



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 17 July 2012

10830/12

**OMBUDS 8
INST 385
INF 100
API 71
JUR 319**

"I/A" ITEM NOTE

from :	Working Party on Information
to :	Coreper (part 2)/Council
No. prev. doc.:	10829/12
Subject :	Complaint 862/2012/RT made by Mr David PRICE to the European Ombudsman

Delegations will find enclosed a draft reply from the Council, as it stands after examination by the Working Party on Information at its meeting on 13 July 2012, to the letter sent on 22 May 2012 by the European Ombudsman to the Secretary-General of the Council concerning complaint 862/2012/RT made by Mr David PRICE.

The Swedish delegation indicated that it would vote against the draft reply and made the following statement: "*Sweden cannot fully agree with the reasoning in paragraphs 7 and 10.*"

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Swedish delegation voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT

Brussels,

Mr Nikiforos Diamandouros
European Ombudsman
1, avenue du Président Robert Schuman
B.P. 403
F - 67001 Strasbourg

Subject: Complaint made by Mr David PRICE (0862/2012/RT) against the European Council concerning a request for public access to legal opinions on the draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“Fiscal Compact Treaty”)
- your letter dated 22 May 2012

Sir,

Thank you for your letter of 22 May 2012 concerning a complaint by Mr David PRICE (0862/2012/RT) in which you ask the European Council to submit an opinion on the above matter. I am pleased to inform you of the Council’s opinion on this question, as the present complaint concerns the Council's activities.

(Complimentary close)

Uwe Corsepius

I. THE INQUIRY

1. By letter of 22 May 2012 the European Ombudsman opened an inquiry into a complaint submitted by Mr David Price (0862/2012/RT) concerning a request for public access to a legal opinion on the draft “Fiscal Compact Treaty”. The complainant’s allegation and claim are set out in the European Ombudsman’s letter as follows:
 - *“The European Council failed to handle properly and in a timely manner the complainant's request for access to documents”*;
 - *“the European Council should grant access to the requested documents”*.
2. In accordance with Articles 2(2) and 3(1) of the Ombudsman’s Statute, the European Ombudsman invited the European Council to submit an opinion on the above allegation and claim by 31 August 2012. Furthermore, the European Ombudsman requested the inspection of the relevant documents under Article 3(2) of the Ombudsman’s Statute.

II. THE COMPLAINT

3. In his complaint of 26 April 2012, the complainant explains that his application for public access related to an *“an urgent matter of great public interest”* on *“the legal basis for the new financial treaties and whether they fall within the European rule of law, in particular whether the European Court of Justice may act”*. He complains about the delay in the General Secretariat’s initial reply that went beyond the fifteen-day deadline set out in Regulation 1049/2001 and which resulted in a total refusal of his request. The complainant also deplores the absence of a reply to his confirmatory application *“some four weeks after [his] appeal for urgent action”* on a matter of great public interest where *“[g]reat political pressure is being placed on public and parliaments for a quick decision”*.
4. The complainant claims that *“[u]rgent matters should be treated urgently and at least within the legal limits of ... Regulation 1049/2001”*. He also claims that the European Council’s information system should be changed so to make urgent documents required for the public debate available immediately.

III. COUNCIL'S OBSERVATIONS

i) The institution concerned by the complaint

5. The Council would like to clarify that the application for public access at the origin of the present complaint was addressed to the General Secretariat of the Council in the initial stage and to the Council in the confirmatory stage. Accordingly, it was the Council and its General Secretariat that replied to the complainant's public access request in accordance with Regulation 1049/2001 and the specific provisions set out in Annex II to the Council's Rules of Procedure. Consequently, the present complaint concerns the activities of the Council and not the European Council, as the complainant indicates in his complaint.
6. The Council would respectfully request the correction of the name of the institution concerned by the present complaint in the relevant case-files.

ii) Admissibility of the complaint

7. The Council will limit its comments to the question of admissibility of the present complaint. It will argue that the complainant submitted his complaint to the European Ombudsman too early, before having exhausted the internal administrative review under Regulation 1049/2001 and before having made appropriate administrative approaches to the Council.
8. The complainant submitted his initial application for public access to the General Secretariat of the Council on 2 February 2012. Following an extension in accordance with Article 7(2) of Regulation 1049/2001 of the fifteen working-day time limit for replying to the initial application by an additional period of fifteen working days, the General Secretariat of the Council replied to the complainant on 16 March 2012. The complainant submitted a confirmatory application to the Council against the General Secretariat's initial reply consisting of a refusal to give public access to the requested document on 30 March 2012. On 25 April 2012, the General Secretariat of the Council extended by fifteen working days the time limit for replying to the confirmatory application in accordance with Article 8(2) of

Regulation 1049/2001 expiring on 22 May 2012. In its letter of extension, the General Secretariat of the Council relied upon *“the complexity of the examination of the confirmatory application”* and on *“the exceptional constraints in the timetable for meetings of the various Council bodies involved in the examination”* justifying the extension of the time limit for processing the confirmatory application. The complainant submitted his complaint to the European Ombudsman on 25 April 2012, on the day on which he received the General Secretariat’s letter extending the time limit for the Council’s processing of his confirmatory application by fifteen working days.

9. Pursuant to Article 8(1) and (3), of Regulation 1049/2001, the institution's total or partial refusal of a confirmatory application or failure to reply to a confirmatory application within the prescribed time limit entitles the applicant to institute court proceedings against the institution or make a complaint to the Ombudsman.
10. It is clear from the facts described above that no finalised position of the Council on the confirmatory application existed on 25 April 2012, on the day of the submission of the present complaint to the Ombudsman. In addition, since the General Secretariat properly informed the complainant of the Council’s intention to give a final reply on the confirmatory application by 22 May 2012, no implied negative reply of the complainant’s confirmatory application can be deemed to have existed either on 25 April 2012. Therefore, since the present complaint is not directed against the Council's explicit or implicit decision on the confirmatory application that is open to challenge under Article 8(1) or (3) of Regulation 1049/2001, the Council considers that the complaint should be declared inadmissible.
11. Nor can the present complaint be regarded as admissible insofar as the complainant's allegation of procedural errors in the Council's handling of the confirmatory application is concerned. In fact, the complainant did not make any prior administrative approaches with the Council, as required by Article 2(4) of the Ombudsman's Statute¹, regarding the extension

¹ *“A complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.”*

by the General Secretariat of the Council of the deadline for handling the complainant's confirmatory application before launching the complaint with the European Ombudsman. Accordingly, the Council, acting through its General Secretariat, did not have the opportunity to learn about the complainant's grief and to explain its position to the complainant.

12. In summary, the Council considers that the conditions of admissibility of the present complaint are not met.

iii) Substance of the complaint

13. Since the present complaint is not directed against an administrative act or omission open to complaint before the Ombudsman, and, insofar as the procedural aspects are concerned, has not been preceded by appropriate administrative approaches, the Council does not consider it appropriate to formulate comments regarding the substance of the complaint.
14. Should the complainant decide to make a complaint against the Council's decision of 22 May regarding the confirmatory application (attached for ease of reference), the Council will remain at the disposal of the European Ombudsman to submit observations on the substance of the matter. Likewise, it will be at the disposal of the Ombudsman's services to facilitate the inspection of the requested document in the framework of an inquiry.

Enclosure