

Reply of the European Commission to the recommendation from the European Ombudsman on how the European Commission dealt with a request for public access to documents related to its exchanges with the Hungarian government on judicial independence. Complaint [REDACTED], ref. 849/2024/PVV [REDACTED]

I. SUMMARY OF THE FACTS

On 13 November 2023, the complainant submitted an application¹ for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’)².

In his application, handled by the Directorate-General for Employment, Social Affairs and Inclusion (hereinafter ‘DG EMPL’), the applicant requested access to

‘- All documents by which the Hungarian authorities have informed the Commission, pursuant to Article 15 paragraph 3 of Regulation 2021/1060, that they consider an enabling condition that was not fulfilled at the time of approval of a programme under that regulation has been subsequently fulfilled. In particular, the document containing a new “self-assessment” about the fulfilment of the horizontal enabling condition “Effective application and implementation of the Charter of Fundamental Rights” as regards judicial independence. [REDACTED].’

- All documents that contain the Commission's assessment of the information submitted by Hungary pursuant to Article 15 paragraph 3 of Regulation 2021/1060, or any exchange between the Commission and the Hungarian authorities following a submission of information pursuant to Article 15 paragraph 3 of Regulation 2021/1060. [REDACTED].’

For the purpose of replying to the access to documents request, on 29 December 2023, DG EMPL consulted the Hungarian authorities, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, with respect to documents [REDACTED].’

¹ Registered with reference [REDACTED].
² OJ L 145 of 31.5.2001, p. 43.

On 12 January 2024, the Hungarian authorities opposed the disclosure of documents [REDACTED] based on the exception of the third indent (protection of the purpose of inspections, investigations and audits) of Article 4(2) of Regulation (EC) 1049/2001. The Hungarian authorities observed that:

- 1) The documents contain sensitive information concerning the preparation of Hungary's judicial reform, which includes exchanges between the Hungarian Government and the Commission, and also exchanges between the Hungarian Government and the supreme court of Hungary, the Curia, and the central administrative supervision body, the National Office for the Judiciary (OBH);
- 2) the Commission, in its decision of 13 December 2023, clarified that it would 'closely and continuously monitor, notably through audits, active engagement with stakeholders and in monitoring committees, the application of the measures put in place by Hungary'. The Commission also made clear in the same document that '[i]f, at any point in time, the Commission considers that this horizontal enabling condition is no longer fulfilled, it may again decide to block funding'³; and
- 3) the Commission's monitoring process is still ongoing and there is no overriding public interest in disclosure.

In its initial reply of 30 January 2024, DG EMPL identified documents registered under five ARES registration references⁴ falling under the scope of the applicant's request. It granted full access to documents [REDACTED] and partial access to document [REDACTED] based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. It refused access to documents [REDACTED] based on the exception of the third indent (protection of the purpose of investigations, inspections and audits) of Article 4(2) of Regulation (EC) No 1049/2001 and to documents [REDACTED] based on the exception of the second subparagraph (protection of decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

On 28 February 2024, the complainant submitted a confirmatory application contesting the applicability of the exception of the third indent (protection of the purpose of investigations, inspections and audits) of Article 4(2) of Regulation (EC) No 1049/2001 with respect to documents [REDACTED], [REDACTED], and the applicability of the exception of the second subparagraph (protection of decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001 with respect to documents [REDACTED].

³ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465.

⁴ Documents [REDACTED] are registered under [REDACTED]. Documents [REDACTED] are registered under [REDACTED]; Document [REDACTED] is registered under [REDACTED]. Documents [REDACTED] are registered under [REDACTED]. Document [REDACTED] is registered under [REDACTED].

In the absence of a reply to the confirmatory application within the statutory limit, on 30 April 2024, the complainant submitted a complaint with the European Ombudsman⁵.

Following the submission of the complaint, on 17 May 2024, the Ombudsman opened an inquiry on the Commission's implicit refusal to grant access to the documents requested under Regulation (EC) No 1049/2001.

In the course of the Ombudsman's inquiry, the Commission provided a copy of the documents requested to the Ombudsman, upon its request.

The Legal Service of the Commission asked for a meeting with the Ombudsman inquiry team. The meeting between the Legal Service and the Ombudsman inquiry team took place on 3 June 2024⁶.

Following a review of the reply given by DG EMPL, on 9 July 2024, the Commission issued the confirmatory decision [REDACTED] [REDACTED]. In its confirmatory decision, the Commission identified additional documents falling within the scope of the request⁷, informed the complainant that documents [REDACTED] were publicly available and provided the links thereof. The Commission protected documents [REDACTED] [REDACTED] from public disclosure based on the exceptions laid down in the second (protection of court proceedings) and third (protection of the purpose of investigations) indents of Article 4(2) of Regulation (EC) No 1049/2001.

In particular, the Commission explained that documents [REDACTED] [REDACTED]

- have been annexed to the Commission defence and form part of the court file in case C-225/24 *Parliament v. Commission*⁸ that is currently ongoing;
- were gathered in the context of an investigation, namely the assessment of the fulfilment by Hungary of the horizontal enabling condition on the 'Effective application and implementation of the Charter of Fundamental Rights' (HEC Charter 3) for the implementation of the Cohesion Policy funds pursuant to Article 15(4) of Regulation (EU) 2021/1060⁹ and in preparation of the Commission Decision C(2023)9014¹⁰ of

⁵ Reference 849/2024/PVV.

⁶ [Report on the meeting of the European Ombudsman inquiry team with representatives of the European Commission on its refusal to grant public access to documents related to exchanges between the Commission and Hungary on judicial independence | Correspondence | European Ombudsman.](#)

⁷ Documents [REDACTED] [REDACTED] [REDACTED] are registered under [REDACTED]; Document [REDACTED] is registered under [REDACTED]; Document [REDACTED] is registered under [REDACTED]

⁸ *Parliament v Commission*, Case C-225/24, application lodged on 26 April 2024.

⁹ OJ L 231, 30.6.2021, p. 159–706.

13 December 2023 (hereinafter ‘the Commission Decision’). The Commission explained that according to the result of the pending court case C-225/24, the Commission might be still called upon to recommence its investigation activities with a view to the possible adoption of a new decision on the fulfilment of the Charter HEC by Hungary¹¹.

Furthermore, during the assessment of the case at confirmatory stage, the Secretariat-General registered *ex officio* a new initial request [REDACTED] with respect to documents not identified at initial stage related to the thematic enabling conditions (TECs) that were not fulfilled at the time of the approval of Hungary’s operational programmes. On 15 June 2024, DG EMPL issued a reply granting wide access to 17 additional documents subject only to the redaction of personal data based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

II. THE EUROPEAN OMBUDSMAN’S RECOMMENDATION

In its recommendation of 13 February 2025, the Ombudsman takes the view that the Commission has not sufficiently demonstrated how the disclosure of the documents could undermine the court proceedings and challenges the Commission’s position that the disclosure of the documents would undermine an investigation. In addition, the Ombudsman stresses the importance of informing the public of the Commission and the Hungarian authorities’ actions to protect the financial interests of the EU and to ensure that the rule of law is respected.

2.1. Paragraphs 29 – 38 – Protection of court proceedings

The Ombudsman acknowledges that the documents have been annexed to the Commission’s defence in case C-225/24 and have a relevant link with the court proceedings in that case. However, the Ombudsman considers that this circumstance does not suffice to apply the exception.

The Ombudsman takes the view that the Commission did not demonstrate an actual or specific risk to the court proceedings arising from disclosure that is reasonably foreseeable and not hypothetical. In the Ombudsman’s opinion, the Commission did not demonstrate that the principle of equality of arms or the integrity of the court proceedings would be compromised.

¹⁰ Commission Decision C(2023) 9014 of 13 December 2023 on the approval and signature of the Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition ‘3. Effective application and implementation of the Charter of Fundamental Rights’ with regard to the deficiencies in judicial independence in Hungary.

¹¹ Judgement of the Court of Justice of 28 June 2012, *Commission v Editions Odile Jacobs*, C-404/10, ECLI:EU:C:2012:393, paragraph 130.

With respect to the respect of the principle of equality of arms, the Ombudsman claims that the Parliament already has privileged access to the documents as part of the court proceedings, consequently their disclosure would not give it a further advantage.

Following the inspections of the documents, the Ombudsman considers that the documents only contain factual information and limited ‘positions’ or ‘assessments’ and not internal positions or internal legal positions on contentious issues. In view of this, the Ombudsman ‘remains unconvinced how the Commission’s ability to defend its Decision would be impeded’ by the disclosure.

2.2. Paragraphs 39 to 45 – Protection of the purpose of the investigation

The Ombudsman acknowledges that the Commission has correctly considered the assessment of enabling conditions under Regulation (EU) 2021/1060 as an investigation. However, the Ombudsman takes the view that the protection of these documents from disclosure is not justified by the fact that the Commission might still be called upon to recommence its investigation activities with a view to the possible adoption of a new decision on the fulfilment of the Charter HEC by Hungary, according to the result of the pending court case C-225/24.

The Ombudsman draws three considerations:

- 1) The Ombudsman finds that the Commission could not refer to case-law *Commission v. Editions Odile Jacob*¹², because the documents identified are not internal documents, nor has a general presumption of confidentiality been recognised for the type of documents at issue.
- 2) The Ombudsman finds that it would be disproportionate to exclude public scrutiny of the measures Member States proposed to remedy concerns and/or how the Commission assessed fulfilment with these conditions until the end of the current multiannual financial framework based on the mere possibility of a new assessment by the Commission. Moreover, the Ombudsman takes the view that the Commission’s investigation has become devoid of any object and the prospect of any new assessment is too hypothetical to be taken into account. In particular, while the factual information contained in the documents requested may remain relevant, the Commission’s assessment would have to be replaced to take account of the Court of Justice of the European Union (CJEU)’s view and more recent factual information.

¹² Judgement of the Court of Justice of 28 June 2012, *Commission/ Editions Odile Jacobs*, C-404/10, ECLI:EU:C:2012:393, paragraph 130.

III. THE EUROPEAN COMMISSION'S REPLY TO THE RECOMMENDATION OF THE EUROPEAN OMBUDSMAN

3. Legal context

The Commission observes that the documents identified consist of preparatory documents underlying the adoption of the Commission Decision C(2023)9014 of 13 December 2023 concerning Hungary's compliance with the horizontal enabling condition of the Common Provision Regulation (hereafter: 'Commission Decision of 13 December 2023') 'Effective application and implementation of the Charter of Fundamental Rights' ('HEC 3') in relation to deficiencies in Hungarian judicial independence; as well as all those shared between Hungary and the Commission pursuant to Article 15(3) and (4) of Common Provision Regulation (hereafter CPR).

Enabling conditions are prerequisites, which Member States must fulfil to ensure the effective and efficient implementation of the Cohesion Policy funds. There are four horizontal enabling conditions in the areas of (1) public procurement, (2) State aid, (3) compliance with the EU Charter of Fundamental Rights, and (4) the application of the United Nations Convention on Persons with Disabilities. To have their expenditure reimbursed, Member States must fulfil all four horizontal enabling conditions, as well as the thematic ones which are relevant to their programmes throughout the entire programming period¹⁴.

More specifically, the horizontal enabling condition on the EU Charter of Fundamental Rights ('HEC3') requires Member States to establish effective mechanisms so that the implementation of their programmes complies with the Charter.

In its Implementing Decisions of 22 December 2022, the Commission considered that the HEC 3 'Effective application and implementation of the Charter' could not be considered as fulfilled – among others – because of deficiencies in Hungarian judicial independence until Hungary took several measures specified in those decisions. The Hungarian authorities started preparing such measures and discussed them with Commission services and Members. The Commission assessed those measures carefully and, after further clarifications, by its Decision C(2023)9014 adopted on 13 December 2023, decided that HEC3 had been fulfilled regarding judicial independence. Thus, the expenditure for several programmes specified in Commission Implementing Decisions of 22 December 2022 could be reimbursed.

3.1. The European Commission's assessment

The Commission has reassessed the identified documents and noted that two documents were registered under reference [REDACTED]:

¹⁴ There are 16 thematic enabling conditions that apply to specific areas and sectors.

– [REDACTED]

[REDACTED]

Document [REDACTED] consists of an adopted and published Hungarian legal act. The document has been already disclosed prior the submission of the Court case C-225/24 and more recently disclosed following the requests for access to documents [REDACTED] and [REDACTED]. In view of this, its publicly available version can be sent to the complainant¹⁵.

The Commission considers that access to documents [REDACTED] cannot be granted based on the exceptions of the second (protection of court proceedings) and third (protection of the purpose of investigations) indents of Article 4(2) of Regulation (EC) No 1049/2001.

3.1.1. Protection of court proceedings

The Ombudsman did not question that the documents have a relevant link with the pending Court case C-225/24, therefore there is no need for further explanations on this point.

The Commission disagrees with the Ombudsman’s view according to which the documents only contain ‘factual information and limited “positions” or “assessments” and not internal positions or internal legal positions on contentious issues’.

While the documents contain some factual elements, they also contain explanations from the Hungarian authorities on the measures put in place to address the deficiencies in the fulfilment of HEC3 and the reason why they considered them sufficient to address the Commission’s concerns on judicial independence. They relate to preliminary questions on an interpretation of the applicable standard of judicial independence under HEC3, as interpreted by the Commission and Hungary. They are also relevant to determine the adequacy of the statement of reasons of the contested Commission Decision of 13 December 2023. They provide a legal assessment of the Hungarian legislation by the Hungarian authorities and the Commission, and legal views or questions on why the Hungarian legislation fulfilled the HEC3 requirement in relation to judicial independence, as set in the former Commission implementing Decisions of 22 December 2022 concerning the Hungarian programmes for funding under the CPR funds¹⁶. Letters sent by the Commission contain questions on the assessment provided, which do not qualify as factual basis of the challenged Commission Decision of 13 December 2023. Those questions were based on a legal interpretation of the Hungarian judicial reforms in the light of the requirements set in the

¹⁵ <https://magyarkozlony.hu/dokumentumok/e9aa99db5db7678c89fc54f3f818a1a06c204c92/megtekintes>.

¹⁶ C(2022)10019, (2022)10020, C(2022)10022, C(2022)10010, C(2022)10007, C(2022)10008, C(2022)10011, C(2022)10004, C(2022)10009 and C(2022)10018.

former Commission implementing Decisions of 22 December 2022. The letters contain also the legal assessment of the Commission with respect to the explanations provided by Hungarian authorities.

The content of the documents was crucial for the adoption of the Commission Decision C(2023)9014¹⁷ of 13 December 2023 and for preparation of the Commission's defence in the case C-225/24, in particular to contest the first and second pleas in law raised by the European Parliament.

The Commission reiterates that the disclosure of the documents requested is prevented by the need to protect the court proceedings.

Indeed, while the principle of equality of arms may not be invoked as the Parliament had privileged access to the documents in the context of the litigation, the Commission considers that the principle of the integrity of court's proceedings and the protection of sound administration of justice still prevent the documents from disclosure.

The Commission considers that the serenity of the Court proceedings should be preserved. It considers that only if the documents forming part of the judicial file are protected from public disclosure can the exchanges of arguments by the parties and the deliberation of the Court take place in an atmosphere of total serenity.

As the Commission explained in detail in its confirmatory decision [REDACTED] of 9 July 2024, the public disclosure of the documents after the start of the court proceedings in case C-225/24 could unduly influence the outcome of ongoing court proceedings and expose the judicial activities to external pressure.

The risk is foreseeable and not purely hypothetical as the Commission decision of December 2023 has been subject to criticisms from different actors, including civil society and academia.

As the judicial proceedings in case C-225/24 are still ongoing, the Commission considers that the disclosure of documents at this stage would undoubtedly have a negative impact on the integrity of the judicial proceedings.

Therefore, the Commission concludes that the disclosure of the documents is likely to compromise, actually and specifically in the context of the pending court proceedings, the smooth conduct of the judicial activities, which is at the core of the exception laid down in the

¹⁷ Commission Decision C(2023) 9014 of 13 December 2023 on the approval and signature of the Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition '3. Effective application and implementation of the Charter of Fundamental Rights' with regard to the deficiencies in judicial independence in Hungary.

second indent of Article 4(2) of Regulation (EC) No 1049/2001 and confirms that the documents must remain protected on this basis.

3.1.2. Protection of the purpose of the investigation

The Ombudsman did not put into question that the documents are related to an investigation, within the meaning of third indent of Article 4(2) of Regulation (EC) No 1049/2001, therefore there is no need for further explanations on this point.

With respect to the first consideration drawn up by the Ombudsman, the Commission notes that in its confirmatory decision, it did not claim the existence of a general presumption of confidentiality. The Commission undertook an individual assessment of the documents before issuing the confirmatory decision [REDACTED]. The exception provided in third indent of Article 4(2) of Regulation (EC) No 1049/2001 is applicable also in the absence of confidential character recognised under EU law to the procedure provided for in Article 15 CPR.

The Commission notes that the documents at stake are exchanges between the Commission and the Hungarian authorities, between the Hungarian authorities and the Supreme Court of Judiciary (Kúria), and the Hungarian authorities and the National Office for Judiciary (OBH).

These documents are still relevant for the assessment that the Commission might be called to undertake once the Court of Justice issues its decision on the pending case C-225/24.

In fact, the new assessment would still need to take into account the documents protected together with new circumstances that in the meantime might have occurred.

For this reason, the Commission does not consider that the Commission's investigation has become devoid of any object nor that the prospect of a new assessment is too hypothetical. A new assessment might be required, should the Court annul the decision C(2023)9014 of 13 December 2023. The fact that the Court will issue a judgment on this topic is not hypothetical.

As the Commission explained in its confirmatory decision, the protection of the documents served to preserve the climate of mutual trust between the Commission and the Member State investigated.

Indeed, the Member State investigated has cooperated with the Commission providing all the necessary documents in accordance not only with Article 15 of Regulation (EU) 2021/1060 but also with the principle of loyal cooperation under Article 4(3) of the Treaty of European Union.

The fact that Hungary cooperates with the Commission, sending information and sensitive documents related to the fulfilment by Hungary of the horizontal enabling condition on the ‘Effective application and implementation of the Charter of Fundamental Rights’ (HEC Charter 3) for the implementation of the Cohesion Policy funds to the Commission, does not automatically imply that the Hungarian authorities agreed to their disclosure *erga omnes*. The Commission consulted the Hungarian authorities and found their opposition to the disclosure of the documents concerned to be justified.

The Commission concludes that the disclosure of the documents could undermine the willingness of Hungary to cooperate, where the Commission relied and continues to rely on information from Hungary to perform its tasks conferred to it. The disclosure would also undermine the Commission’s authority and make it unable to properly carry out its assessment required under Regulation (EC) 2021/1060.

In light of the above, the Commission considers that the documents requested must remain protected under the exception of the third indent of Article 4(2) of Regulation (EC) No 1049/2001, as long as the Commission’s investigations have not become definitive as they may be resumed following the Court of Justice’s judgment in case C-225/24.

3.1.3. Overriding public interest in disclosure

The Commission considers of utmost importance to inform the public of the actions it takes to protect the financial interests of the EU and the rule of law.

For this purpose, the Commission published all relevant information on its website. The public is informed and updated via press releases, out of which the most relevant are the following:

- [Judicial independence and EU funding for Hungary \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801); and
- https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801

The Commission has already published information explaining the reasons for concluding that Hungary’s judicial reforms addressed the previously identified deficiencies. The Commission thus indicated that based on the information provided by the Hungarian authorities, Hungary’s reforms strengthened the independence of its judiciary, insofar as:

- the role and powers of the National Judicial Council, whose members are elected by judges, have been strengthened. In particular, the Commission noted that the National Judicial Council will be able to counter-balance the powers of the President of the National Office for the Judiciary, who is a top official in charge of court administration, elected by Parliament;

- the independence and transparency of the Kúria (Supreme Court) have been strengthened. In particular, the Commission noted that the National Judicial Council and judicial bodies of the Kúria will be able to counter-balance the powers of the Kúria President, elected by Parliament. Also, the Commission took into account the fact that case registration and case allocation in the Kúria will now follow clearer rules;
- the obstacles to references for preliminary rulings to the Court of Justice of the EU have been removed, in light of the withdrawal of Kúria jurisdiction to review the lawfulness of such questions about EU law; and
- the possibility for public authorities to challenge final judicial decisions before the Constitutional Court has been removed. In particular, the Commission stressed that the Constitutional Court, elected by Parliament, will no longer be able to quash decisions of the ordinary courts upon request of public authorities¹⁸.

Moreover, for the sake of transparency, the Commission takes the view that the widest possible access has been granted not only in the context of the initial reply of ██████████, but also following the reply to the initial request registered *ex officio* ██████████, where DG EMPL further disclosed 17 documents related to the Thematic enabling conditions (TEC) that were not fulfilled at the time of the approval of Hungary's operational programmes.

Even if there might be a certain public interest, the Commission considers that such an interest does not override the need to protect the remaining documents from disclosure based on the exceptions of the protection of the ongoing court proceedings and the protection of the purpose of investigations.

Pursuant to settled case-law, in non-legislative cases, transparency can only constitute an overriding interest if it is especially pressing and based on concrete elements¹⁹. The complainant did not submit any concrete elements establishing such especially pressing overriding interest. Consequently, the Commission concludes that an overriding public interest has not been identified in this case.

¹⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465;
https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801;
https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_23_6466/QANDA_23_6466_EN.pdf.

¹⁹ See *inter alia*, Judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 92-93.

The fact that the documents relate to administrative and not any legislative procedures, for which the Court of Justice has acknowledged the existence of wider openness²⁰, provides further support to this conclusion.

Notably, the documents requested have been established within an administrative bilateral procedure pursuant to Article 15(4) of Regulation (EU) 2021/1060. The Commission decision of 13 December 2023 is not a legislative act, but a decision addressed to a specific Member State relating to the implementation of cohesion funds.

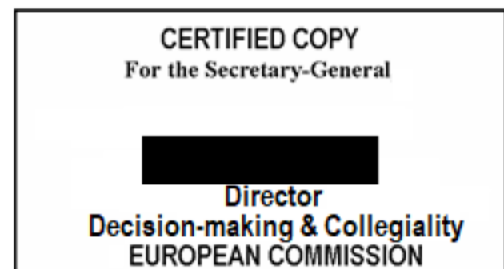
IV. CONCLUSIONS

For the reasons set out above, the Commission considers that its confirmatory decision was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken. Therefore, the Commission maintains its position as expressed in the above-mentioned decision subject to the above clarifications regarding document [REDACTED]. With respect to this document, the Commission will send the document to the complainant.

For the Commission

Maroš ŠEFČOVIČ

Member of the Commission



²⁰ See *inter alia*, Judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; and of 5 September 2024, *ClientEarth v European Commission*, C-249/23 P, *op.cit.*, paragraph 67.