling of its request for access to documents.
5. By letter dated 7 August 2008, DG Trade informed the complainant that, given the significant number and the wide range of documents requested, the process of handling them would involve the work of many teams within the DG. It added that DG Trade had now completed identifying the documents and that it was in the process of reviewing them to ensure that it could proceed with their release.
6. By letters dated 8 December 2008, and 19 December 2009, DG Trade informed CEO that it had decided to grant partial access to documents regarding the EU- India, EU-ASEAN, and EU-Korea trade negotiations, respectively.
7. On 19 May 2009, the complainant submitted a complaint to the Ombudsman regarding the delays that had occurred in processing the above outlined requests for access to documents.



The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation

The Commission's replies to the complainant's initial applications for access to documents and information regarding the EU-India, EU-ASEAN, and EU-Korea trade negotiations were unnecessarily delayed and, as such, infringed Regulation 1049/2001.

Claim

The Commission should ensure that the time limits for handling applications under Regulation 1049/2001 are respected.

The inquiry

9. On 22 July 2009, the Ombudsman forwarded the complaint to the Commission. The Commission provided its opinion, which was forwarded to the complainant with an invitation to make observations. The complainant submitted its observations on 28 November 2009.

The Ombudsman's analysis and conclusions

A. Allegation and claim

Arguments presented to the Ombudsman

10. In its opinion, the Commission acknowledged that there had been delays in replying to the complainant's requests for access to documents regarding the EU-India, EU-Korea and EU-ASEAN trade negotiations, and expressed its regret for those delays.

11. The Commission stated that, when handling access to documents requests, the institution must, in accordance with the relevant case-law, also take into account the principle of sound administration. In this regard, the Commission referred to paragraph 101 of case T-2/05 *Verein für Konsumenteninformation v Commission* [2], which states the following:

"[I]t should however be borne in mind that it is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution. It should



also be noted that, where a request relates to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to Article 6(3) of Regulation No 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration. "

12. The Commission also stated that, for the purpose of taking into account the principle of sound administration, Article 6(3) of Regulation 1049/2001 provides that the institutions may confer with the applicant to find a fair solution in the case of an application relating to a very long document, or to a very large number of documents. Furthermore, such a fair solution may consist of extended time limits. The Commission took the position that the interest in sound administration must also be taken into account in cases where multiple, and sometimes complex, requests are made within a short period of time.

13. The Commission stated that, in the present case, DG Trade informed the complainant on several occasions that the handling of its requests for access to documents regarding the EU-India, EU-Korea and EU-ASEAN trade negotiations would take more time. The Commission pointed out that, in its letter dated 17 April 2008, DG Trade referred to the significant number of requests made by the complainant since the beginning of the year, and informed it that a reply within the time limits could not, therefore, be guaranteed. In addition, by letter dated 10 September 2008, DG Trade indicated that it was in the final stages of processing the complainant's other requests for access to documents. The Commission pointed out that, in 2008, the complainant submitted 22 of the 166 applications received by DG Trade for access to documents held, and that this figure represented 13.25% of the total number of requests received by the DG in question.

14. The Commission underlined that, during the course of the last two years, G Trade had introduced several measures to improve, and speed up the handling of access to document requests, and to make its staff aware of the need to handle requests for access to documents in accordance with the highest professional standards. The Commission gave assurances that it would continue to make such efforts, with a special emphasis on first, ensuring that complex requests are handled within reasonable time limits, and second, where delays are encountered, keeping the applicant informed of how the handling of its requests is progressing.

15. The Commission then explained that the delays in the present case were caused by the complexity of the complainant's requests, and by the fact that it had simultaneously received a large number of complex requests, the handling of which demanded significant resources, as well as the "*careful management of resource allocation conflicts*". The Commission recalled that most of the numerous requests received by DG Trade tend to be straightforward, and can be easily answered, since they typically concern one, or a few well-identified document(s). Some requests are, however, extremely complex. The complex requests concern, for example, unidentified records of meetings, or all correspondence, including e-mails, with a non-exhaustive list of organisations over periods of time, which can be as long as four years, in which negotiations with a particular country, or regional grouping, are discussed. The Commission then gave a detailed account of the reasons for the delays in the present case.



16. The Commission explained that the complainant's request for public access to documents relating to the EU-India, EU-ASEAN, and EU-Korea trade negotiations concerned three or four different units within DG Trade. These units were led by the unit with overall geographical responsibility for the region in question, as well as the Cabinet of the Commissioner for Trade. Requests which cover an entire negotiating process, therefore, involve reviewing a large number of files and e-mails to identify material which might fall within the scope of a given request. Once the requested documents have been identified, they are assessed in accordance with the criteria laid down in Regulation 1049/2001, in order to ascertain whether any of the material falling within the scope of the request should not be made available. Such requests can require the involvement of four to eight desk officers. Moreover, the most complex requests often focus on areas where the negotiating process is most active, for instance, in this case, in negotiations with India, ASEAN or Korea. This inevitably creates conflicts in terms of allocation of resources.

17. The Commission pointed out that the complainant's three requests, which are the subject to the present complaint, were just three out of twelve requests it submitted within a period of two days. Of those twelve requests, ten were complex. Consequently, several units within DG Trade had to follow-up on these requests. First, the geographical unit concerned by each request, and second, the units which deal with trade in services, intellectual property, or the environmental aspects of the agreements. The second group had to participate in all ongoing trade negotiations. As a result, these units faced a large amount of requests which were submitted within a very short period of time. The examination and handling of these requests not only had to be carried out in parallel with the day-to-day work of negotiations, but were, unavoidably, also interrupted by travel linked to rounds of negotiations.

18. The Commission then underlined that, in the case of international negotiations, there is an inevitable tension between two considerations: on the one hand, the need to negotiate effectively and in good faith so as to deliver the best deal possible; this need may require that certain sensitive information must be kept confidential, at least during the negotiations; on the other hand, the general principles of transparency, such as those contained in Regulation 1049/2001, which govern the work of the Commission and the other EU institutions.

19. The Commission stated that, as a result of the tension between the above-mentioned goals, a very delicate assessment has to be made as regards what can, or cannot be made public. This explains why Regulation 1049/2001 allows the public interest in transparency to be weighed against other factors, such as the potential harm which can occur if EU negotiating positions are revealed prematurely to its negotiating partners. For example, the loss of EU jobs caused by third countries which retaliate unfairly against businesses which alert the EU to unfair trade practices or barriers; or the weakening of EU decision-making if the Commission, the Council, or Parliament can no longer seek, sometimes confidentially, the informed views of external organisations on the position which should be taken in order to achieve good trade deals. Furthermore, applications for public access to documents require the documents concerned to be thoroughly screened by sufficiently experienced staff who are aware of the issues involved, and who are familiar with the rules on access to documents. Moreover, this has



to be done in the same way throughout the various negotiations to ensure overall transparency and consistency regarding access to documents requests. For the foregoing reasons, the handling of such requests is both time and resource intensive.

20. The Commission then drew attention to the very tight deadlines contained in Regulation 1049/2001. It stated that, where complex requests are concerned, some prioritisation has to be given to the requests, and, in the present case, the three requests to which the present complaint relates, were the ones which were answered last. The Commission stated that the need to prioritise is acknowledged in the Regulation itself, since Article 6 of the said Regulation stipulates that "in the event of an application relating to a very long document, or to a very large number of documents, the institutions concerned may confer with the applicant informally, with a view to finding a fair solution". The Commission recalled that DG Trade informed the complainant several times that it would take some time to handle the complainant's three requests. The Commission strongly refuted any suggestions that DG Trade had adopted a deliberate policy of delaying when answering the requests in question. The Commission argued that the delays encountered were, rather, due to the time required to handle, coordinate, and review this particularly complex series of requests, as well as to ensure that DG Trade exercised a consistent and transparent approach.

21. In its observations, the complainant argued that it is precisely the lack of transparency in DG Trade's consultation processes which forces public interest groups, including the complainant, to make relatively complex and numerous requests for access to documents if they want to find out, in accordance with the Commission's relevant Communication, "*what issues are being developed, what mechanisms are being used to consult, who is being consulted and why, what has influenced decisions in the formulation of policy* [3] ". The complainant acknowledged the complex nature of its requests for access to documents, but argued that that the need for many of its requests could be alleviated, or its requests might be less complicated, if DG Trade were, for example, to use its website to make available updated lists of meetings and correspondence with regard to specific issues. The complainant stated that increasing transparency in this pro-active way would not only reduce the number and volume of access to documents requests, but would also be more in line with DG Trade's repeated assurances that it is firmly committed to operating in a transparent, open, and accountable manner.

22. The complainant then argued that DG Trade's restrictive policy on access to documents unnecessarily increases its workload in dealing with requests for such access. The complainant stated that, whereas, formerly, DG Trade used to release whole documents, it now employs a complicated system of deleting parts of documents which are not explicitly mentioned in requests, and which are, therefore, considered to be 'not relevant'. The complainant stated that this approach is particularly time-consuming since, where there are several separate requests for public access to one specific document, the document then has to be released with different parts deleted, depending on the nature of each individual request. The complainant illustrated this by way of an example where the same minutes were released to CEO in five different versions, since five different requests had to be made. The complainant stated that this practice can render the partially released documents difficult to understand, and can even be the cause of new requests for access to the whole document, which, in turn, increases the workload of the



team dealing with requests for access to documents held by DG Trade.

23. The complainant went on to argue that the way in which DG Trade prioritised its twelve requests for access to documents, which it submitted within a period of two days at the beginning of 2008, had contradicted the priorities CEO had expressed. In its e-mail of 19 February 2008, CEO expressly asked DG Trade to prioritise its requests about the EU-India, EU-ASEAN, and EU-Korea trade negotiations. However, as the Commission itself pointed out, due to some internal prioritisation, "*the three replies to these requests were the ones which were answered last*". The complainant stated that the Commission's prioritisation obviously did not amount to a "*fair solution*" as foreseen in Article 6(4) of Regulation 1049/2001 regarding applications for access to a very long document, or a very large number of documents.

24. The complainant then argued that DG Trade deliberately delays its replies to requests for access to documents from certain civil society groups in order to prevent civil society from scrutinising certain policies and trade negotiations when the processes are still ongoing, and during the time when they could be challenged. In the complainant's view, this deliberate strategy seeks to deny civil society the chance to participate in on-going policy decisions. In support of this argument, the complainant referred to an internal DG Trade document in which the (then) Director-General wrote (regarding a separate request for access to documents) that "*given the hostile attitude of some NGOs (including Corporate Europe Observatory) towards the GATS negotiations and our contacts with the industry, and in view of Corporate Europe Observatory's lack of restraint in using very selective quotes removed from their proper context from the documents it has obtained to attract media attention, it is very likely that, if we gave public access to the correspondence received from the industry, our relations with the latter could be seriously jeopardised.*" The complainant stated that this quotation indicates that DG Trade has a tradition of handling requests for access to documents in accordance with the political position of the applicant, and shows that it has taken a restrictive attitude in releasing information to civil society groups which are critical of its policies.

The Ombudsman's assessment

25. Regulation 1049/2001 establishes a two-step procedure for processing applications for access to documents. An applicant can make an initial application under Article 7 of Regulation 1049/2001. If that application is refused (wholly or partially), or if no response is received within defined time periods, the applicant has a right to make confirmatory application under Article 8 of Regulation 1049/2001. If that confirmatory application is refused (wholly or partially), or if no response is received within defined time limits, the applicant has the right to bring the issue before the General Court. The applicant also has a right to make a complaint to the Ombudsman regarding a refusal to grant public access.

26. Article 7 of Regulation 1049/2001 (Processing of initial applications) provides that:

"1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. 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 and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. 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.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application."

27. As is clear from Article 7(4) of Regulation 1049/2001, the consequence of not meeting the deadlines set out in Article 7(1) and, where applicable, Article 7(3), is that the applicant becomes *entitled* to make a confirmatory application under Article 8 of Regulation 1049/2001. It is worth noting, however, that Article 7(4) does not impose any limit as to precisely *when*, after these time limits have expired, a confirmatory application shall be made in relation to a failure to respond to an initial application. [4] In sum, it is possible to submit a confirmatory application *at any time* subsequent to the expiry of the prescribed time limits set out in Article 7(1) and Article 7(3). This also implies that an applicant can *choose*, for an undetermined period of time, to await a decision in relation to an initial application. Thus, the time limits set out in Article 7 must be understood to be mechanisms which empower applicants to choose one of the following options:

1) to make confirmatory applications *at any time* after the time limits set out in Article 7 have expired;

or alternatively,

2) await a decision on the initial application.

28. In the present case, the Commission exceeded the time limits set out in Article 7 of Regulation 1049/2001. The complainant was, in those circumstances, *entitled* to submit a confirmatory application at any time (up to the time the Commission responded to the three relevant requests for public access in December 2008 [5]). In sum, while the complainant was entitled to make a confirmatory application immediately, once the prescribed time limits set out in Article 7(1) and Article 7(3) had expired, it was also entitled to choose to await a decision from the Commission.

29. Article 7(1) of Regulation 1049/2001 states that an application for access to a document



shall be handled promptly. This implies that the application should be dealt with in the shortest time frame possible. Thus, if the time limits set out in Article 7 are not complied with, and the applicant chooses not immediately to exercise its right to make a confirmatory application, the institution concerned should, in any case, continue to endeavour to respond to the application within the shortest time frame possible.

30. The precise period of time required to deal with a request will depend upon a number of factors, including the number of documents requested, their length and complexity and, above all, the complexity and the sensitivity of the issues that may arise in relation to the exceptions set out in Article 4 of Regulation 1049/2001.

31. The Ombudsman takes the view that, if an institution is faced with an objective need for an extended period of time to process an initial application, it would be in conformity with principles of good administration if the institution were to explain to an applicant the reasons why this need arises, and also to provide the applicant with some indication of how long it will take to process the initial application. An applicant requires such information in order to make an *informed decision* as to whether it is in its interest to exercise its option to submit a confirmatory application or, rather, to await the institution's decision regarding the initial application.

32. In the present case, the Commission explained the delay in responding to the initial application by referring to the complexity and the extent of the requests concerned, the difficulties caused by the fact that negotiations were ongoing, and the need to consult various teams within DG Trade. As regards the Commission's failure to comply with the complainant's request that the three requests, which are the subject to the present inquiry, should be dealt with first, the Commission explained that this was due, in particular, to the *complexity* of those three requests. The Commission stated that they could not be dealt with, first, because of the amount of work involved in their assessment, and second, the prioritising process which had to be carried out when replying to the complainant's numerous requests for access to documents. Other explanations and justifications put forward by the Commission were the amount of work caused by other requests for access to documents, a large part of which were submitted by the complainant, and the need to prioritise the requests. The Commission pointed out that it had dealt positively with the complainant's other nine requests for access to documents.

33. The complainant, in the present case, did not make confirmatory applications in relation to the three requests at issue during the period leading up to December 2008. The complainant, thereby, effectively, *chose* to await the Commission's decisions in relation to its initial applications, and not to impose a strict time frame on the Commission. It can only be concluded from these actions that, at that time, the complainant was convinced by the Commission's explanations regarding the processing of its initial applications.

34. In its observations to the Ombudsman, the complainant now states that the Commission erred in the way in which it prioritised its requests, and that it deliberately delayed releasing the documents while the trade negotiations in question were ongoing. However, if this was the complainant's view during the time the Commission was examining the initial applications, it could have made a confirmatory application at any time, but it did not do so. Furthermore, there



is no evidence to suggest that the Commission sought to mislead the complainant regarding the complexity of the review the institution was carrying out.

35. The Ombudsman notes, however, that, in the present case, the Commission does not appear to have given the complainant an indication of how long it would take to deal with its application. The Ombudsman is of the view that it would be appropriate for the Commission to provide such an indication in future cases. This would allow applicants to make an informed decision regarding the merits of immediately making a confirmatory application. In this context, the Ombudsman will make a further remark.

36. In light of the above, the Ombudsman concludes that no further inquiries are necessary in the present case.

B. Conclusions

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

No further inquiries are necessary in the present case.

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

Further remark

The Commission should, if it cannot deal with an initial application within the time limits set out in Article 7 of Regulation 1049/2001, provide the applicant with reasons for the delay, and an indication of how long it will take to deal with the initial application. This would allow the applicant to make an informed decision regarding the merits of immediately making a confirmatory application.

P. Nikiforos Diamandouros

Done in Strasbourg on 15 December 2010

[1] The time-limit for replying to an initial application, set out in Article 7(1) of Regulation 1049/2001, is 15 working days from the registration of the application. Furthermore, Article 7(3) provides that 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.

[2] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[3] Communication from the Commission. Towards a reinforced culture of consolidation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, 11.12.2002, Com(2002) 704 final.

[4] In contrast, Article 7(2) requires that a confirmatory application be made within 15 days of any *express* refusal or express partial refusal to grant public access to documents.

[5] Article 7(2) of Regulation 1049/2001 states that an applicant can submit a confirmatory application within 15 working days in the event of a total or partial refusal. In the present case, the Commission gave partial access to the three documents in December 2008. Thus, the complainant had, subsequent to those decisions, 15 working days within which to make a confirmatory application, asking the institution to reconsider its position. The Ombudsman is not aware that the complainant made such a confirmatory application.