



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 September 2013

13396/13

OMBUDS	7
INST	468
INF	152
API	79
JUR	446

COVER NOTE

From : Mr P. Nikiforos DIAMANDOUROS, European Ombudsman
Dated : 29 August 2013
To : Mr Uwe Corsepius, Secretary General

Subject : Decision of the European Ombudsman closing his inquiry into complaint
531/2012/MMN made by Mr Olivier HOEDEMANN

Delegations will find at Annex copy of a letter sent by the European Ombudsman to the Council closing his inquiry into complaint 531/2012/MMN.



European Ombudsman

0531/2012/MMN
S2013-179642

P. Nikiforos Diamandouros
European Ombudsman

European Council
To the attention of Mr Uwe Corsepius
Secretary-General of the Council of the
European Union
1048 BRUSSELS
BELGIQUE

Strasbourg, 29 -08- 2013

Decision of the European Ombudsman closing his inquiry into complaint
531/2012/MMN against the European Council

Dear Mr Corsepius,

Please find enclosed a copy of my above decision, which has been sent to the
complainant, Mr Olivier Hoedeman.

On the basis of my inquiry into this complaint, I have decided to close it
with the following conclusion:

No maladministration has been found.

Yours sincerely,

P. Nikiforos Diamandouros

cc: Mr Hubert Legal and Dr Richard Corbett.

Enclosure (sent by e-mail):

- Decision on complaint 531/2012/MMN

SECRETARIAT DU CONSEIL DE L'UNION EUROPÉENNE	
SGE13 / 8796	
REÇU LE	04 SEP. 2013
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DEST. COP.	M. CORSEPIUS.....
.....	M. KEMPPINEN.....



Decision

of the European Ombudsman closing his inquiry into complaint 531/2012/MMN against the European Council

The background to the complaint

1. This case concerns a request for access to documents held by the European Council concerning meetings and correspondence with the Institute of International Finance ('IIF'). The IIF is a global association of financial institutions and, thus, included representatives of banks which held Greek bonds.

2. On 27 October 2011, the complainant (a representative from a civil society organisation) made a request for access to documents held by the European Council pursuant to Regulation 1049/2001.¹ In particular, the complainant requested access to the following documents:

(i) the minutes (and notes) of meetings with (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011;

(ii) correspondence with (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011; and

(iii) documents submitted by (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011.

3. On 12 December 2011, the General Secretariat of the Council rejected the complainant's application for access to documents. It based its refusal on the grounds that it did not hold any documents corresponding to the request, apart from some documents which were already publicly available (i.e., certain press releases and a statement by the Heads of State or Government of the Euro-zone and the EU institutions). The General Secretariat added that the contacts that took place with representatives of the IIF consisted of discussions between one Member State (i.e., Greece) and private investors which held Greek bonds (to the extent that these were represented by the IIF).

4. The General Secretariat further noted that these discussions were attended by the 'troika' (i.e., the Commission, the European Central Bank and the International Monetary Fund) and by the Italian Minister of Finance (who

¹ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145 p. 43 ('Regulation 1049/2001').



provided oral information about these discussions during the Euro-zone meetings mentioned above).

5. On 30 December 2011, the complainant made a confirmatory application for access to the documents in question. He indicated that there was ample evidence in the media that the discussions involved not only Greece but, more generally, the European Council and in particular the Heads of State or Government of France and Germany respectively.

6. On 14 February 2012, the General Secretariat replied on behalf of the European Council and confirmed the rejection of the request for access to documents. However, it stated the following: "*documents may have been communicated between various entities. This being said, it is only as far as the European Council or its General Secretariat received and actually hold any documents which may have been exchanged in the negotiations that such documents come under the scope of Regulation 1049/2001*".

7. It added that, after carrying out further internal research, the General Secretariat identified an e-mail and a letter addressed by representatives of the IIF to the Greek Minister of Finance. However, the General Secretariat indicated that it could not grant access to these documents either in their entirety or in part because they fell within the exception of Article 4(1)(a) fourth indent of Regulation 1049/2001 (i.e., the protection of the public interest as regards the financial, monetary and economic policy of the Community or a Member State). It added that it consulted the authors of the documents pursuant to Article 4(4) of Regulation 1049/2001, who stated that the document should not be disclosed.

8. On 9 March 2012, the complainant lodged the present complaint against the European Council. In his complaint, first, the complainant expressed doubts that the European Council did not hold any documents falling within the scope of his request for access to documents (other than the e-mail and the letter mentioned and the documents which were already publicly available). The complainant noted that, according to media news, the IIF had been very active during the summits in question. Thus, in the complainant's view, it was not credible that the European Council did not hold any other documents. Second, the complainant disputed that the e-mail and the letter identified should be regarded as falling in their entirety within the exception of Article 4(1)(a) fourth indent of Regulation 1049/2001.

The subject matter of the inquiry

9. The complainant put forward the following allegation and claim, which were included in the Ombudsman's inquiry:

Allegation:

The European Council failed to grant access to documents requested by the complainant pursuant to Regulation 1049/2001, namely the following:

(i) the minutes (and notes) of meetings with (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011;



(ii) correspondence with (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011; and

(iii) documents submitted by (representatives of) the IIF before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011.

Claim:

The European Council should grant access to the documents requested by the complainant.

10. In his opening letter, the Ombudsman indicated that when an EU institution states, in reply to a request for access to documents, that it does not hold the documents to which access is requested, there is normally no reason to doubt the veracity of such a statement. In such a case, there would be no reason for the Ombudsman to open an inquiry. He noted, however, that in the present case the European Council subsequently modified its initial statement that it did not hold any relevant documents and identified two relevant documents that could fall within the scope of the request for access. Thus, the Ombudsman took the view that it was appropriate to open an inquiry in order to clarify whether the European Council holds any additional documents which fall within the scope of the complainant's request for access.

11. Furthermore, the Ombudsman invited the European Council to explain further the reasons why the two documents it identified fall in their entirety within the scope of the exception established in Article 4(1)(a) fourth indent of Regulation 1049/2001.

12. As regards the complainant's additional allegation that the European Council should have taken minutes of the meetings with the IIF, in case it had failed to do so, the Ombudsman considered this allegation as inadmissible because it had not been preceded by appropriate administrative approaches to the European Council.

The inquiry

13. On 11 April 2012, the Ombudsman invited the European Council to provide an opinion on the above allegation and claim.

14. On 31 July 2012, the General Secretariat submitted an opinion on behalf of the European Council, which was forwarded to the complainant for observations.

15. However, the complainant did not submit any observations.



The Ombudsman's analysis and conclusions

A. Allegation of failure to grant access to documents and related claim

Arguments presented to the Ombudsman

16. In its opinion, first, the European Council explained that the research for documents falling within the scope of the complainant's request for access had to cover a number of different administrative frameworks involving several entities (i.e., the Eurogroup, the Eurogroup Working Group and the Euro Summit). It further indicated that it initially tried to identify any relevant documents following the request for access, which led to no result. In view of the complainant's confirmatory application, the European Council, acting through its General Secretariat consulted again the relevant services and identified the e-mail and the letter in question.

17. The European Council argued that diverse contacts occurred between the various entities involved in the negotiations and documents may have been prepared and exchanged between various entities. However, such documents were not received and held by the European Council. Documents are held by the European Council if the President, the European Council as an institution or the General Secretariat receive or draft such documents. Thus, the European Council confirmed that it holds no additional documents falling within the scope of the complainant's request for access.

18. As regards the reasons why the e-mail and the letter in question fall in their entirety within the scope of the exception established in Article 4(1)(a) fourth indent of Regulation 1049/2001, the European Council explained that the letter attached to the e-mail contains specific information concerning the negotiations on the private sector involvement in the Greek debt crisis, as well as the timeline. Given the particular political and economic sensitivity and complexity of the negotiations, disclosing the documents would affect the trust among the involved entities and would compromise the negotiations (including future similar negotiations). The European Council stressed that the reactions of EU and world markets to signs of disturbances have far-reaching effects on the financial, monetary and economic situation of the EU, its Member States and also third countries. This applied to the entire content of the letter, including the date on which it was sent.

19. The European Council added that the e-mail contained considerations on the progress of the negotiations. Thus, the considerations set out above also applied to the e-mail.

20. In view of the foregoing, the European Council considered that the complaint was unfounded.

21. As indicated above, the complainant did not submit any observations.

The Ombudsman's assessment

22. As a starting point, the Ombudsman notes that Article 2(3) of Regulation 1049/2001 states that "[t]his Regulation shall apply to all documents held by an



institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union."

23. In connection with this, the case-law of the Court of Justice of the EU (the 'Court') has made it clear that the obligation to grant access to documents "presupposes that such documents exist".² Moreover, according to the Court, a presumption of veracity attaches to any statement by an institution relating to the non-existence of documents. However, the applicant may rebut that presumption by providing relevant and consistent evidence to the contrary.³

24. In the present case, the European Council has explained why, although it was initially unable to identify any relevant documents, it subsequently identified two documents after further consultation with the relevant services. Moreover, it has confirmed that it does not hold any additional documents falling within the scope of the complainant's request for access to documents. The Ombudsman notes that the complainant has not submitted any observations and thus has not adduced any evidence to call in question the European Council's statement.

25. As regards the two existing documents which were identified by the European Council (i.e., the e-mail and the letter in question), it invoked the exception contained in the fourth indent of Article 4(1)(a) of Regulation 1049/2001, which provides the following:

"The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the financial, monetary or economic policy of the Community or a Member State".

26. Moreover, pursuant to Article 4(6) of Regulation 1049/2001 "[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."

27. In this respect, the Ombudsman recalls the established case-law of the Court concerning the application of the substantive exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation 1049/2001: "[the] institution must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest", given that "such a refusal decision is of a complex and delicate nature which calls for the exercise of particular care and that the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general".⁴

28. In the present case, the Ombudsman considers that the European Council has provided sufficient and convincing explanations as to the reasons why the two documents in question fall within the scope of the above-mentioned exception in their entirety. In particular, the European Council explained that the documents contain details concerning the involvement of the private sector in the Greek debt crisis (i.e., the so-called 'haircuts' of claims held by private sector investors) and the time-line; that the relevant negotiations are complex; that they involve particular political and economic sensitivity and that disclosing the documents would affect the trust among the involved entities. In

² Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911, paragraph 76; Case T-380/04 *Terezakis v Commission* [2008] ECR II-11, paragraph 154.

³ See *Terezakis*, cited above, paragraph 155.

⁴ Case C-266/05 *P Sison v Council* [2007] ECR I-1233, paragraphs 34-36; Case T-362/08 *IFAW Internationaler Tierschutz-Fonds v Commission* [2011] ECR II-11, paragraph 104.



light of these explanations, the Ombudsman takes the view that the European Council's position that the relevant exception applied (i.e., that disclosure of the documents "*would undermine the protection of: [...] the financial, monetary or economic policy of the Community or a Member State*") appears to be reasonable.

29. In view of the foregoing, the Ombudsman concludes that no maladministration has been found.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

No maladministration has been found.

The complainant and the European Council will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 29-08-2013