



REPORT ON THE EUROPEAN OMBUDSMAN'S INSPECTION OF DOCUMENTS AND MEETINGS

COMPLAINT: 2006/2017/██████████

Case title: The alleged failure of the Court of Justice of the European Union to address the concerns of a former judge about various possible instances of maladministration

Date: Friday, 14 September 2018

Location: Premises of the Court of Justice of the European Union, Rue du Fort Niedergrünwald, L-2925, Luxembourg

Present

Representatives from the Court of Justice of the European Union ("CJEU"):

- ██████████ on Administrative Matters
- ██████████ Chambers of the President of the Court of Justice of the European Union

Representatives from the European Ombudsman:

- Mr Lambros Papadias, Head of Inquiries Unit 3
- ██████████, Case Handler, Inquiries Unit 3

Background and purpose of the inspection of documents and meeting

The Ombudsman's inquiry concerns (a) the alleged extension on 1 January 2017 of the Code of Conduct for Members and former Members of the Court of Justice of the European Union¹ ("Code of Conduct") to administrative matters as well as judicial matters; and (b) the CJEU's handling of the complainant's requests for access to documents 0007/2017D and 0007/2017C as well as 0011/2017D and 0011/2017C, resulting in the confirmatory decisions 0007/2017C of 25 August 2017 and 0011/2017C of 17 January 2018 respectively.

The purpose of the inspection meeting was to inquire into the amendment of the Code of Conduct and the CJEU's handling of its confirmatory decisions of 25 August 2017 and 17 January 2018.

¹ Code of Conduct for Members and former Members of the Court of Justice of the European Union, OJ 2016 C 483/01.

Introduction and procedural information

The inspection meeting was organised pursuant to Article 3(2) of the Statute of the European Ombudsman and Article 4 of the European Ombudsman's Implementing Provisions.

The inspection meeting took place from 9:30 until 12:30 and from 14:00 until 16:30.

The Ombudsman's inquiry team explained the procedure for the inspection meeting and informed the CJEU's representatives of the confidentiality rules. The Ombudsman's inquiry team noted that if the CJEU's representatives identify any documents as confidential, no access may be granted to those documents without the CJEU's prior agreement.

Information exchanged

Code of Conduct:

The CJEU's representatives and the Ombudsman's inquiry team discussed whether the European Ombudsman is entitled to inquire into the Code of Conduct. While expressing certain reservations on the matter, the CJEU's representatives agreed to give the explanations requested by the Ombudsman's inquiry team.

The CJEU's representatives stated that the Code of Conduct does not prevent (former) Members from reporting illegalities or irregularities allegedly occurring at the CJEU. On the contrary, if (former) Members become aware of any such illegalities or irregularities, they can and must report them through the formal channels available, that is, internally, through the CJEU itself, and externally, through the European Ombudsman, the European Parliament, the European Anti-fraud Office ("OLAF") and the European Court of Auditors ("ECA").

The CJEU's representatives stated that (former) Members should however not bypass these formal channels and choose instead to disclose in public any such alleged illegalities or irregularities at the CJEU, since the CJEU as a judicial institution does not believe it is appropriate to respond in any way to allegations made through such channels². The representatives noted that the Code of Conduct requires that (former) judges do not undermine the authority of the judiciary, and that its rules are also intended to safeguard the independence of the Members of the CJEU. This independence must at all times be guaranteed since it is a requirement inherent in the task of adjudication.

The CJEU's representatives further stated that the Code of Conduct contains internal rules of the CJEU that are lower in the hierarchy of norms than the EU Treaties and EU regulations. Therefore, the Code of Conduct does not limit in any way the powers of the Ombudsman, the Parliament, the ECA or OLAF to inquire into the CJEU's practices. In addition, they stated that the previous Code of Conduct of 2007, although formulated in terms that were more general, also covered administrative matters.

² The words "such channels" do not refer to "formal channels" at the beginning of the same sentence but to "disclosure in public of any such alleged illegalities or irregularities at the CJEU."

The CJEU's representatives added that the documents relating to the amendment of the Code of Conduct are documents relating to the judicial activity of the institution, which is an issue covered by the complainant's action pending before the General Court in Case T-
[REDACTED]

Transparency and access to documents:

The CJEU's representatives and the Ombudsman's inquiry team exchanged views on the role of the European Ombudsman to inquire into decisions on access to documents which have obtained a definitive character because they were not challenged before the General Court within the time limit provided for in Article 263 of the Treaty on the Functioning of the European Union ("TFEU"). While maintaining their views on this issue, the CJEU's representatives provided further explanations on the handling of the complainant's access to documents requests.

The Ombudsman's inquiry team explained to the CJEU's representatives how the Ombudsman treats complaints concerning public access to documents. In particular, the inquiry team stated that the Ombudsman checks whether the EU institution or body concerned has applied the rules on access to documents and the related case law in a correct and reasonable manner. The inquiry team stated that the Ombudsman could ask the EU institution or body concerned to consider granting (further) access to documents via non-binding proposals for a solution and/or recommendations. The Ombudsman could not however oblige EU institutions or bodies to withdraw previously taken confirmatory decisions. Only the EU Courts issue binding judgments. To illustrate this further, the inquiry team referred to examples of previous access to documents cases dealt with by the Ombudsman.

The CJEU's representatives informed the Ombudsman's inquiry team about the CJEU's procedure for dealing with requests for access to documents.

As regards the present case, the CJEU's representatives explained that the CJEU had granted the complainant access to 190 documents (1 686 pages in total) following requests 0007/2017D and 0007/2017C as well as 557 documents (2 960 pages in total) following requests 0011/2017D and 0011/2017C. In the context of request 0011/2017C, the CJEU had asked the authors of 69 requests for access to documents whether they agreed that their requests for access to documents be disclosed to the complainant following his request for public access to all of their requests. In those cases where the CJEU obtained such consent, it then redacted all personal data from them. It had also redacted all personal data from the CJEU's replies to those requests, in accordance with the applicable rules on data protection.

The CJEU's representatives further outlined in detail the reasoning of the CJEU in its decisions on requests 0007/2017D and 0007/2017C as well as 0011/2017D and 0011/2017C.

The CJEU's representatives stated that, as far as the complainant requested access to documents in relation to a specific person, named by him, all the documents requested are to be classified as information in relation to an identified person and therefore as personal data to which the strict rules on data protection set out in the case-law apply. They stated that the complainant had not shown the necessity to access such personal data, as required

by the Court's settled jurisprudence. Regarding the complainant's sixth question in the context of requests 0011/2017D and 0011/2017C, the representatives informed the inquiry team that the complainant had recently submitted a new request for public access, covering among others, a request for access to documents produced by the legal adviser for Brexit, but this time without naming the person concerned. They stated that the CJEU was currently dealing with that request.

The CJEU's representatives furthermore said that several parts of the complainant's access to documents requests raised the question of whether the documents were related to the administrative or judicial activity of the CJEU. The representatives said that this issue was covered by the complainant's action pending before the General Court (T██████).

Other:

At the end of the inspection meeting, and although the matter is not covered by the Ombudsman's inquiry, the CJEU's representatives also provided the Ombudsman's inquiry team, for information purposes only, with a copy of the new internal rules adopted in November 2017 regarding the use of drivers at the CJEU.

Documents inspected

The CJEU's representatives made available for inspection the documents requested by the Ombudsman's inquiry team, as follows:

- a) The documents disclosed to the complainant in the context of requests 0007/2017D and 0007/2017C (under questions 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, and 13 of those requests);
- b) The non-redacted version of the documents referred to in a);
- c) The documents disclosed to the complainant in the context of requests 0011/2017D and 0011/2017C (under questions 1, 8, 10 and 12 of those requests);
- d) The non-redacted version of the documents referred to in c);
- e) The complainant's initial application 0007/2017D of 22 March 2017, the CJEU's initial reply 0007/2017D of 24 May 2017, the complainant's confirmatory application 0007/2017C of 23 June 2017 and the CJEU's confirmatory decision 0007/2017C of 25 August 2017;
- f) The complainant's initial application 0011/2017D of 17 August 2017, the CJEU's initial replies 0011/2017D of 17 and 18 October 2017, the complainant's confirmatory application 0011/2017C of 16 November 2017 and the CJEU's confirmatory decision 0011/2017C of 17 January 2018;

The Ombudsman's inquiry team inspected the documents and obtained a copy of the documents under e)³ and f)⁴. The CJEU's representatives stated that the documents under b) and d) were confidential.

³ The complainant's initial and confirmatory applications of 22 March and 23 June 2017 respectively and the CJEU's initial reply of 24 May 2017 were already in the complaint file.

⁴ Except for the CJEU's confirmatory decision of 17 January 2018, which was already in the complaint file.

The CJEU's representatives further explained that in relation to the questions included in the complainant's requests for access to documents other than those mentioned under a) and c) above,

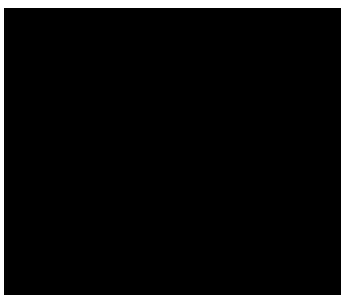
- the documents requested by the complainant did not exist (question 5 of requests 0007/2017D and 0007/2017C and question 4 of requests 0011/2017D and 0011/2017C), or
- the documents fell outside the scope of the public access rules because they are to be considered as related to the judicial tasks of the institution, which is an issue covered by the complainant's action pending before the General Court in Case T- [REDACTED] (question 8 of requests 0007/2017D and 0007/2017C), or because the requests were requests for information instead of requests for access to documents (questions 5, 6 and 7 of requests 0011/2017D and 0011/2017C), or for other reasons, or
- the reply given to the complainant to his initial request was not contested by him at the stage of his confirmatory application (questions 2, 3, 9 and 11 of requests 0011/2017D and 0011/2017C).

Finally, the CJEU's representatives explained that part of the documents under question 12 of requests 0011/2017D and 0011/2017C have not been disclosed on several grounds, inter alia, on the ground that the documents fell outside the scope of access to documents because they are to be considered as related to the judicial tasks of the institution, which is an issue covered by the complainant's action pending before the General Court in Case T- [REDACTED]

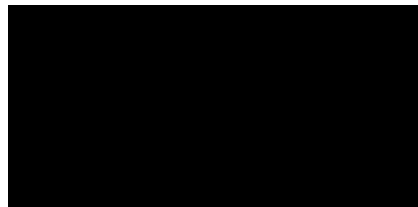
Conclusion of the inspection of documents and meeting

The Ombudsman's inquiry team thanked the CJEU representatives for the detailed explanations and documents, which will be carefully reviewed before the Ombudsman decides how to proceed with this case.

Brussels, 28 September 2018



Mr Lambros Papadias
Head of Inquiries Unit 3



Case Handler, Inquiries Unit 3