

Reply of the European Commission to the proposal for a solution from the European Ombudsman regarding the Commission's refusal to grant public access to communications with Denmark in closed State aid file COMP/N 172/033
- Complaint by Mr [REDACTED], ref. 358/2020/PB

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 22 November 2019, the complainant, Mr [REDACTED] a journalist acting on behalf of HK Hovedstaden union, submitted an initial application 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')¹.

In his application, addressed to the Directorate-General for Competition, the complainant requested access to communications between the European Commission and Danish authorities that were part of the closed State aid file COMP/N 172/03².

In its initial reply of 12 December 2019, the Directorate-General for Competition concluded that the documents requested in the State aid file COMP/N 172/03 were covered by a general presumption of non-disclosure, based on the exception of the third indent of Article 4(2) of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits). The Directorate-General for Competition further underlined that disclosure of the documents exchanged between the European Commission and the Member State would undermine the protection of the objectives of investigation activities.

On 18 December 2019, the complainant submitted a confirmatory application against the reply of the Directorate-General for Competition, alleging the existence of an overriding public interest in disclosure and arguing that the documents should be disclosed as they were more than 15 years old.

On 14 February 2020, the European Commission confirmed the initial decision taken by the Directorate-General for Competition to refuse access to the requested documents based on the exception to disclosure in the third indent of Article 4(2) of Regulation (EC) No 1049/2001³.

The Commission considered that the general presumption of confidentiality established by the Court in relation to State aid files still applied. According to Article 4(7) of Regulation (EC) No 1049/2001, the exceptions laid down in paragraphs (1) to (3) of that Article can apply for a period of 30 years. Furthermore, the Commission noted that the interests of the applicant were of a private nature, rather than public, considering that he

¹ OJ L 145 of 31.5.2001, p. 43.

² OJ C 95 of 20.4.2005, p. 8.

³ C(2020) 981 final.

represented the HK Hovedstaden union, and thus they could not be taken into account for the purpose of assessing the possible existence of an overriding public interest.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 21 February 2020, the complainant turned to the European Ombudsman complaining that the European Commission wrongly refused to acknowledge the overriding public interest in this case and to disclose the requested documents.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

In the course of the European Ombudsman's inquiry, the European Commission provided a copy of the documents concerned to the former.

On 28 July 2020, the European Ombudsman issued a proposal for a solution considering that the Commission should waive the application of the general presumption in this specific case and grant partial access to the requested documents.

Firstly, the European Ombudsman considered that the Commission's decision was based on an automatic application of the presumption of non-disclosure in State aid files. In this respect, the European Ombudsman noted that the application of the presumption is an option, not an obligation.

Secondly, the European Ombudsman considered that i) the fact that the documents are more than fifteen years old, ii) their relatively reduced number and iii) the fact that a large majority of documents do not contain commercial information, but rather exchanges that are factual in nature, are grounds for performing an individual assessment of the documents and granting partial access.

IV. THE EUROPEAN COMMISSION'S REPLY TO THE PROPOSAL FOR A SOLUTION

As the European Ombudsman noted in her proposal for a solution and as the European Commission underlined in its above-mentioned decision of 14 February 2020, the Commission applied in this case the general presumption of confidentiality to documents pertaining to State aid files, as recognised by the Court.

While an EU institution is not legally obliged to apply the general presumption, as the European Ombudsman noted, the decision to use this legal option remains solely in the remit of the institution. It is the role of the EU Courts to rule on the legality of the use of the general presumption and other matters on the substance of a decision, which are not matters related to maladministration.

The purpose of the general presumption of confidentiality in State aid files, as stated in the Commission decision C(2020)981 final, is to offer an institution the possibility to refuse access to documents contained in a State aid file without the need to perform an individual identification and assessment of the documents⁴.

In addition, the Court of Justice held in its judgment in *AlzChem* that the general presumption of confidentiality applies regardless whether the documents targeted by the application for access were specifically identified and few in number⁵. In addition, in the appeal on the *Sea Handling*⁶ judgment, the Court recognised that the general presumption applies irrespective of the number of documents requested by the applicant. This means that the general presumption covers the entire administrative file of an investigation, irrespective the number of documents contained in it. Consequently, such documents do not fall within an obligation of disclosure, in full, or in part.

As already noted in the above-mentioned Commission decision, the Court of Justice reasoned that public access to a State aid file on the basis of Regulation (EC) No 1049/2001 would call into question the State aid procedural system, which is a strictly bilateral procedure between the Commission and the respective Member State, based on mutual trust, involving exchanges of sensitive nature under the understanding that it would remain confidential.

Without the protection of the confidentiality of the investigations, the parties contributing to current or to future investigations, in general, would thus be discouraged from cooperating with the Commission, even after the definitive closure of the case. As a result, the effectiveness of the State aid control system that depends on the cooperation of third parties, in particular Member States, beneficiaries and other interested parties, would be seriously undermined.

The European Commission has been so far successful in fostering a genuine dialogue with Member State authorities. Such dialogue requires an atmosphere of mutual trust and a free exchange of views and information related to the investigations. The ability to have such an exchange of views, free from external pressure, is a key component for the success of the investigative activities.

Therefore, Regulation (EU) 2015/1589⁷ has established specific regimes for access to the Commission's files, designed to avoid the undesirable consequences of the disclosure of sensitive information collected in the course of State aid investigations, and to ensure the efficiency of such control procedures generally. Thus, natural and legal persons, as well

⁴ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-54.

⁵ Judgment of the Court of Justice of 13 March 2019, *AlzChem AG v European Commission*, C-666/17 P, EU:C:2019:196, paragraph 32.

⁶ Judgment of the Court of Justice of 14 July 2015, *Sea Handling SPA v Commission*, C-271/15 P, EU:C:2016:557, paragraph 41.

⁷ OJ L 248 of 24.9.2015, p. 9.

as Member States authorities submitting information to the European Commission, have a legitimate right to expect that the information they supply on an obligatory or voluntary basis will not be disclosed to the public. This legitimate right arises from the specific provisions concerning the professional secrecy obligation⁸, which provides for documents to be used only for the purposes for which they have been gathered.

The release, contrary to the specific rules on the confidentiality of information exchanged within the State aid investigation, of the requested documents would indeed have a detrimental effect on the spirit of mutual trust between the Commission and the Member States. Such disclosure would thus affect future discussions between the Commission services and national authorities because the quality of such discussions depends heavily on the full, frank and thorough exchanges.

The considerations above mean that the reduced number of documents in the file, the fact that the investigation was closed more than fifteen years ago and the limited amount of commercially sensitive information are irrelevant for the application of the general presumption.

V. CONCLUSIONS

The European Commission stands by its decision to apply the general presumption of confidentiality and considers that its confirmatory decision was fully in line with the applicable legislation and the relevant case-law on access to documents at the point in time it was taken.

For the Commission
Maroš ŠEFČOVIČ
Vice-President

⁸ See Article 30 of Regulation (EU) 2015/1589, backed by Article 339 of the Treaty on the Functioning of the European Union.