

Reply of the European Commission to the recommendations of the European Ombudsman related to the time taken by the European Commission to deal with requests for public access to documents.

- Strategic inquiry: OI/2/2022/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The European Ombudsman's office has been monitoring whether the European Commission deals with requests for public access to documents within the deadlines laid down in Regulation 1049/2001. The European Ombudsman concluded that the delays in handling of the applications for access to documents amounted to a case of maladministration and issued recommendations to the Commission.

II. EUROPEAN OMBUDSMAN'S INQUIRY

On 4 April 2022, the Ombudsman launched an own-initiative inquiry on the time taken by the Commission to deal with requests for public access to documents following an increase in complaints regarding delays in the process. As a first step, the Ombudsman asked the Commission to reply to a set of questions and to provide her Office with relevant data. On 29 June 2022, the Commission replied to the Ombudsman's request for information. The Commission provided detailed information and statistical data regarding the handling of applications (average and median time). The Commission concluded that the workload and complexity stemming from an application for access to a single document is not comparable to an application for access to multiple long complex documents originating from third parties with several exceptions applicable, the salience of the numbers concerning average or median time it took to provide replies to initial and confirmatory requests does not provide an accurate picture of the situation.

On 9 September 2022, the Ombudsman requested the Commission to provide her Office with a sample of files and to reply to follow-up questions. The Commission provided the requested files and replied to the Ombudsman's questions on 7 and 25 October 2022, respectively. Moreover, the Ombudsman inquiry team met with Commission services on 16 January 2023. The Commission recalled the increased number of requests for public access to documents the Commission receives. It noted that access requests become increasingly complex, both in terms of their scope and the type of documents that are requested (as examples, the Commission representatives referred to access requests the Commission received concerning COVID-19 vaccines and the Recovery and Resilience Facility). The Commission explained all steps it needs to take to handle a confirmatory application. It also recalled the launch of the Commission's new EASE portal (Electronic Access to Commission Documents) through which applicants can make public access requests and which facilitates dealing with such requests.

On 24 March 2023, the European Ombudsman informed the Commission of its Recommendation on the time the European Commission takes to deal with requests for public access to documents. The Ombudsman concluded that the delays amounted to a case of maladministration and submitted seven recommendations related to resources; interactions with applicants; consultations; handling of confirmatory applications on the ground of lack of initial reply, proactive publication of documents and disclosure of documents in the Public

Portal EASE. The recommendations were made public on 28 March 2023. The European Ombudsman expects the Commission to reply by 3 August 2023.

III. THE REPLY OF THE EUROPEAN COMMISSION

The Commission took note of the Ombudsman's recommendation and related suggestions for improvement. The Commission acknowledges the importance of timely handling requests for access to documents. It is striving to ensure that requests are processed within statutory deadlines. Since Regulation 1049/2001 entered into force in 2001, there has been a significant increase in volume of documents created, reflecting the increased scope of EU policymaking, the jurisprudence from the European Court of Justice has evolved and many more stakeholders are informed about the possibilities offered by the regime of access to documents.

The number of requests for public access to documents has significantly increased over the last few years. In 2021, the number of initial applications reached 8,420, a record figure in the history of Commission's implementation of access to documents policy. This figure reflects an increase of 5.2% compared to 2020 and an increase of 38 % when compared to 5 years earlier. Confirmatory applications, whereby applicants request a review of initial positions of the Directorates-General and services, reached a record high of 355 in 2021. Furthermore, their number reached 418 in 2022, which reflects a striking increase of almost 17.8% in comparison with 2021. Dealing with an ever-increasing number of requests poses many challenges.

As recognised by the Ombudsman, most requests for access to documents submitted to the Commission were handled in a timely manner. The Commission welcomes the Ombudsman's statement that in the vast majority of initial requests for access to documents, the time limit of 30 working days was met. Indeed, the average duration (in working days) for the Commission to take a decision on initial requests for public access in 2021 was 20 days, which is fully in line with deadlines provided for under Regulation 1049/2001. The Ombudsman's finding of maladministration concerns the second stage of the access to documents procedure ('confirmatory'), which represents a limited part of the total applications received by the Commission, 4 % in 2021 and 5% in 2022.

As already indicated to the European Ombudsman in the replies to earlier correspondence and during the meeting, the main reason behind delays in handling requests is not only the ever-growing number of initial and confirmatory applications, but also the ever-wider scope and a higher degree of complexity. Many requests are also very general in their stated scope (e.g., "all documents related to subject of meetings with IT companies") that require substantial background analysis and research work to clarify their exact content and expected delivery.

The data for access to documents show a high level of transparency of the Commission, as full or partial access is granted to a vast majority of the requested documents, as confirmed in almost 74% of the cases at the initial stage in 2021. Furthermore, a wider or even full access was granted in 38% of the 247 cases reviewed at the confirmatory stage in 2021. In 2022, a full or partial access was granted in 77% of cases, while at a confirmatory stage further access was granted in 51% of reviewed cases¹. The data not only confirms the openness of the

¹ Detailed data and statistics are included in the forthcoming Annual Report for 2022.

Commission, but also the commitment of the institution to the right to access documents as part of its overall transparency policy.

The Register of the Commission documents offers wide access to an ever-growing number of documents that are proactively published or that can be requested using the EASE Portal. The Register of the Commission documents was substantially revamped in 2022. It is also coupled with the exercise of rationalisation of registers of the Commission in view of creating a single-entry point.

As part of efforts to simplify the exercise of the right of access to documents, the Commission has facilitated interaction with applicants with the new IT system for submitting and handling requests for access to Commission documents (EASE – Electronic Access to European Commission Documents) that was launched in September 2022. On the new public portal, applicants get valuable information on access to documents, they can submit initial and confirmatory requests, get an overview of their ongoing and closed cases, receive Commission replies electronically, manage their personal data. The Commission is already publishing in its EASE portal documents disclosed in the context of applications for access to documents. It also provides a search functionality so that documents can be easily identified by applicants.

The Commission wishes to respond to each of the recommendations made by the European Ombudsman:

1. Considering the increasing number of confirmatory requests and the fact that the Commission does not meet the prescribed time limit in the vast majority of cases, the Commission should dedicate more resources to dealing with confirmatory requests.

The Commission operates under a stable staffing obligation all along the current multiannual financial framework (2021-2027), having suffered a reduction of 5% of its staff during the previous multiannual financial framework. In addition, the Commission has been given substantial additional tasks in different areas of its competence (energy crisis, war of aggression against Ukraine, humanitarian crises, etc.) without a corresponding increase in staff. Despite these very heavy constraints, the Commission recognises the need to swiftly respond to requests for access for documents in line with the legal requirements of Regulation 1049/2001 and has allocated additional resources to the unit of the Secretariat-General in charge of confirmatory decisions. The recruitment process is ongoing. This solution should enable accelerating the handling of requests and help treat the backlog that might have accumulated.

2. At the outset of the procedure, following the registration of a request, the Commission should verify whether external consultation will be necessary and, if so, launch that process in a timely way.

The Commission welcomes this suggestion, which is in line with its administrative practices and guidance for staff. Whenever required, the Commission services launch the third party consultations as soon as all relevant documents within the scope of the requests are identified. The Commission points to the fact that this first phase (identification of documents) may take time, as a proper assessment of the scope of a request may require prior clarification by the applicant. In many cases, the Commission has to consult third parties as authors or recipients

of the documents concerned, including – where relevant – Member States’ authorities. The outcome of these consultations depends largely on the respect by these third parties of the deadlines set, as well as the transmission of well substantiated responses, where they should indicate the applicable exceptions under Regulation 1049/2001. The standard deadline for a reply to a consultation letter is five days. The Commission regularly reminds staff of the need to take any procedural steps in the file without any undue delay. This is done by means of internal notes and in dedicated meetings of the networks of access to documents correspondents.

3. Where necessary, the Commission should seek to obtain clarifications from requesters within days of the request being registered.

The Commission welcomes this suggestion that already forms part of its current practice consisting in clarifying the scope of unclear requests for access to documents. This is a prerequisite for a correct identification of the service responsible and the relevant documents. This concerns primarily the initial stage; however, in relatively rare cases, it can be also done at the confirmatory stage. As in the above response, the Commission is making sure that all services are aware of applicable rules.

The Commission also notes that the time taken to respond depends largely on the successful interaction with applicants to clarify their request, which is usually the case except some very rare occurrences related to wide-scope requests. In this regard, the Commission issued last year a joint note from the Legal Service and the Secretariat-General on efficient handling of access to documents requests, where this point is clearly highlighted². The Secretariat-General regularly reminds the other Commission departments about the importance of this practice.

4. The Commission should engage with requesters openly and constructively at all stages, and ensure they are provided with all necessary information that may enable them to clarify their requests (for example by providing a list of documents that potentially fall within the scope of the request).

The Commission welcomes this suggestion. It is usual practice by the Commission to reply to any communication received from an applicant, in line with the rules of the Code of Good Administrative Conduct. Moreover, the new EASE Portal offers a very efficient interface for interaction between the Commission and applicants with smooth exchanges on the steps of procedure, with the Portal sending a notification to the applicant as soon as a step of the procedure is made for the ongoing case. The Commission notes also the surge in the number of wide-scope requests that make an identification of documents exceedingly difficult, thus a constructive approach and clear responses from the applicants are also a prerequisite for timely handling of the requests.

5. For confirmatory applications submitted where the Commission has failed to take an initial decision within the prescribed time limits, the Commission should end its practice of calling its decision on the confirmatory application an initial decision.

The Commission understands that the Ombudsman suggests that it prepares a confirmatory decision in all cases, including the ones where no initial reply was issued within statutory deadlines by the line Directorates-General and where the applicant introduced a confirmatory

² ARES (2022) 4823096.

request only due to s/he not receiving an initial reply within statutory deadlines. The Commission strives to safeguard the procedural rights of an applicant through the entire process. Therefore, whenever an initial response was not provided within the statutory deadlines of Regulation 1049/2001, the Secretariat-General, while assessing the confirmatory application, liaises with the service in charge at initial stage and urges it to provide the initial reply without any further delay. Once an initial reply is provided, the Commission, in line with the two-step procedure organised by the Regulation 1049/2001, enables the applicant to make a confirmatory application and to request the review of the initial answer. This solution is legally sound, complies with Regulation 1049/2001, and ensures legal security for the applicant by preserving its full means of redress.

This approach is also necessary for operational and efficiency reasons:

- as the Commission applies a decentralised approach to the handling of access to documents requests, line Directorates-General are in charge of the identification and assessment of the requested documents, also when those documents pertain to their tutor Commissioners and Cabinets. On this basis, they prepare an initial reply. Due to the very large area of the Commission competences, the Secretariat-General cannot substitute a competent service in charge of a case at initial level and must rely on its work;
- once an initial reply is provided, an applicant must be able to make use of means of redress as per Regulation 1049/2001 and is entitled to file a confirmatory application to the Commission. Were the Commission to provide an initial answer at the confirmatory stage, this would prevent the applicant from requesting a review at confirmatory level and would limit means of redress to those opened at confirmatory level (complaint to the European Ombudsman or filing a case before the Court). It would not be a satisfactory way of handling a request; both from a legal point of view and from an applicant standpoint.

For these reasons, the Commission is of the opinion that its present practice is legally sound and the best to safeguard the rights of applicants.

6. The Commission should continue anticipating policy areas/topics that may generate particular public interest and ensure proactive transparency in relation to these policy areas/topics, such as by considering in advance what documents should be made public and publishing such information in user-friendly and accessible formats, for example on dedicated webpages.

The Commission welcomes this suggestion, which aligns with its constant efforts to offer more proactive access to documents and its general priority to ensure more transparency of its action. The Commission has already a good record of accomplishment of such proactive publication, in relation, for example, to the Brexit negotiations or trade negotiations. The requests for documents related to the purchase of vaccines against Covid-19 or to the Recovery and Resilience Facility also made a convincing case for such proactive publication of relevant documents. The Commission will continue to proactively anticipate public interest and publish all necessary information on its websites and multiple registers. The Register of Commission Documents also offers already a lot of documents than can be accessed directly or easily requested directly from the database. The Commission will continue its work to offer more documents via its Register of Documents.

7. Documents disclosed in the context of public access requests should be published and easy to find on the Electronic Access to Commission Documents' Portal (EASE). This implies having clear titles that have sufficient information. Guidance on drafting clear titles could be made available to all those involved in dealing with public access requests.

The EASE Portal (Electronic Access to Commission Documents) provides documents disclosed in the context of other requests for access to documents in a simple and accessible way. The search features are implemented in the Portal allowing documents' searches by certain key criteria: title, service, dates, free text, or reference of the document.

In order to facilitate the identification of documents, the Secretariat-General has issued specific guidance related to the title or subject of documents. The primary objective of a title or subject of a document is to succinctly describe its contents, in order to understand what it is mainly about without having to consult the full document itself. This guidance is available to staff and will be regularly reminded to them through meetings of the networks of access to documents correspondents and via the helpdesk.

IV. CONCLUSION

The Commission welcomes most of the Ombudsman's recommendations that largely correspond to its current practices. It notes that most requests for access to documents are handled within the deadlines provided for by Regulation 1049/2001 (20 days on average). It notes that certain delays occur at a confirmatory stage due to the complexity and sensitivity of the document requests, but also the sheer number of documents requested by applicants and their volume. The Commission has already reinforced the team in charge of confirmatory applications, which should bring tangible results in the medium term. The Commission regularly revises the existing practice, taking into account the relevant case-law of the European Court of Justice and the recommendations of the European Ombudsman. Moreover, the increased level of digitalisation of the work of the Commission (e.g. the roll-out of EASE) simplifies the preparation of initial and confirmatory decisions.

For the Commission

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