

Reply by the European Commission to a proposal for a solution from the European Ombudsman on how the European Commission dealt with a request for public access to documents related to its proposal for applying the 'rule of law procedure' in Hungary
ref. 646/2024/PVV

I. BACKGROUND

On 6 December 2023, the European Commission ('Commission') received a request for public access to several documents referred to 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 ('Proposal') ⁽¹⁾, issued pursuant to the Conditionality Regulation ⁽²⁾, namely:

- (1) the 'Request for information' the Commission sent to Hungary on 24 November 2021, mentioned in paragraph (4) of the explanatory memorandum of the Proposal,
- (2) the 'Written notification' the Commission sent to Hungary on 27 April 2022, mentioned in paragraph (5) of the explanatory memorandum of the Proposal,
- (3) the 'Intention letter' the Commission sent to Hungary on 20 July 2022, mentioned 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 the Directorate-General for Budget ('DG Budget'), mentioned 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', mentioned 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, mentioned in paragraph (11) of the explanatory memorandum of the Proposal, that are relevant in the context of the conditionality procedure (i.e., that the Commission has relied upon them during the procedure), including, but not restricted to, the findings of and the recommendations arising from 'Audit REGC214HU0068', mentioned in footnote 6 of the explanatory memorandum of the Proposal.

⁽¹⁾ COM/2022/485 final.

⁽²⁾ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 4331, 22.12.2020, p. 1.

On 21 December 2023, the Commission services informed the citizen requesting the documents (the ‘complainant’) that the analysis of his request was still on-going and extended the time to reply until 26 January 2024.

On 26 January 2024, the Commission services informed the complainant that the reply would be delayed by a few days, as a reply from the third-party author of one of the requested documents, which had been consulted on the possible disclosure of the documents in question under Article 4(4) of Regulation (EC) No 1049/2001, was still outstanding.

By e-mail of 16 February 2024, registered on 18 February 2024, the complainant submitted a confirmatory application due to the lack of reply to his initial application for public access to documents. The Commission services extended the deadline to reply to the confirmatory application until 4 April 2024.

On 21 March 2024, the Commission services issued an initial reply (i) granting full access to the documents listed under number (4) and (5), (ii) informing that a separate reply would be sent for the documents under number (6), and (iii) granting partial access to the documents listed under number (1), (2) and (3), based on exceptions to disclosure laid down in the second indent of Article 4(2) (protection of court proceedings, in this case T-115/23, T-132/23, T-133/23, T-138/23, T-139/23 and T-140/23) and in Article 4(3) of Regulation (EC) No 1049/2001 (protection of the decision-making process).

As the complainant had received a reply to his initial request, on 2 April 2024, the Commission services closed the confirmatory application related to the lack of initial reply and invited the complainant to submit a new confirmatory application if he wished to challenge the substance of the Commission services' reply of 21 March 2024, thereby preserving the two-stage process provided under Regulation (EC) No 1049/2001. The complainant did not submit any such confirmatory application.

II. THE EUROPEAN OMBUDSMAN’S INQUIRY AND THE PROPOSAL FOR A SOLUTION

On 3 April 2024, the complainant submitted a complaint before the European Ombudsman. In his letter, the complainant argued that the Commission services should have granted full access to the three partially disclosed documents.

On 18 April 2024, the European Ombudsman opened an inquiry into the Commission services’ refusal to grant full access to the requested documents.

On 8 May 2024, the Commission services replied to the European Ombudsman’s request to provide a copy of the three documents for which partial access was granted in order to determine whether the Commission services correctly provided partial access. With this reply, the Commission services upheld their decision to grant partial access to the three documents in question and presented additional arguments in this regard.

During the inquiry, representatives of the Commission services met with the European Ombudsman inquiry team on two occasions (in August and October 2024) to provide further clarifications on the Commission services’ reasons for the partial redaction of the requested documents and the decision to close the complainant’s confirmatory application.

On 12 November 2024, the European Ombudsman inquiry team informed the complainant of the Commission's position, by sharing the report of the two meetings along with the redacted report of the Commission services' additional views of 8 May 2024.

On 12 December 2024, the complainant contested the Commission services' position.

On 14 February 2025, the European Ombudsman proposed the following solution (the 'proposal for a solution'):

'The European Commission should:

- 1) review its application of the exceptions under Article 4(2) and Article 4(3) of Regulation 1049/2001 with a view to granting wider access to the documents concerned, in light also of the orders of the General Court on admissibility of the actions against the Commission.
- 2) explain, in more detail, why any remaining redactions are covered by the exceptions invoked.
- 3) engage with the complainant's arguments regarding the existence of public interest in disclosure and balance any competing interests to determine if there is an overriding public interest in disclosure.'

III. THE REPLY OF THE EUROPEAN COMMISSION

1. Preliminary remarks

Preliminarily, the Commission would like to note the following, in relation to the text of the proposal for a solution.

In reference to paragraph 21 of the proposal for a solution, the statement that the Commission 'adopts a yearly reassessment' is not factually correct. According to Article 7(2) of the Conditionality Regulation, the Commission is required to reassess the situation 'at the latest one year after the adoption of measures by the Council', on its own initiative and if the Member State concerned has not requested the Commission to reassess the situation. No provision in the Conditionality Regulation requires the Commission to carry out a yearly reassessment. In fact, the Commission did reassess the situation once, on 13 December 2023 ⁽³⁾.

In reference to paragraph 40 of the proposal for a solution, the Commission would like to clarify that after the General Court dismissed as inadmissible some of the actions of the applicants in so far as they were directed against acts of the Commission, the Commission applied to join these proceedings as an intervener. The Commission issued the documents that led to the adoption of the Council Implementing Decision (EU) 2022/2506 of 15 December 2022 and continues to support the Council in the ongoing litigation (T-115/23, T-132/23, T-133/23, T-138/23, T-139/23 and T-140/23).

⁽³⁾ See Commission Decision C(2023) 8999 final of 13.12.2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, available at https://commission.europa.eu/document/download/83f08b3a-bf4a-4462-a361-88d44692452b_en?filename=C_2023_8999_1_EN_ACT.pdf.

2. Assessment of the European Ombudsman's proposal for a solution

The Commission appreciates the thoroughness of the European Ombudsman's inquiry and the exchanges held between the respective services.

As the proposal for a solution notes, the situation has evolved since the Commission services' reply to the complainant of 2 April 2024 and after the latest exchanges held with the European Ombudsman's inquiry team in August and October 2024. In particular, the Commission adopted a new decision pursuant to Article 7(2) of the Conditionality Regulation on 16 December 2024 ⁽⁴⁾ following a formal request by Hungary.

In this light, the Commission has assessed the European Ombudsman's proposal for a solution comprehensively. It has considered the observations contained in the European Ombudsman's proposal for a solution, the time that has passed since the Commission services' reply to the complainant of 2 April 2024 and the latest exchanges held with the Ombudsman's inquiry team.

As regards the European Ombudsman's observations on the application of the exception for the protection of court proceedings (second indent of Article 4(2) of Regulation (EC) No 1049/2001), the Commission has applied to be an intervener in certain actions filed for the annulment of the Council Implementing Decision of December 2022 (T-115/23, T-132/23, T-133/23, T-138/23, T-139/23 and T-140/23). At the same time, the Commission acknowledges that because of the publication of its decision of 16 December 2024, the partial redaction done in reply to the complainant's request is no longer relevant.

Notwithstanding the fact that the applicant did not put forward any arguments for the existence of an overriding public interest and, after taking into account the European Ombudsman's observations, the Commission services carried out a new assessment of its position on the documents concerned, pursuant to Article 15(2) of the Commission's Detailed rules for the application of Regulation (EC) No 1049/2001 ⁽⁵⁾. Following this assessment, the Commission services have decided to disclose the parts of the documents that had remained redacted.

IV. COMMISSION'S ACTION FOLLOWING ITS ASSESSMENT

In light of the foregoing, please find attached the unredacted versions of the documents listed under number (1), (2) and (3) of the complainant's initial application. The Commission services understand that the Ombudsman will communicate the present reply to the complainant and hereby agrees with the transmission to the complainant of the unredacted versions of the requested documents. In accordance with Article 15(2) of the Commission's Detailed rules for the application of Regulation (EC) No 1049/2001, the

⁽⁴⁾ Commission Decision C(2024) 9140 final of 16.12.2024 pursuant to Article 7(2) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, concerning a written notification from Hungary with regard to Article 2(2) of Council Implementing Decision (EU) 2022/2506 of 15 December 2022, available at https://commission.europa.eu/document/download/8003e1ad-8e79-4238-bf76-af1fcd2b5efe_en?filename=20241216%20Decision%20on%20PITs%20notification%20-%20EN.pdf.

⁽⁵⁾ Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 (OJ L, 2024/3080, 5.12.2024, ELI: <http://data.europa.eu/eli/dec/2024/3080/oj>).

documents thus disclosed and the present reply will be published on the Commission's EASE ⁽⁶⁾ Portal.

V. CONCLUSION

Considering the full disclosure of the requested documents, the Commission's action is in line with the proposal for a solution by the European Ombudsman.

For the Commission

Piotr SERAFIN

Member of the Commission



⁽⁶⁾ Electronic Access to Commission documents (EASE).

List of enclosures both in Hungarian and English:

- the ‘Request for information’ the Commission sent to Hungary on 24 November, 2021,
- the ‘Written notification’ the Commission sent to Hungary on 27 April 2022,
- Annex I to the ‘Written notification’ the Commission sent to Hungary on 27 April 2022,
- Annex II to the ‘Written notification’ the Commission sent to Hungary on 27 April 2022,
- the ‘Intention letter’ the Commission sent to Hungary on 20 July 2022 (the annex had already been disclosed in full).