



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 1 March 2012**

**7158/12**

<b>OMBUDS</b>	<b>2</b>
<b>INST</b>	<b>164</b>
<b>INF</b>	<b>36</b>
<b>API</b>	<b>24</b>
<b>JUR</b>	<b>118</b>

**COVER NOTE**

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from : General Secretariat of the Council

to : Delegations

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No. prev. docs. : 11286/11 OMBUDS 3 INST 302 INF 101 API 56 JUR 294

11285/11 OMBUDS 2 INST 301 INF 100 API 55 JUR 293

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Subject : Decision of the European Ombudsman closing his inquiry into complaint  
1170/2009/KM made by Mr Klaus Sohn against the Council

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Delegations will find at Annex a copy of a letter sent by the European Ombudsman to the Council concerning the Ombudsman's decision to close his inquiry into complaint 1170/2009/KM made by Mr Klaus Sohn against the Council.



European Ombudsman

1170/2009/KM  
S2011-147831

**P. Nikiforos Diamandouros**  
European Ombudsman

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

Strasbourg, 19 -12- 2011

Decision of the European Ombudsman closing his inquiry into complaint  
1170/2009/KM against the Council of the European Union

Dear Mr Corsepius,

Please find enclosed a copy of my above decision, which has been sent to the complainant, Mr Klaus-Dieter Sohn. I also enclose a translation of this decision into English.

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

**The Council has taken steps to settle to the complainant's satisfaction the issues arising from the first allegation and related claim.**

**Concerning the second allegation and related claim, the Ombudsman is pleased to note that the Council has partially accepted his proposal for a friendly solution by announcing that it will, from now on, inform applicants of the date on which the time limit for its decision on their applications for**

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access to documents expires. In relation to the other issues arising from the second allegation and related claim, there are no grounds for further inquiries.

Yours sincerely,

P. Nikiforos Diamandouros

cc: Mr Hubert Legal, Director-General of the Legal Service

Enclosures:

- Decision on complaint 1170/2009/KM
- English translation of decision on complaint 1170/2009/KM



European Ombudsman

## Decision

of the European Ombudsman closing his inquiry into complaint 1170/2009/KM against the Council of the European Union

### The background to the complaint

1. On 21 January 2009, the complainant, a German citizen, made an application for access to Document No 10673/02 ('the Document') of the Council of the European Union ('the Council'). The Document contains an opinion of the Council's Legal Service, discussing the legal basis for a proposal for a Regulation on genetically modified food and feed<sup>1</sup>.

2. Article 2(1) of Regulation 1049/2001<sup>2</sup> provides that "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.*"

3. An exception to this general right of access is set out in Article 4(2), which reads as follows:

*"The institutions shall refuse access to a document where disclosure would undermine the protection of:*

- [...]
- court proceedings and legal advice,
- [...]

*unless there is an overriding public interest in disclosure."*

4. The rules for processing confirmatory applications are set out in Article 8, which states the following:

*"(1) A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely, instituting court proceedings against the*

<sup>1</sup> The resulting Regulation 1829/2009 of the European Parliament and of the Council of 22 September 2009 on genetically modified food and feed (OJ 2009 L 268, p. 1) entered into force on 7 November 2009 and had to be transposed by the Member States by 18 April 2010.

<sup>2</sup> Regulation (EC) No 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

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*institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.*

*(2) In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given."*

**5.** On 23 February 2009, the Council granted partial access to the Document. The Council, relying on Article 4(2) of Regulation 1049/2001, argued that disclosing the Document in its entirety would undermine the protection of legal advice, since the legal opinion of the Council's Legal Service on the legality of the relevant act would then be made public. The Council stated that, not only was the opinion sensitive in view of the evolution of EU law, but the possibility of such internal legal advice being published might lead the Council to be overcautious about requesting internal legal advice, given that it might then be forced to publicly defend itself if it did not act in accordance with the advice it was given. The Council added that the Legal Service could come under external pressure, which might influence its advice and make it more difficult for it to defend the Council before the Court of Justice. The Council added that it had reached the conclusion that the principle of transparency did not override the public interest in the protection of legal advice.

**6.** On 9 March 2009, the complainant made a confirmatory application. He noted that Regulation 1829/2003 was based on Articles 37, 95 and 152(4)(e) EC Treaty, but that there was no justification for why these articles had been chosen as the legal basis. Likewise, he stated that no such explanation could be found in the relevant Commission proposals. The only document which contained a discussion regarding the choice of legal basis was the Document. The complainant considered that the reasons the Council had given for denying him access to the Document did not establish that the public interest in keeping the Document secret overrode his general right to access. The complainant considered the Council's argument that disclosure might undermine the work of the Legal Service to be of a very general nature, and that the reasons it put forward in support of its argument were the same as those rejected by the Court of Justice in *Turco*<sup>3</sup>.

**7.** On 31 March 2009, the Council informed the complainant that it needed more time to examine the matter, and that it therefore had to extend the deadline in accordance with Article 8(2) of Regulation 1049/2001. The extended deadline expired on 20 April 2009, without the complainant having received a reply.

**8.** On 30 April 2009, the complainant, therefore, submitted a complaint to the European Ombudsman, maintaining the arguments he made in his confirmatory application. He also criticised the way in which the Council had processed his application, notably by (i) not informing him when the reply to his confirmatory application was due; (ii) not providing reasons for extending the time limit (even though this was required by Article 8(2) of Regulation 1049/2001), and (iii) by not informing him of the remedies open to him.

**9.** On 5 May 2009, the complainant received a letter from the Council dated 24 April 2009, in which the latter rejected the confirmatory application, stating

<sup>3</sup> Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2006] ECR I-4723.



that, once an institution had satisfied itself that the public interest in the protection of legal advice would be affected, the document was generally protected from publication. However, a document containing legal advice could exceptionally be disclosed if the public interest justified such disclosure. In *Turco*, the Court of Justice had held that, generally, documents containing legal advice on legislative matters had to be disclosed, unless they were "of a particularly sensitive nature" or had a "particularly wide scope that goes beyond the context of the legislative process in question". The Council defended its position by stating that a part of the Document contained an analysis of the Union legislator's competences in relation to the introduction of a centralised system for the authorisation of certain products. It stressed that this was a matter which was particularly sensitive and its scope went beyond the particular legislative proposal in question. For these reasons, the Document could not be disclosed.

## The subject matter of the inquiry

**10.** The complainant submitted the following allegations:

1. The Council of the European Union wrongly refused access to a document, based on arguments which the European Court of Justice had rejected in its judgment in the *Turco* case.
2. The Council failed to comply with procedural requirements imposed by the rule of law and/or laid down in Regulation 1049/2001.

**11.** The complainant added the following claims:

1. The Council should grant the complainant access to Document No. 10673/02.
2. The Council should, in the future, ensure that its proceedings accord with the rule of law by:
  - (a) stating the new deadline when it sends out "holding letters" because it needs more time to examine an application for access to documents;
  - (b) giving reasons for extending the deadline for replying to an application; and
  - (c) providing applicants with a statement relating to the legal remedies open to them in case the application is refused. This should happen at an early stage to ensure that applicants whose request is not dealt with in time know that they can treat this as a negative reply, and know what legal remedies are open to them in such a case.

## The inquiry

**12.** The complaint was submitted on 30 April 2009. Further information was submitted on 7 May 2009. On 4 June 2009, the Ombudsman opened an inquiry and asked the Council for an opinion.

**13.** The Council sent its opinion on 10 July 2009. On 20 July 2009, the Council's opinion was forwarded to the complainant with an invitation to submit observations by 31 August 2009. He sent no observations by that date. On 10

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September 2010, the Ombudsman inspected the Document at the Council's premises. The report on the inspection was subsequently forwarded to the complainant and to the Council<sup>4</sup>. On 16 March 2011, the complainant sent his observations.

14. On 27 May 2011, the Ombudsman made a proposal for a friendly solution. The Council sent its reply to the proposal on 15 July 2011. In a telephone conversation with the legal officer handling the case, held on 20 July 2011, the complainant indicated that he had received the Document and that, should he not send further observations within two weeks of that telephone communication, he could be considered to be satisfied with the outcome of the inquiry. The complainant sent no further observations.

## The Ombudsman's analysis and provisional conclusions

### A. Allegation of failure to provide access to a document and related claim

#### Arguments presented to the Ombudsman

15. The complainant argued that, based on a misreading of the *Turco* judgment, the Council had wrongly rejected his application for access to the Document. In the letter rejecting the confirmatory application, the Council argued that access to documents containing legal advice is granted only exceptionally. He submitted that this was a misinterpretation of Regulation 1049/2001.

16. The complainant noted that the Council, echoing the criteria set out in the judgment in the *Turco* case, paragraph 69, further attempted to show that the Document was of a "particularly sensitive nature" and that it had a "particularly wide scope which goes beyond the legislative process in question". He maintained that the legislative procedure in question had been completed, and that the Council's reference to this advice in the context of other legislative procedures was not sufficient to justify making an exception to the duty of transparency. Otherwise, he claimed, the Council could undermine the right of access to documents by referring to old advice in new cases or procedures.

17. The Council had argued that disclosure could undermine the value of opinions provided by the Legal Service to the Council, to the extent that the latter would cease to request them. The complainant responded that this consideration was irrelevant, since the Court of Justice had rejected it in *Turco*. He considered that the Council had not shown that this danger existed in the present case, or that it ever existed. The same applied to the Council's argument that disclosure of the Legal Service's opinions would make it more difficult for the latter to defend the Council before the court. The complainant pointed out that the Document related to a regulation which had been applicable since April 2004, but had never been challenged before the EU courts. He was not aware of the Legal Service ever having refused to represent the Council before the EU

<sup>4</sup> The report did not reveal the protected content of the document inspected.



courts because its initial legal opinion had differed from the position eventually adopted. It was clear that the EU courts decided cases on the basis of their interpretation of the law, and not on the basis of whether an institution had followed internal legal advice.

**18.** The complainant added that the main purpose of Regulation 1049/2001, and of the Treaty rules on which it was based, was that greater importance should be attached to the principle of transparency than to an administration's interest in keeping documents secret. He went on to argue that the exception to the right of access set out in Article 4(2) of Regulation 1049/2001 did not apply generally to all legal advice. Rather, detailed reasoning was required to sustain a claim that it was in the public interest not to disclose a document. In that regard, the complainant considered that the Council seemed to want to be left undisturbed in its role in developing EU law. However, he thought it of vital importance that citizens should be included in this process, which requires that they should be able to understand the reasons behind the actions of the EU legislator so as to be able to discuss and criticise them. The complainant expressed his belief that excessive secrecy in legislative matters risked undermining the trust which citizens place in the European institutions. Thus, the Council's argument that it would be forced to justify its legislative decisions showed its misunderstanding of the fundamental principles of democracy, and suggested that the Council wanted to avoid public scrutiny.

**19.** In its opinion, the Council stated that the complainant must have misunderstood its statement of reasons regarding the relationship between rules and exceptions in the application of Article 4(2) of Regulation 1049/2001. The Council clarified that, contrary to the complainant's argument, it had not misapplied, or disregarded, either Regulation 1049/2001 or the EU courts' case-law. Rather, it had relied on the exception set out in Article 4(2) of Regulation 1049/2001, and applied the principles established by the Court of Justice. It had found that the Document contained a legal opinion, and had then examined whether disclosure would undermine the protection of legal advice, balancing this public interest against the public interest in the openness of the legislative procedure.

**20.** As regards the argument that legal advice relating to a legislative proposal should be disclosed once the legislative procedure was concluded, the Council took the view that this would distort the EU courts' case-law, which had, in fact, recognised two instances where legal advice had to be protected. The first was where the legal advice was particularly sensitive in nature, and the second was where it had a particularly wide scope which went beyond the context of the legislative procedure in question. In such instances, the legal advice was to be protected for the period during which protection was justified. The Court of Justice had not stated that the conclusion of the legislative procedure in question was the determining factor in this regard.

**21.** The Council considered that the protection of part of the Document was justified, in accordance with Article 4(2) of Regulation 1049/2001. Even though the legislative procedure had been concluded, the Council was of the view that the opinion remained particularly sensitive because the critical question it discussed had also been, and continued to be, considered in the context of other legislative proposals relating to the internal market. Moreover, the same





question had been the subject of an annulment action before the EU courts<sup>5</sup>. The Council submitted that it had thus substantiated its view with specific and concrete reasons, as required by the Court of Justice's judgment in *Turco*.

**22.** The Council stressed that the Document was written as an internal legal opinion, intended for the members of the Council. The possibility that such internal legal advice might be published might lead the Council to display caution when requesting such advice, given that it might then be forced to publicly defend itself if it were to adopt a position other than the one it was advised to take. This would result in the Council having to forego an important instrument which ensures the legality of its acts.

**23.** Further, the Legal Service could come under external pressure which might influence its advice. Finally, it might be more difficult for the Legal Service to defend the Council before the Court of Justice if the Legal Service's opinions were to become known in advance, notably in cases where the Council's position proves to differ from the position it was advised to take in the Legal Service's opinion. If the Legal Service had to function under the expectation that its internal advice might be published, the way in which it drafts its advice could be influenced which, in turn, would undermine the availability to the Council of frank, objective, and comprehensive advice. The Council added that it had analysed whether there was an overriding public interest in disclosure and had come to the conclusion that the principle of transparency did not override the interest in the protection of the legal advice contained in the Document.

**24.** The Council disagreed with the complainant's rejection of its argument that the institution might lose all interest in requesting written opinions from its Legal Service. Quite to the contrary, Article 4(2) of Regulation 1049/2001 aims to protect the institutions' interest in receiving frank, objective and comprehensive legal advice. If one were to take the opposite view, this would undermine the very purpose of the protection of legal advice contained in Article 4(2) of Regulation 1049/2001.

**25.** As regards the complainant's claim that the Council had not reasoned its position or substantiated its arguments, the Council noted that, in accordance with Article 4(2) of Regulation 1049/2001, it merely had to show that there was a reasonably foreseeable risk that the protection of legal advice would be undermined. In the Council's view, this risk could be shown to exist by the specific arguments made above.

**26.** Finally, regarding the question of whether there was an overriding public interest in disclosure, the Council stated that, given the specific circumstances of the case, and the very sensitive nature and the scope of the Document, the principle of transparency did not outweigh the public interest in protecting legal advice. The Council understood that the complainant was interested in the Document for academic purposes, but considered this to be irrelevant, given that it could only disclose the Document *erga omnes*. As there were no other arguments in support of an overriding public interest in disclosure, it concluded that its interest in receiving frank, objective and comprehensive

<sup>5</sup> This concerned Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods (OJ 2003 L 309, p. 1).



advice overrode the complainant's interest in the disclosure of the entire document.

#### **The inspection**

27. On 10 September 2010, the Ombudsman's representatives carried out an inspection of the Document at the Council's premises. The inspection established that the Document contained an opinion of the Council's Legal Service on the legal basis for a proposed European Parliament and Council regulation on genetically modified food and feed. It further emerged that the Document did not focus on the subject matter of the proposed regulation, but discussed the choice of legal basis for the centralised authorisation procedure which was to be foreseen in the proposed regulation. During the inspection, the Council's representative again emphasised that the relevant opinion was particularly wide in scope, and particularly sensitive in nature, and that the question of a central authorisation procedure at Community level was one that came up regularly and repeatedly, as was indeed the case in discussions which were ongoing.

#### **Further arguments presented to the Ombudsman after the inspection**

28. In his observations on the inspection report, the complainant referred to the *API* case<sup>6</sup> in which the Court of Justice had made it clear that court proceedings could not be undermined by a disclosure of documents if the proceedings in question had been concluded. In principle, this also applied where other, closely related proceedings were still ongoing. In light of the Court of Justice's finding, the complainant submitted that the Council's argument, namely, that it might have to refer to the opinion contained in the Document in future proceedings before the EU courts, could not be regarded as valid.

#### **The Ombudsman's preliminary assessment leading to a friendly solution proposal**

##### **The relationship between rule and exception under Regulation 1049/2001**

29. It is clear that Regulation 1049/2001 provides the general rule that documents held by an institution, including opinions drawn up by an institution's legal service concerning legislative procedures, are to be disclosed. The second indent of Article 4(2) of Regulation 1049/2001 provides for an exception where disclosure would undermine the protection of legal advice. However, even if this exception applies, access will still have to be granted if it can be shown that there is an overriding public interest in disclosure.

30. In its reply to the complainant's confirmatory application, the Council stated that a document was "*generally protected from publication once the institution had satisfied itself that the disclosure of the document would undermine the public interest in protecting legal advice; access to a document containing legal advice could exceptionally be granted if it was established that an overriding public interest would justify disclosure.*"<sup>7</sup> The Council did not agree with the complainant's argument that an institution may benefit from the exception in Article 4(2) only

<sup>6</sup> Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and others / API and Commission*, not yet reported.

<sup>7</sup> Translation by the Ombudsman's services, emphasis in the original.



if it could show that there is an overriding public interest in keeping a document secret. The Council considered that this would turn the relationship between rule and exception on its head.

**31.** The Council thus incorporated the exception contained in Article 4(2) of Regulation 1049/2001 into what it referred to as "*the general rule*". In doing so, it somewhat blurred the distinctions made in Regulation 1049/2001 between the general rule, the exception designed to protect legal advice, and the proviso that, if an overriding public interest is established, access will, nonetheless, have to be given.

**32.** In its opinion, however, the Council dispelled the resulting uncertainty by stating clearly that it had followed the rules provided in Regulation 1049/2001 and the EU courts' case-law. It had thus analysed whether disclosure of the Document, which contained legal advice, would undermine the interest protected by Article 4(2), and at all times balanced the public interest in transparency against the public interest in protecting legal advice. The Ombudsman therefore considered that there was no need for further inquiries into this aspect of the case.

#### The confidentiality of the opinions of the Legal Service

**33.** The Council rejected the complainant's confirmatory application on two grounds. First, the Council argued that it might be deterred from asking for written opinions from its Legal Service, given that it may have to publicly defend itself if it decides not to adopt a position it was advised to take. Second, its Legal Service's ability to provide frank advice and to represent the Council in court would be undermined if the Legal Service's opinions were known in advance. The complainant objected to the Council's arguments, noting that the Court of Justice in its *Turco* judgment had rejected the arguments put forward by the Council.

**34.** It appeared useful at this point to refer to that judgment.

**35.** The Court of Justice rejected the first of the above arguments as follows:

*"59 As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.*

*60 Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed.*

*61 Consequently, to submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of the second indent of*



*Article 4(2) of Regulation No 1049/2001 and cannot, accordingly, provide a basis for a refusal to disclose such advice."*

**36.** The Council's argument that it might find itself obliged to defend a decision taken against the advice given by its Legal Service is essentially the same as that employed before the Court of Justice in *Turco*. It cannot, therefore, be accepted in the present case.

**37.** As regards the second of the above arguments, the Court of Justice pronounced as follows:

*"65 As regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001.*

*66 In view of those considerations, there appears to be no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issued in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.*

*67 In any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. As was pointed out in paragraphs 45 to 47 of this judgment, such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.*

*68 It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process."*

**38.** If these criteria were applied to the reasoning the Council used to support its decision that access to the Document should be denied, the preliminary conclusion therefore had to be that the Council failed to show that access had to be denied in order to protect its interest in obtaining frank, objective and comprehensive legal advice. It also failed to take due account of what recital 2 of Regulation 1049/2001 describes as one of the aims of the regulation, namely, an administration which is *"more accountable to the citizen in a democratic system"*, which is particularly important in relation to legislative procedures.

The particularly sensitive nature of the opinion and its importance which goes beyond the legislative measure in question

**39.** It should be noted, however, that the Court of Justice went on to state the following:

*"69 That finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process,*



*but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.*

70 *In that context, it must also be borne in mind that, under Article 4(7) of Regulation No 1049/2001, an exception can only apply for the period during which protection is justified on the basis of the content of the document."*

**40.** It thus had to be assessed whether the Council had shown, on the basis of the Document, that it remained necessary to protect it.

**41.** The Council argued that the part of the Document to which it did not give access was particularly sensitive, given that it concerned the EU legislator's competences regarding the introduction of a centralised authorisation procedure. Furthermore, it continued to be particularly relevant for procedures beyond the one already concluded because the same question had to be analysed in a number of future legislative procedures.

**42.** The Ombudsman was not convinced that the Council's explanations established that the Document was "*particularly sensitive*" within the meaning of the interpretation given to this term by the EU courts. In a recent judgment, the General Court suggested that a document was only "*particularly sensitive*" if "*a fundamental interest of the European Union or of the Member States would be jeopardised*" by disclosure<sup>8</sup>. While it is true that there are often diverging views as to the legal basis on which a proposal should be based, this alone did not, in the Ombudsman's view, suffice to make an opinion "*particularly sensitive*".

**43.** Secondly, as regards the question whether the Document had "*a particularly wide scope that goes beyond the legislative procedure in question*", the Council relied on the fact that the Document discussed the question of competences, which is relevant in a number of legislative procedures. The complainant argued that the legislative procedure in question had been finalised and that the document should, therefore, be disclosed.

**44.** In a different context, the Court of Justice accepted that it could not be ruled out that the disclosure of pleadings made in one case might undermine the proceedings in another closely related case. However, such a risk depended "*on a number of factors*". Therefore, "*only a specific examination of the documents to which access is requested, according to the [usual] criteria*" can determine whether access to a document can be refused<sup>9</sup>.

**45.** The Ombudsman accepted that an opinion concerning which legal basis to choose for a marketing authorisation procedure might be of relevance for a similar procedure concerning a different set of products. In that sense, it might be considered to have "*an importance going beyond the legislative procedure in question*". The Council referred to concluded discussions on two Commission proposals<sup>10</sup>, and to one procedure which was ongoing at the time in question,

<sup>8</sup> T-233/09 *Access Info Europe v Council*, judgment of 22 March 2011, not yet reported, paragraph 78.

<sup>9</sup> *Sweden and others v API and Commission*, cited above (footnote 7), paragraphs 130 onwards.

<sup>10</sup> One proposal gave rise to Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods OJ 2003 L



but which had, in the meantime, been concluded<sup>11</sup>. It also referred to proceedings before the Court of Justice which were concluded by a judgment on 6 December 2005<sup>12</sup>. It should be noted that, in this context, the only cases which could be taken into account were those in which the legislative procedure was not finalised by the time the confirmatory application was rejected. Seen against this background, the Ombudsman was not convinced that the explanations provided by the Council established that the Document had a "particularly wide" scope.

**46.** Thus, in the Ombudsman's view, the Council's arguments were not sufficient to justify, on the basis of the Document's content, as required by Article 4(7) of Regulation 1049/2001, the Council's view that the Document cannot be disclosed in its entirety. This could be an instance of maladministration.

#### Preliminary conclusion in relation to the first allegation and related claim

**47.** In light of the above, the Ombudsman made the preliminary finding that the Council had failed to reason its rejection of the complainant's application for access to documents in accordance with the relevant statutory provisions and applicable case-law. This could amount to an instance of maladministration. The Ombudsman therefore proposed that, taking into account his findings, the Council could consider granting the complainant access to document No 10673/02 in its entirety, unless it could duly establish why parts of the document merit protection in accordance with Regulation 1049/2001, taking into account the relevant case-law of the Court of Justice.

#### The arguments presented to the Ombudsman after his friendly solution proposal

**48.** In its reply to the proposal, the Council objected to the Ombudsman's analysis that its decision not to publish the document was not in line with the relevant case-law of the Court of Justice. It noted that the Court has accepted that general considerations could be invoked to refuse access to documents covered by a "presumption which appl[ies] to certain categories of documents" and also that this could be done in relation to legislative files. This notwithstanding, the Council had demonstrated, by reference to the Document and by relying on concrete and specific reasons to show that the Document was of a particularly wide scope and of a particularly sensitive nature, that the general presumption that written opinions of the Legal Service had to be protected applied. It further underlined that, in its view, it did not result from Regulation 1049/2001 or from the judgment in *Access Info Europe*<sup>13</sup>, cited by the Ombudsman, that the need to protect legal advice could only be relied upon where a "fundamental interest of the European Union or of the Member States would be jeopardised". Finally, as regards the notion of a 'particularly wide scope', the Council maintained that, given that the exception relating to the protection of legal advice is aimed at

309 p. 1. Another led to the Directive of the European Parliament and of the Council amending Directive 2001/82/EC on the Community code relating to veterinary medicinal products (OJ 2004 L 136, p. 58).

<sup>11</sup> Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.

<sup>12</sup> Case C-66/05 *United Kingdom v. Parliament and Council* [2005] ECR I-10553.

<sup>13</sup> T-233/09 *Access Info Europe v Council*, cited above (footnote 9).



safeguarding the institutions' ability to receive frank, objective and comprehensive legal advice from their legal services, it should suffice for an institution to demonstrate, as the Council did in the present case, that it is reasonably foreseeable that questions similar to those raised in the opinion in question would arise in the future for it to be able to justify refusing access to the document.

**49.** The Council added that it had nonetheless re-examined the matter and had decided that given, in particular, the time which had elapsed, the exception relating to the protection of legal advice was no longer applicable. Nor was any other exception provided for in Article 4 of Regulation 1049/2001 applicable. It therefore decided to forward a publicly available version of the Document to the complainant.

**50.** The complainant indicated that he had received the Document and that he was satisfied with this outcome.

#### **The Ombudsman's assessment after his friendly solution proposal**

**51.** While the Ombudsman does not agree entirely with the Council's analysis, he notes that the Council has now given the complainant full access to the Document and that the complainant declared that he was satisfied with this outcome. Notwithstanding the divergent views on the legal aspects of the matter, the Ombudsman therefore concludes that the Council has taken steps to settle this aspect of the complaint to the complainant's satisfaction.

## **B. Allegation of failure to respect the procedural requirements set out in Regulation 1049/2001 and related claim**

### **Arguments presented to the Ombudsman**

**52.** The complainant alleged that the Council disregarded a number of procedural requirements set out in Regulation 1049/2001. In this context, he submitted the arguments listed below.

(a) In its letter dated 31 March 2009 extending the time limit for reviewing the confirmatory application, the Council did not specify the new deadline.

(b) In its letter dated 31 March 2009, the Council failed to provide reasons for the extension of the time limit, thereby infringing Article 8(2) of Regulation 1049/2001.

(c) The Council failed to include information on the legal remedies open to the applicant which, although not technically contrary to Regulation 1049/2001 (which requires this information to be contained in a negative reply), infringes the rule of law and the principle of transparency.

(d) By the expiry of the extended time limit, the Council had not replied to the complainant, which entitled him to turn to the European Ombudsman under Article 8(3) of Regulation 1049/2001.

**53.** In its opinion, the Council rejected the first three arguments. As regards the first argument, it noted that, when it extended the time limit, it referred to



Article 8(2) of Regulation 1049/2001. This provision clearly states that the time limit is extended by 15 working days. Thus, a reference to this provision in the holding letter did not leave any doubt as to the extended deadline date.

**54.** As regards the second argument, the Council pointed out that it had explained that the bodies charged with processing the application had not yet completed their work. Pursuant to the Council's Rules of Procedure, confirmatory applications are decided by the Council, but the decision is prepared by the working party and Coreper<sup>14</sup>. Since all these bodies have to examine and then decide on an application, it was not unusual for the processing of applications to take more time than that foreseen in Article 8(1) of Regulation 1049/2001. However, applicants were always informed of extensions of the normal time limit, and, where possible, given an indicative date for the final decision.

**55.** As regards the third argument, the Council noted that it had complied with Regulation 1049/2001 by informing the complainant of the remedies open to him when it rejected the confirmatory application. Article 8(1) of that Regulation stipulates that the institution has to provide this information "*in the event of a total or partial refusal*". The Council went on to argue that an extension of the time limit was merely a procedural step, and could not, in itself, be challenged. The Council therefore considered that it might be misleading to indicate legal remedies in a holding letter, since doing so might lead the recipient wrongly to believe that the extension of a time limit was a measure which could be challenged.

#### **The Ombudsman's preliminary assessment leading to a friendly solution proposal**

##### Information on the date on which the time limit ends

**56.** Article 8(2) of Regulation 1049/2001 clearly states that the time limit for dealing with an application can, in exceptional circumstances, be extended by 15 working days.

**57.** However, it cannot be presumed that all citizens have a detailed knowledge of Regulation 1049/2001. In this particular case, the Council extended the time limit on 31 March 2009. The additional period of 15 working days thus expired around Easter. Circumstances such as these make it especially difficult for citizens to work out which days are working days, particularly in light of the fact that public holidays differ between Member States, and EU institutions set their holidays independently. The date on which an extended time limit expires has, however, a particular relevance for applicants, since it is the date on which they can treat an institution's failure to reply as a negative reply, and use the legal remedies described in Article 8(3) of Regulation 1049/2001.

**58.** Good administration requires an institution to put all applicants, including those with a less than perfect knowledge of the applicable legal provisions, in a position to be able to challenge a negative reply, and thus effectively to exercise their right to gain access to documents. Even though this is not expressly

<sup>14</sup> Coreper is the short name of the Committee of Permanent Representatives, which is composed of the head, or deputy head of mission of each Member State of the EU.





provided for in Regulation 1049/2001, the Ombudsman, therefore, considered that the actual date on which the extended time limit expires should be indicated. The Council's failure to do so in the present case could be an instance of maladministration. The Ombudsman, therefore, made a corresponding proposal for a friendly solution.

#### Statement of reasons for an extension of the time limit

**59.** According to Article 8(2) of Regulation 1049/2001, the time limit can only be extended in "exceptional cases". The applicant has to be notified in advance and "detailed reasons" have to be given. In the present case, the Council's letter dated 31 March 2009 merely informed the complainant that it had not yet completed its examination of the complainant's confirmatory application. However, no reason for the delay was given.

**60.** The Council thus failed to comply with the relevant statutory requirement. This could constitute an instance of maladministration.

**61.** In its opinion, the Council stated that it was not unusual for the time limit to be extended since several bodies had to provide an opinion on confirmatory applications. It thus appeared that there could be a systemic problem as regards the Council's compliance with the time limits set by Regulation 1049/2001. The Ombudsman considered that this issue, which was not raised by the complainant, should be addressed separately, and not within the framework of the present inquiry. On 26 June 2011, the Ombudsman thus opened an own-initiative inquiry into the matter.<sup>15</sup>

#### Information on the remedies open to the applicant

**62.** Article 8(2) of Regulation 1049/2001 only requires the institution to inform the applicant of the legal remedies open to him or her "in the event of a negative reply". The Council thus clearly acted within the framework set by Regulation 1049/2001, and complied with its legal obligations in acting as it did.

**63.** However, it was important to note that such information is only made available to applicants where an institution takes an explicit decision to reject an application for access. As the complainant correctly pointed out, in cases where no such explicit decision is taken by the institution, informing applicants at an earlier stage would ensure that they can use the legal remedies open to them once the time limit for the institution's reply has expired. As stated above, citizens do not always have a perfect knowledge of all the relevant provisions. While it is true that Regulation 1049/2001 does not require information about legal remedies to be communicated to an applicant before a 'negative reply', good administration sometimes makes it necessary to do more than is legally required in order to serve the citizen well. In this context, this would mean providing applicants with information on the legal remedies available to them at an earlier stage in the procedure. In this regard, the Ombudsman could not agree with the Council's argument that it would mislead citizens if they were to be informed of legal remedies already at the stage of receiving a holding letter. The danger that applicants might be misled could, in his view, be easily prevented by selecting appropriate wording, and by making it clear that the

<sup>15</sup> OI 3/2011/KM.



relevant remedies are only available once the extended deadline has expired. A further possibility would be to provide citizens with more detailed information on the procedure to be followed, including possible remedies, already in the institution's letter of acknowledgement of receipt of a request for access to documents. In the Ombudsman's view, such a pro-active approach would be particularly citizen-friendly. Accordingly, the fact that, in the present case, the Council failed to provide the complainant with any information on possible remedies before the time limit for dealing with his confirmatory application had expired, could constitute maladministration. The Ombudsman, therefore, made a corresponding friendly solution proposal.

#### **Preliminary conclusion in relation to the second allegation and related claim**

**64.** The Ombudsman made preliminary findings of maladministration in the preceding paragraphs. As regards the issues raised in the complainant's first and third arguments, these were reflected in the friendly solution proposal inviting the Council to consider also improving its communications with citizens who request access to documents by (a) informing them of time limit expiry dates, and (b) informing them in good time and, in any event, before the expiry of any relevant time limit, of the remedies open to them in case of total or partial refusal. The issue relating to the statement of reasons for the extension of the time limit was, as indicated above, taken up by the Ombudsman separately, and not within the framework of the present inquiry.

#### **The arguments presented to the Ombudsman after his friendly solution proposal**

**65.** Concerning the issue of informing citizens of the date on which a time limit expires, the Council remained of the view that citizens are in a position to calculate these dates themselves. Nevertheless, it stated that, in the interest of good administration, it is ready to indicate the actual date on which the time limits for its replies expire, in relation to both initial and confirmatory applications.

**66.** The Council maintained its view on the subject of indicating to citizens the legal remedies available to them before the expiry of the relevant time limit. It went on to point out that it had, in any event, replied to the complainant within the time-limit and had a record of doing so generally. It therefore did not accept the Ombudsman's friendly solution proposal in this regard.

#### **The Ombudsman's assessment after his friendly solution proposal**

**67.** The Ombudsman applauds the Council's announcement that it will, in future, inform applicants of the date on which the Council's reply to their initial or confirmatory application for access to a document under Regulation 1049/2001 is due. He notes that, in this regard, the Council has accepted his proposal for a friendly solution. At the same time, he notes that the Council rejected the part of his proposal for a friendly solution in which he invited it to inform applicants of the legal remedies available to them in the event that it does not reply before the expiry of that time limit. However, given that the Council has partially accepted his friendly solution proposal and that the complainant indicated that he was satisfied with the outcome of the case at hand, the Ombudsman does not consider that there are grounds for further inquiries in this regard.



## C. Conclusions

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

**The Council has taken steps to settle to the complainant's satisfaction the issues arising from the first allegation and related claim.**

**Concerning the second allegation and related claim, the Ombudsman is pleased to note that the Council has partially accepted his proposal for a friendly solution by announcing that it will, from now on, inform applicants of the date on which the time limit for its decision on their applications for access to documents expires. In relation to the other issues arising from the second allegation and related claim, there are no grounds for further inquiries.**

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

P. Nikiforos Diamandouros

Done in Strasbourg on 19-12-2011

Final English version of the decision on complaint 1170/2009/KM