

Reply of the European Commission to the proposal for 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 [REDACTED], ref. 358/2020/PB

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 22 November 2019, the complainant, [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 1049/2001.³

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 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.

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.

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, THE FIRST PROPOSAL FOR A SOLUTION AND THE EUROPEAN COMMISSION'S REPLY

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

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.

In its reply to 20 October 2020, the European Commission explained that it chose to apply the general presumption of confidentiality to the documents in this case, a legal option that remains within the remit of the institution. The Commission explained why it believed that the general presumption still applied in this case, relying on the preservation of the mutual trust between the Commission and Member States, as recognised by case-law, coupled with the confidentiality requirements for State aid procedures set in Regulation (EU) 2015/1589⁴.

IV. THE EUROPEAN OMBUDSMAN'S INSPECTION AND THE SECOND PROPOSAL FOR A SOLUTION

Following the Commission's reply, the European Ombudsman called for a meeting on 17 December 2020 to discuss the case in light of new information received from the complainant. The European Ombudsman noted that, following a request for access to documents addressed by the complainant to the Danish national authorities, the latter granted access to the complainant to part of the documents present in the contested file.

⁴ OJ L 248 of 24.9.2015, p. 9.

During the meeting, the European Ombudsman reasoned that the Commission should envisage partial access to the documents, considering that the Danish authorities had already disclosed part of the documents, that the file was old and it did not contain commercially sensitive information. Moreover, the European Ombudsman questioned the application of the general presumption of confidentiality to closed State aid cases where the documents did not contain commercially sensitive information.

On 23 February 2021, the European Ombudsman issued a second proposal for a solution recommending that the Commission should waive the application of the general presumption in this specific case and examine the documents in view of granting the widest possible public access through partial disclosure.

The fact that the Danish authorities released to the applicant part of the documents contained in the file suggest, to the European Ombudsman, that they do not oppose public disclosure of the documents. Moreover, the European Ombudsman encouraged the Commission to consult the Danish authorities as regards a possible disclosure of the documents in this case.

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

The European Ombudsman explained in her proposal for a solution that, considering the specificity of the case, the Commission should waive the application of the general presumption and individually examine the documents, which total 177 pages, in view of granting the widest possible access after consulting the Danish authorities.

The Commission noted the arguments of the European Ombudsman and, after careful assessment of all the elements in the case, considers that the confirmatory decision it took was in line with the Regulation (EC) No 2001/1049 and the relevant case-law on access to documents at the point in time it was taken. A change of position with respect to that confirmatory decision would imply that the Commission's assessment was erroneous. The new elements brought forward by the complainant, while they may be relevant for a future request for access, should not impact the confirmatory decision retroactively.

The Commission considers that, taking into account the elements at its disposal at the time of the confirmatory decision, it was justified to apply the general presumption of confidentiality. Although its use is not compulsory, the use of 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.

As explained during the inspection meeting, the Commission believed it correctly applied the general presumption in this case, which, as detailed in the previous reply of the Commission in this case, does not entail an individual identification and assessment of the documents. The Commission explained that the general presumption does not rely

only on the protection of commercial interests of public or private actors, but also on the protection of the mutual trust between the Commission and the Member States in the framework of the State aid investigations.

As already noted in the above-mentioned Commission confirmatory 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, even after the definitive closure of the case, the parties contributing with information would thus be discouraged from cooperating with the Commission. As a result, the effectiveness of the State aid control system that depends on the cooperation of the 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.

The procedural Regulation (EU) 2015/1589 has established a specific regime for access to the Commission's State aid files, designed to avoid the undesirable consequences of the disclosure of sometimes 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 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 obligation⁵, which provides for documents to be used only for the purposes for which they have been gathered and which do not expire at the moment of the closure of a file. The Commission is taking seriously the confidentiality requirements set in Regulation (EU) 2015/1589.

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 atmosphere 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 full, frank and thorough exchanges.

⁵ See Article 30 of Regulation (EU) 2015/1589, backed by Article 339 of the Treaty on the Functioning of the European Union.

The fact, that Danish authorities disclosed to the complainant a number of documents forming part of the state aid file does not render the confirmatory decision illegal nor prove an existence of maladministration. In addition, in the spirit of mutual trust, the Commission wishes it had been consulted by the Danish authorities on the basis of Article 5 of Regulation (EC) No 1049/2001 prior to their disclosure of documents in the file.

Moreover, as the Commission noted during the inspection meeting, the complainant did not put forward specific arguments as to demonstrate, on one hand the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.⁶

The elements provided by the European Ombudsman were equally insufficient to demonstrate the public interest capable of outweighing the general presumption of confidentiality of State aid files. Given that the case did not raise general issues with state aid, the general considerations of the media interest in alleged misuse of the scheme in relation to low-paid jobs are not sufficiently specific and pressing to overturn the confidentiality and provide access to the documents.

Nonetheless, the Commission is committed to fostering transparency across all policy areas, within the boundaries of case-law. In case new and precise elements of public interest are brought to the Commission attention, it can reconsider the possibility to grant access to documents following a new request.

VI. CONCLUSIONS

For the reasons set out above, the European Commission considers that its confirmatory decision, which has become definitive in the absence of any legal challenge before the Union courts, 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.

For the Commission
Maroš ŠEFČOVIČ
Vice-President

⁶ 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*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.