Reply of the European Commission to the letter of the European Ombudsman of 6 July 2023 regarding the European Commission's refusal to give public access to the 'pillar assessment' reports of the International Centre for Migration Policy Development - Complaint by Mr [redacted], case 1731/2022/MIG

I. BACKGROUND

On 8 October 2021, the complainant submitted an application for access to documents[1] under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')[2]. He requested access to all documents and correspondence related to the pillar assessment process of the International Centre for Migration Policy Development (hereafter 'ICMPD').

In its initial reply of 14 December 2021[3], the Directorate-General for International Partnerships identified 16 documents as falling under the scope of this request. It granted full access to five documents, namely documents 2.1, 2.2, 2.3, 2.4 and 7.1 and wide partial access to documents 2, 3, 5, 7, 8 and 9 with only personal data redacted based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. Furthermore, taking into account the reply of the International Centre for Migration Policy Development, it refused access to documents 1, 4, 4.1, 6 and 6.1 based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests, including intellectual property rights) of Article 4(2) of the same Regulation.

On 26 December 2021, the complainant submitted a confirmatory application against the reply of the Directorate-General for International Partnerships.

At the confirmatory stage, the European Commission re-consulted the ICMPD and examined the arguments provided by the third party and the complainant. Following this assessment:

- wide partial access was granted to three documents, namely documents 1, document 4 and document 6. The limited undisclosed parts of these documents had to be protected under the exception in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;

- access to documents 4.1 and document 6.1 was refused, based on the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests, including intellectual property) of Article 4(2) of the same Regulation.

The complainant lodged a complaint with the European Ombudsman in relation to the documents to which the European Commission had refused access (documents 4.1 and 6.1).

[1] Registered under reference GESTDEM 2021/6406.
[2] OJ L 145 of 31.5.2001, p. 43.
[3] Reference Ares(2021)7734699.

II. THE EUROPEAN OMBUDSMAN'S PROPOSAL OF 4 NOVEMBER 2022 AND ITS SUBSEQUENT REQUEST OF 6 JUNE 2023.

On 28 September 2022, the European Ombudsman opened an inquiry into the European Commission's refusal to grant public access to the two pillar assessment reports of the international organisation concerned, referred to as documents '4.1' and '6.1' in the confirmatory decision of 22 August 2022. It did not concern the nine documents to which wide partial access was granted by the European Commission, subject only to the redaction of personal data.

In the course of the European Ombudsman's inquiry, the European Commission provided the latter with a copy of the two reports, as well as the European Commission's exchanges with the international organisation concerned.

On 4 November 2022, the European Ombudsman issued a proposal for a solution. It considered that the European Commission should review its position to refuse access (to the extend that it does not concern personal data) and provide wide partial access to the reports.

In particular, the European Ombudsman considered that the pillar assessment reports follow the respective templates developed by the European Commission. In the European Ombudsman's view, the comments of the auditor are 'rather descriptive and factual in nature'. It considered that the methodology used in the assessment does not reflect "an unusual or unique approach" and, moreover, parts of the reports had been disclosed by the European Commission, such as information on the scope of the assessment and the overall outcome in relation to each pillar. The European Ombudsman took the view that, in general, the disclosure of the reports would not undermine the commercial interests of the international organisation, with the exception of, for instance, the first two headings on page 30 of the 2014 report.

Moreover, the European Ombudsman considered that while the arguments put forward by the complainant support the existence of a 'strong public interest' in transparency of the reports, they 'do not seem such as to establish an *overriding* public interest'.

On 13 February 2023, in its reply to the European Ombudsman's proposal for a solution, the European Commission noted the arguments therein, and after careful assessment of all the elements of the case, it confirmed its position in the confirmatory decision, as regards the documents in question and set out the reasons for its position, summarised in section IV below.

Almost five months after the reply of the European Commission, on 6 July 2023, the European Ombudsman sent a letter to the European Commission, arguing that the response to the proposal was 'general and abstract in nature' and that it repeated the assessment of the confirmatory decision. Furthermore, the European Ombudsman requested the European Commission to engage with 'the detailed assessment in the proposal for a solution' and to provide a response 'as a matter of priority' and no later than 31 August 2023.

III. THE EUROPEAN COMMISSION'S POSITION ON THE PROPOSAL FOR A SOLUTION AND THE EUROPEAN OMBUDSMAN'S LETTER OF 6 JULY 2023

In its five-pages response to the proposal, after a careful analysis, the European Commission confirmed its position as regards the two final reports. The European Commission:

- explained that the information contained in the reports is more detailed than publicly available information about the assessment and the new Terms of Reference for the pillar assessment methodology[4] published on Europa website[5];

- considered that the reports concerned qualify as an original work and that copyright claim by the third party is legitimate in this case;

- explained that the documents requested are intended for information and use of the ICMPD and the European Commission and must be analysed in light of the confidentiality requirements and the applicable legal framework; and

- confirmed the analysis set out in its confirmatory decision insofar as the documents contain information, such as specific methodology and know-how, as well as findings and recommendations the disclosure of which could harm the competitive position of the ICMPD.

The European Commission duly took into account the arguments presented by the European Ombudsman and its conclusion remains that the confirmatory decision was correct from a legal and factual point of view.

Taking into account the reasons provided by the European Commission, as summarised above, its reply of 13 February 2022 cannot be regarded as a 'brief' and 'general' response to the European Ombudsman's proposal. While it is the European Ombudsman's view that the reply to the proposal was repetitive, the arguments provided in the reply must be logically regarded in conjunction with the reasons set out in the confirmatory decision, the conclusions of which the European Commission has confirmed as part of the European Ombudsman proceedings[6].

Therefore, the European Commission reply cannot be considered as reflecting its 'lack of engagement', and therefore it respectfully submits that a finding of maladministration is not justified in the present case.

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[4] Commission Decision of 17 April 2019 on establishing new terms of reference for the pillar assessment methodology to be used under Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, OJ C 191, 6.6.2019, p. 2-136.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0606(01)&from=EN.

[6] See by analogy the judgment of 12 December 2018, *Deutsche Umwelthilfe eV* v *Commission*, T-498/14, EU:T:2018:913, paragraphs 102-103 whereby the General Court confirmed that the reasoning invoked at initial stage of a request under Regulation (EC) 1049/2001, remains valid and therefore needs to be addressed also in the confirmatory decision. By analogy, as the European Ombudsman review constitutes an administrative remedy, the European Commission's position in its reply *necessarily* should address the arguments invoked at confirmatory stage, without being considered repetitive.

Nevertheless, in spirit of good cooperation, the European Commission hereby submits the following additional observations.

The pillar assessment reports contain commercially sensitive information

The reports contain commercially sensitive information of the ICMPD relating to its know-how, expertise gained as a result of the organisation's investment in operational experience, training, research and development, as well as concrete findings and recommendations concerning identified weaknesses, such as for instance:

- As regards the 2014 Pillar Assessment Report (document 4.1) covering Pillars 1, 2, 3, 4, 5 and the sub-delegation pillar:

    - information about ICMPD's organisational structure and key staff members, including the appointment of individuals, and concrete details about its areas of activities[7];

    - under pillar 1 'Internal Control Systems': detailed description and review of ICMPD's risk management procedures, including the identified shortcomings, description of ICMPD's IT software (for example the anti-virus used by the entity) and equipment including personal accounts management[8], information about how payroll data is stored, and which software is used[9], findings and recommendations describing identified weaknesses of ICMPD's internal control system;

    - under the pillar 2 'Accounting System': detailed description and review of ICMPD's accounting practices including information about its accounting software, conclusions about its audits' reports, information about ICMPD's implementing partner agreements and its contents, financial reporting, management of bank accounts and petty cash at headquarters and field offices[10];

    - under the pillars 3 and 4 'Grants' and 'Procurement': detailed description of internal procedures for the evaluation and award of contracts, thresholds for different types of contracts;

    - specific details about ICMPD's cost allocation methods[11]; or

    - scoring of the individual pillars and of the successful or failed pillar assessment and the need for targeted and temporary supervisory measures[12].

[7] p. 22-24.
[8] p.29.
[9] p.30.
[10] p.36-37.
[11] p.48-49.
[12] p.52-59.

- As regards the 2020 Pillar Assessment Report (document 6.1) covering Pillars 7, 8 and 9:

    - information about ICMPD's organisational structure and key staff members, including the appointment of individuals, and concrete details about its areas of activities[13];

    - detailed description by ICMPD of its tendering procedures including thresholds for due diligence procedures in grants and procurement[14];

    - detailed description of ICMPD's data protection rules and procedure including its Code of Conduct which is for internal use only[15];

    - detailed description of ICMPD's data management system including its use of anti-malware software and a crisis intervention procedure in case of a breach[16];

    - findings regarding weaknesses in ICMPD's data protection policy as well as ongoing actions regarding ICMPD's data protection policy[17]; or

    - the scoring given by the auditor[18].

Based on the above (non-exhaustive) list, the European Commission cannot agree with the European Ombudsman's view that only 'limited parts' of the reports, such as for instance the first two headings on page 30 of the 2014 report, should be protected under the first indent of Article 4(2) of Regulation (EC) No 1049/2001, nor the assertion that the detailed comments, findings and recommendations of the auditor cannot be generally regarded as sensitive. The outcome of pillar assessments (i.e., positive or negative) does not imply that the reports cannot contain commercially sensitive information which, if disclosed, would undermine the commercial interests of the organisation.

The disclosure of the documents requested would undermine the interests of the ICMPD in the sense of the first indent of Article 4(2) of Regulation (EC) No 1049/2001

The objective of the pillar assessment was to provide reasonable assurance to the European Commission as to whether ICMPD policies, rules and procedures are equivalent to those of the European Commission applicable to the General Budget of the European Commission and the European Development Fund with regard to nine pillars: 'Internal Control System', 'Accounting System', 'Independent External Audit', 'Grants', 'Procurement' and 'Sub-Delegation' (2014 Pillar Assessment) and 'Exclusion from access to funding', 'Publication of information on recipients' and 'Protection of Personal data (2020 Pillar Assessment).

[13] p. 12-13.
[14] p.32-36.
[15] p.20, and p. 41-46.
[16] p.21.
[17] p. 23.
[18] p. 26-28.

The disclosure of the parts of the documents containing the analysis of identified weaknesses (or the lack of equivalence with European Commission policies, rules or procedures) in the partner organisation would undermine the confidence in this entity, as the public would learn about these shortcomings at a given point in time. Disclosure of the specific scoring, findings and results poses a reputational risk which could undermine its commercial interests including potential cooperation with partners other than the European Commission. In the European Commission's view, public disclosure of such information would undermine the protection of the expertise and knowledge of ICMPD, thus prejudicing their legitimate commercial interests.

Furthermore, a negative commercial impact as a result of the disclosure of the concerned reports could undermine the relations with the organisation concerned, with the subsequent loss of partnership opportunities to implement the European Commission's policies and actions.

In this regard, the General Court has acknowledged that a reputational damage clearly constitutes a damage to commercial interests in the sense of the first indent of Article 4(2) of Regulation (EC) No 1049/2001[19].

Moreover, disclosing the detailed descriptions and assessments of internal rules and procedures, including *inter alia* which software systems are used for data protection, payroll and accounting, would expose the entity to potential cyber threats and risks of security breaches into its internal systems. The disclosure of information about grants, procurement and financial instruments, such as how due diligence checks and evaluations are carried out and integrated in the entities' rules and procedures, could undermine the commercial interests of the organisation.

It must be noted that the concerned entity was consulted twice (at initial and confirmatory levels) and clearly opposed the disclosure of its two pillar assessment reports. Taking into account the content of the documents and the position of the third party, it was legitimate to conclude that the disclosure of the documents would undermine the commercial interests of the latter.

In these circumstances, the European Commission reiterates that there were not enough elements to overrule the objections of the author by disclosing the pillar assessment reports with the explicit opposition of the entity concerned.

The information contained in the reports is more detailed than the publicly available information and its disclosure could affect the commercial interests of the audit firm

The new Terms of Reference for the pillar assessment methodology are composed of instructions for the auditor and questionnaires with requirements that the entity must meet for each pillar. The Terms of Reference provide for a model contract to be used by the entity

[19] See in this regard judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 51.

when contracting the auditor to establish how the assessment shall be carried out. They also define criteria to be complied with by the auditor in view of its selection. The terms of reference are publicly available.

While the Terms of Reference follow a standard layout, 'the auditor remains fully responsible at all times for designing, planning and performing the assessment procedures it deems necessary to arrive at a conclusion for each pillar covered by the assessment. The auditor must take into account the specific engagement circumstances and apply professional judgement throughout the assessment process'[20]. Also, as specified in the template, 'the Auditor can modify, complete and add information […] as s/he sees fit. The Auditor may also add additional questions if s/he considers that this is necessary to arrive at an informed conclusion for key questions'[21].

Consequently, the reports are the result of the auditor's work. A description of the work performed by the selected audit firm, detailed for each pillar that has been assessed, is included in the pillar assessment report.

The disclosure of the work performed by the auditor in the context of the pillar assessment could distort market competitiveness, as public access to information about the methodologies and capacities applied by the audit firm could be used by other audit firms to gain a comparative advantage in future tenders. Furthermore, some auditors may be stricter than others and entities could base their decision on which audit firm to hire for future pillar assessment depending on how strict the audit firm is.

Moreover, the documents concerned contain specific information related to the entity and its pillar assessment such as the description of the entity and its internal systems, rules and procedures, as well as the auditor's scoring and opinion about the equivalence of the entities systems, rules and procedures to those applied by the European Commission in line with the Financial Regulation[22], the weaknesses identified and recommendations made together with actions designed by the entity. The section above provides a detailed, non-exhaustive list of information included in the pillar assessment which is more detailed than what is publicly available.

As indicated in the section above, the European Commission, following consultations with the entity concerned, considers that the information contained in the documents is commercially sensitive.

As part of the confirmatory review, the European Commission already considered the possibility of granting partial access to the two pillar assessment reports pursuant to Article

[20] Section 5.2 of the Terms of Reference.
[21] Ibid.
[22] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1.

4(6) of Regulation (EC) No 1049/2001, as it did with regards the other three documents, namely documents 1, 4 and 6, falling within the scope of the complainant's request. However, the European Commission concluded that no partial access is possible without undermining the interests described above.

The arguments provided by the applicant did not demonstrate the existence of an overriding public interest in the disclosure

In his confirmatory application, the complainant justified the alleged existence of an overriding public interest as follows:

'[...]the documents requested are the basis upon which ICMPD is allowed to carry out crucial foreign policy actions on behalf of the European Union. Considering the source of ICMPD's funding, and the well-known central role played by ICMPD in implementing the Union's migration policy towards third countries, there is an obvious public interest in the disclosure of the documents that overrides any commercial consideration'.

The applicant did not put forward any concrete elements that would suggest that the pillar assessments were not conducted in a proper way, nor explained in what way disclosure of the reports, specifically, would contribute to assuring protection of a public interest to the extent that the principle of transparency takes precedence over the protection of the commercial interests of the entity and the auditor. Moreover, the above general considerations do not demonstrate any risk to the financial interests of the European Union that would be derived from the audit. In fact, the pillar assessment remains a voluntary exercise during which no Union funds have been committed. It consists of an *ex-ante* assessment of equivalence of rules between the two players to ascertain if collaboration with the entity is possible.

In its proposal of 4 November 2022, the European Ombudsman itself rejected the complainant's claim by stating that the complainant's arguments 'do not seem such as to establish an overriding public interest' [23].

Although as per settled case-law, it is for the applicant to demonstrate the existence of an overriding public interest[24], the European Commission considered the possible existence of such an interest, but it was not able to identify any public interest capable of overriding the interests that justified the protection of the documents requested, detailed in the section above. In any event, any alleged overriding public interest would have been satisfied in view of the full or wide partial access granted to the documents requested, with the sole exception of the two pillar assessment reports.

Consequently, public access to the documents at this stage is not justified in view of any

[23] Point 24, page 5 of the European Ombudsman's proposal.

[24] Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission,* T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC* v *European Commission,* T-875/16, EU:T:2018:877, paragraph 84.

alleged overriding public interest in the disclosure of the reports requested by the applicant. The European Commission maintains its view that the public interest is best served in protecting the documents from public disclosure.

IV. CONCLUSIONS

The European Commission has provided a detailed and substantiated reply to the European Ombudsman's proposal. For the reasons set out in the present reply and the previous response of 13 February 2023, the European Commission can only reiterate 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 European Commission respectfully invites to European Ombudsman to reconsider its issuing of a recommendation and finding of maladministration in relation to the administrative procedure in treating the applicant's request for access to documents under Regulation (EC) No 1049/2001, given that it (1) provided a detailed and reasoned response to the European Ombudsman's proposal of 4 November 2022, and (2) shared legitimate concerns related to disclosure of the pillar assessments and its assessment of the legal and factual context, in good faith.

For the Commission
Věra JOUROVÁ
Vice-President

CERTIFIED COPY
For the Secretary-General

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