

**Reply of the European Commission on a request for copies of three documents from the Hungarian file under the Conditionality Regulation from the European Ombudsman
- Complaint by Mr ████████, ref. 646/2024/PVV**

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The complaint concerns the Commission's handling of a request for public access to documents dated 6 December 2023 (EASE 2023/7257). In this request, the applicant asked for access to the following documents, as referenced in the Commission's Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022)485 final (hereafter: 'the Proposal'):

- (1) The 'Request for information' the Commission sent to Hungary on 24 November 2021, cited in paragraph (4) of the explanatory memorandum of the Proposal,
- (2) The 'Written notification' the Commission sent to Hungary on 27 April 2022, cited in paragraph (5) of the explanatory memorandum of the Proposal,
- (3) The 'Intention Letter' the Commission sent to Hungary on 20 July 2022, cited in paragraph (8) of the explanatory memorandum of the Proposal,
- (4) The 'Study on concentration of awards and potential risks of fraud, corruption and conflict of interest in public procurement procedures in Hungary with focus on EU funded public procurements - Empirical analysis of Hungarian public procurement data from 2005 to 2021, Corruption Research Center Budapest', procured by DG Budget, cited in paragraph (25) and footnote 11 of the explanatory memorandum of the Proposal,
- (5) All documents that contain information about 'the examination of certain tender data' and 'reports by media and stakeholders', cited in paragraph (13) of the main text of the Proposal,
- (6) All documents that contain information about the findings of 'consecutive audits by the Commission services' for the 2007-2013 and the 2014-2020 programming periods, as well as the 'financial recommendations for the recovery of significant amounts', concerning the same programming periods, cited in paragraph (11) of the explanatory memorandum of the Proposal, that are relevant in the context of the conditionality procedure (meaning the Commission has relied upon them during the procedure). Including, but not restricted to, the findings of and the recommendations arising from 'Audit REGC214HU0068', cited in footnote 6 of the explanatory memorandum of the Proposal.

Due to the need for further internal discussions on whether disclosing the documents, the Commission sent a request to the applicant for additional time beyond the legal deadline, however, not having received a reply from the Commission within the time limit, the applicant asked the Commission to review what he considered to be the Commission's implicit refusal to grant access (by making a 'confirmatory application') on 16 February 2024.

The Commission replied to the applicant on 22 March 2024, granting full access to a study and six documents containing information about the examination of certain tender data. In addition, the Commission provided the complainant with several hyperlinks to publicly available reports by media and stakeholders. Furthermore, the Commission granted partial access to three documents: the ‘Request for information’, the ‘Written notification’, and the ‘Intention Letter’ as referred to in the Proposal’s explanatory memorandum. In doing so, the Commission invoked exceptions under the EU legislation on access to documents, arguing that full disclosure would undermine the protection of court proceedings and the Commission’s decision-making process.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The partial access to the three documents (the ‘Request for information’, the ‘Written notification’, and the ‘Intention Letter’) is now being questioned by the applicant through the complaint to the European Ombudsman.

III. EUROPEAN OMBUDSMAN’S INQUIRY

The European Ombudsman requested the Commission to provide copy of the three documents for which partial access was granted by 25 April 2024, in order to determine whether the Commission correctly provided partial access.

IV. THE REPLY OF THE EUROPEAN COMMISSION

The Commission upholds its decision to grant partial access to the three documents in question. As explained to the applicant, the disclosure of some parts of the documents was prevented by exceptions to the right of access laid down in Article 4(2) and Article 4(3) of Regulation (EC) No 1049/2001 (‘Regulation’).

Article 4(2) of the Regulation provides that ‘the institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings’. As six applications for partial annulment of the Council Implementing Decision of 15 December 2022 are pending before the General Court, the Commission redacted, in granting partial access, sections of the three documents concerned that would be relevant for the court proceedings. The Commission believes that the court proceedings must be protected by not disclosing these relevant sections.

Furthermore, the first subparagraph of Article 4(3) of the Regulation provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.’ Certain redacted parts of the three documents concerned detail additional considerations regarding some aspects, on which the Commission reserves its right to open a procedure under the Conditionality Regulation in the future. To be more specific, these redacted parts concern i.e., [REDACTED], which are aspects so far not followed up on in the procedure under the Conditionality Regulation, however, the Commission cannot exclude that it would follow up on them in the future. Hence, disclosure of these parts of the documents would undermine the future decision-making process of the Commission (and, in the procedure’s final stage, of the Council).

It should also be noted that the exceptions laid down in Article 4(2) and Article 4(3) of the Regulation apply unless there is an overriding public interest in disclosure of the document, and the applicant has failed to refer to any such overriding public interest in his application.

Finally, the Commission confirms that there are no additional documents falling within the scope of the applicant's request (EASE 2023/7257), beyond what the Commission already identified in its reply.

V. CONCLUSION

To conclude, the Commission upholds its decision to grant partial access to the three documents in question based on the exceptions to the right of access laid down in Article 4(2) and Article 4(3) of the Regulation. The Commission remains available to the European Ombudsman in case of any further queries in relation to this complaint.

VI. LIST OF ENCLOSURES

The following documents were shared with the European Ombudsman via SECEM on 25 April 2024:

- Request for Information – original version;
- Request for Information – redacted version as provided to the applicant;
- Written Notification – original version;
- Written Notification – redacted version as provided to the applicant;
- Intention Letter – original version;
- Intention Letter – redacted version as provided to the applicant.

These documents are marked as SENSITIVE NON CLASSIFIED and therefore would not be shared further by any additional means.