Comments of the Commission on a request for information from the European Ombudsman

- Complaint by M [redacted] ref. 720/2020/EWM

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 4 February 2020, Mr [redacted] requested access to the final audit report drawn up by the European Commission with respect to the audit No REGC414CZ0133 to the Czech institutions. The request was sent under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001') and registered on 4 February 2020 under reference GestDem No 2020/0663.

In its initial reply of 19 February 2020, the Directorate-General for Regional and Urban Policy (hereinafter 'DG REGIO') refused access to this document based on the exception of the third indent (protection of the purpose of inspections, investigations and audits) of Article 4(2) of Regulation (EC) No 1049/2001.

On 10 March 2020, Mr[redacted] submitted to the Commission a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001. The confirmatory application was registered on 11 March 2020.

On 23 April 2020, the Secretariat General of the Commission confirmed the initial decision of DG REGIO to refuse access to the requested document based on the exceptions laid down in the third indent (protection of the purpose of inspections, investigations and audits) of Article 4(2), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In particular, the Commission considered that the disclosure of the requested document, which is part of the administrative file of the audit, would be detrimental to the proper conclusion of the audit, as it would compromise the smooth cooperation between the Czech authorities and the Commission in a crucial stage of the procedure. The Commission underlined that "the audit cannot be considered as definitely closed until the recommendations/actions proposed have been accepted and/or implemented by the Member State." The Commission noted that "the authorities of the Member State are currently asked to provide a reply to the findings of the Commission audit services by 5 June 2020". It added that "the Commission will decide on the appropriate follow-up based on the reply received."

On 27 April 2020, Mr [redacted] submitted a complaint to the European Ombudsman who opened an inquiry 720/2020/EWM.

II. THE EUROPEAN OMBUDSMAN'S INQUIRY

In the course of the European Ombudsman's inquiry, the Commission provided the document concerned to the latter upon a specific request thereto by the European Ombudsman's services.

In a letter to the President of the European Commission dated 5 June 2020, the European Ombudsman considered that "there is a strong public interest in making this final audit report available to EU citizens at the earliest opportunity". At the same time, however, the European Ombudsman acknowledged that, "in this case […] the audit at issue cannot be considered completed pending the Member State's comments on the final report." The European Ombudsman did not question that the Commission's confirmatory decision of 23 April 2020 was legally and factually correct in light of the legal and factual circumstances prevailing at the point in time it was taken.

Nevertheless, the European Ombudsman asked the Commission for:

1. A written reply to confirm that the Commission will publish the final audit report proactively once the audit has been completed;

2. An explanation at what stage the Commission will consider that the audit has been completed and to give an indicative time frame (if possible);

3. A written reply from the Commission regarding the complainant's argument that the Commission is obliged to publish the audit report after its completion if it claims to work according to the ISSAI standards, including specifically, which standards are applicable in this case and why.

III. THE COMMISSION'S RESPONSE

The Commission welcomes the European Ombudsman's conclusion that the audit at issue was ongoing at the time of the adoption of the confirmatory decision of 23 April 2020, and is pleased to submit the following comments with regard to the questions outlined in the European Ombudsman's letter of 5 June 2020.

Answering the first question of the European Ombudsman:

The Commission has analysed the Ombudsman request to publish the final audit report together with the Czech authorities' reply to the final audit report and the audit closure letter of the Commission, once such letter will be completed and sent to the auditee.

The Commission is fully aware of the strong public interest raised by the audit. One has however to strike a balance between, on the one hand, transparency and the public interest and on the other hand, confidentiality of the audit procedure and the auditee's rights. Importantly, part of the audit on Cohesion policy covering the European Regional Development Fund, Cohesion Fund and European Social Fund is common to the audit on the agricultural funds, for which the contradictory procedure is still ongoing. While the Commission expects that the audit procedure for cohesion policy may be closed or partially closed in the following weeks (see below reply to question 2), Directorate-General Agriculture and Rural Development (hereinafter 'DG AGRI') is analysing additional information received from the Czech authorities in August 2020. In case of financial consequences resulting from the audit on agricultural funds, a conciliation letter from the Commission services and possibly a hearing by the Conciliation Body are required before a final position is adopted, in line with Article 34 of the Commission Implementing Regulation (EU) No 908/2014. The contradictory procedure until adoption of possible financial corrections can take up to approximately March 2022.The Commission is carefully weighing all the elements including aspects of equal treatment, consistency and the links between the audits, and therefore, reserves the decision on the publication requested by the Ombudsman.

Answering the second question of the European Ombudsman:

The Czech authorities delivered their reply to the final audit report for cohesion policy on 29 May 2020, after a request to prolong the deadline which had been granted exceptionally by Directorate-General for Regional and Urban Policy (hereafter 'DG REGIO') due to the specific circumstances created by the Covid-19 outbreak. The Czech reply was registered by the Commission services on 2 June 2020.

The Commission services are currently analysing the Czech reply. The Commission is aiming at finalising its assessment of the reply by November 2020. If all measures recommended are implemented, and if it can be confirmed that no expenditure related to the affected operations has been declared, the Commission would be in a position to issue an audit closure letter closing or partially closing the audit. This means that DG REGIO and Directorate-General Employment, Social Affairs and Inclusion (hereinafter 'DG EMPL') audit procedure would be considered completed or partially completed from the Commission side.

However, the audit by DG AGRI of EAFRD expenditure with the same objective as for the cohesion policy audit and a common finding (finding 01) is still on-going (see above reply to question 1).

Answering the third question of the European Ombudsman:

According to the Enquiry Planning Memorandum on the Review of the work of Audit Authorities / Compliance audits (programming period 2014-2020), jointly established and implemented by DG REGIO and DG EMPL, ISSAI 4000 are the applicable international auditing standards which the Commission audit services follow when auditing ESI Funds. ISSAI 4000 do not refer to the public disclosure of audit reports, but foresee that the draft audit reports are to be fully and duly shared with the auditees, including for a due contradictory procedure before a final audit report is issued. This is duly foreseen by the Commission audit procedures and was applied in the specific case, in line with the said standards.

IV. CONCLUSIONS

With respect to the audit on cohesion policy funds, the Commission is carefully weighing all the elements including aspects of equal treatment, consistency and the links between the audits, and therefore, reserves the decision on the publication requested by the Ombudsman, and will inform the Ombudsman in due course on its decision taken.

For the Commission
Elisa FERREIRA
Member of the Commission