



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : General Secretariat
to : Delegations

No. prev. doc.: 8826/12

Subject : European Council : Reply to the European Ombudsman concerning the complaint 531/2012/MMN made by Mr Olivier HOEDEMAN on the handling by the European Council of his access to documents request

Delegations are informed that the attached reply to the European Ombudsman concerning the complaint made by Mr Olivier Hoedeman (531/2012/MMN) on the handling by the European Council of his access to documents request – of which the Working Party on Information was informed on 13 July 2012 – was sent on 20 July.

**COUNCIL OF
THE EUROPEAN UNION**

Brussels,

THE SECRETARY GENERAL

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Subject: Complaint made by Mr Olivier HOEDEMAN (531/2012/MMN) concerning a request for public access to documents relating to meetings and correspondence with the Institute of International Finance ("IIF")
- your letter dated 11 April 2012

Sir,

I am pleased to send you the reply to your letter of 11 April 2012 concerning a complaint by Mr Olivier HOEDEMAN (531/2012/MMN).

Yours sincerely,

Uwe Corsepius

I. THE INQUIRY

1. With letter of 11 April 2012 the European Ombudsman opened an inquiry based on a complaint received from Mr Olivier Hoedeman on 9 March 2012 (Ref. 531/2012/MMN). In his letter, the Ombudsman states that "the European Council modified its initial statement that it did not hold any relevant documents and identified two relevant documents" and "in view of these circumstances [took] the view that it is appropriate to open an inquiry to clarify the situation".
2. In his inquiry the European Ombudsman invites the European Council to:
 - clarify whether it holds any additional documents which fall within the scope of the complainant's original request for access; and
 - further explain 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.The European Ombudsman finds inadmissible the complainant's allegation that the European Council should have taken minutes of the meetings with the IIF for lack of appropriate administrative approaches.
3. The European Ombudsman invites the European Council to submit an opinion on these points by 31 July 2012.

II. THE COMPLAINT

4. In his complaint against the European Council Mr Hoedeman alleges that the European Council committed an instance of maladministration:
 - by failing to identify and mention in its reply more than one document related to the discussions with (representatives of) the IIF during the time period specified by the complainant;

- by limiting its interpretation of the scope of Regulation (EC) No 1049/2001 (hereinafter 'the Regulation') to "any documents received and actually held by the European Council or its General Secretariat which have been exchanged in the [above-mentioned] negotiations";
- by failing to take notes during or produce minutes after the above-mentioned meetings;
- by not granting partial access under Article 4(6) of the Regulation to the email sent by Mr *Charles Dallara* to the President of the European Council or to the letter from Mr *Charles Dallara* and Mr *Jean Lemierre*, representatives of the IIF, to Mr *Evangelos Venizelos*, Greek Minister of Finance. According to the complainant, the European Council did not establish why the protection of the invoked interest would be impaired if the email and the letter were to be partly disclosed; and
- by unnecessarily consulting the third-party author of the above-mentioned letter. According to the complainant, the European Council was under no obligation to take into account the opinion of the above-mentioned third-party.

5. The complainant argues in his letter to the Ombudsman of 9 March 2012 that these elements amount to an unjustified refusal of access to documents, as the European Council failed to deal with key points of both his initial and confirmatory applications. He therefore submitted a complaint with the Ombudsman about the handling of his access to document request by the European Council.

III. THE FACTS

a) Initial application

6. In his application, registered on 27 October 2011, the complainant requested public access to the following documents:

- "- all minutes (and other notes) of discussions with (representatives of) the Institute of International Finance before, during and after the Euro Summits and European Council summits of July 21st, October 23rd and October 26th 2011;
- correspondence with (representatives of) the Institute of International Finance before, during and after the Euro Summits and European Council summits of July 21st, October 23rd and October 26th 2011;
- documents submitted by (representatives of) the Institute of International Finance before, during and after the Euro Summits and European Council summits of July 21st, October 23rd and October 26th 2011".

7. Following the complainant's initial application, the General Secretariat of the Council carried out an internal research in order to identify documents corresponding to the request. By letter dated 12 December 2011, the General Secretariat informed the complainant that it had not found any documents corresponding to the request other than those mentioned in the reply and which were already in the public domain.

b) Confirmatory application

8. In his confirmatory application dated 30 December 2011, Mr Hoedeman commented on the part of the General Secretariat's reply which indicated that "the contacts with the IIF before, during and after the above-mentioned summits consisted of discussions between one Member State, namely Greece, and the IIF". He claimed that there was ample evidence that the discussions involved not only Greece, but the European Council more generally.

9. On 14 February 2012, the European Council replied to the complainant's confirmatory application. It pointed out that the contacts with the IIF before, during and after the summits referred to by the complainant were part of a broader negotiation in order to find agreement on a package of measures aiming at improving the debt sustainability and refinancing profile of Greece. The European Council's reply stated that, as is normal in the context of complex negotiations, diverse direct contacts necessarily occurred between the various entities involved in the negotiations on the whole package and, in this context, documents may have been communicated between various entities. However, the complainant's attention was drawn to the fact that it is only as far as the European Council or its General Secretariat had received and actually held any documents which had been exchanged in the negotiations that such documents came under the scope of Regulation 1049/2001.
10. The European Council, acting through its General Secretariat, carried out a new internal research in the light of the complainant's additional arguments, to establish whether documents corresponding to the request could be identified. To this effect, the Secretary General re-consulted the services which had been involved in various aspects of the negotiations on the package.
11. Following this new research, it was established that an e-mail had been sent by Mr *Charles Dallara* to the President of the European Council relating to the agreement reached at the October 2011 Euro-Summit and its follow-up. This email contained as an attachment a letter from Mr *Charles Dallara* and Mr *Jean Lemierre*, representatives of the IIF, to Mr *Evangelos Venizelos*, Greek Minister of Finance.

12. The European Council, having conducted its examination of the document in question under Regulation 1049/2001 reached the conclusion that disclosure of the document would be detrimental to the protection of the public interest as regards the financial, monetary and economic policy of the European Union and of its Member States. This conclusion was also corroborated by the reply of the third-party author of the document who had been consulted in accordance with Article 4(4) of Regulation 1049/2001 with a view to assessing whether an exception in Article 4 (1) or (2) of Regulation 1049/2001 was applicable. Therefore, the European Council concluded that public access to the document in question had to be refused pursuant to Article 4(1)(a), 4th indent, of Regulation 1049/2001. The European Council also examined whether partial access could be granted to the document concerned according to Article 4(6) of Regulation 1049/2001. It concluded that this was not the case since the above reasons of the application of the said exception applied to the email and the attached letter in their entirety.

IV. LEGAL FRAMEWORK

13. Article 2(3) of Regulation (EC) No 1049/2001, regarding beneficiaries and scope, provides as follows:

"This 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."

14. The fourth indent of Article 4(1)(a) of the Regulation, regarding mandatory exceptions to the right of public access, states:

"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;"

15. Article 4(4) of the Regulation provides:

"As regards third-party documents, the institution shall consult the third party with a view of assessing whether an exception in paragraph 1 or 2 [of Article 4] is applicable, unless it is clear that the document shall or shall not be disclosed."

16. Article 4(6) of the Regulation states:

"If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."

V. OBSERVATIONS

17. In the following, the European Council will address the two issues raised by the Ombudsman in his inquiry.

a) *Does the European Council hold any additional document falling within the scope of the complainant's original request?*

18. The management of documents in a complex institutional setting requires the constant adaptation of the relevant systems to serve emergent workflows. Developments in the response to the difficulties relating to the Euro area have led to closer interactions between the European Council and entities involved in the management of the Euro area, such as the Eurogroup, the Eurogroup Working Group, and the Euro Summit. Research for documents corresponding to the request of the complainant had to cover a number of different administrative frameworks.

19. The administrative procedure relating to the processing public access to documents involves two stages, where the institution's initial reply to an application constitutes only an initial statement of position, conferring the right on the applicant to request a reconsideration of the position in question. Article 7(2) of Regulation (EC) No 1049/2001 provides for a second step in the administrative procedure in processing requests for public access to documents, in cases where the institution has fully or partially refused public access. In this second stage, the institution is requested to reconsider its initial reply and lay down the position of the institution.

20. To comply with this requirement, the European Council, acting through its General Secretariat, re-consulted all relevant services with a view to establishing the institution's final position on the request. In particular, it carried out an internal research in order to establish whether any documents related to the request could be identified in the light of the applicant's claims in his confirmatory application. The European Council consulted twice the services involved in various aspects of the negotiations on the package. The renewed research following the complainant's confirmatory application resulted in the identification of the e-mail with the letter in attachment, as explained above.

21. As indicated in the European Council's reply to the confirmatory application, diverse direct contacts have occurred between the various entities involved in the negotiations on the whole package and, in this context, notes may have been taken, documents may have been drafted and they may have been communicated between various entities. However, such documents were not necessarily received and actually held by the European Council or its General Secretariat. Documents exchanged in these negotiations are held by the European Council, as required by Article 2(3) of Regulation 1049/2001, if the President of the European Council, the European Council as an institution or the General Secretariat of the Council received or drew up such documents. The European Council confirms that it holds no additional documents falling under the complainant's public access request.

- b) *Can the European Council further explain the reasons why the two documents identified fall in their entirety within the scope of the exception established in article 4(1)(a) fourth indent of Regulation 1049/2001?*
22. The complainant contests the European Council's decision not to grant partial access under Article 4(6) of the Regulation. This Article provides that if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
23. The European Council would like to underline that its confirmatory reply clearly states that it had considered the possibility of partial disclosure of the document, i.e. the email from *Mr Charles Dallara* containing in attachment a letter from *Mr Charles Dallara* and *Mr Jean Lemierre*, representatives of the IIF, to *Mr Evangelos Venizelos*, Greek Minister of Finance, under Article 4(6) of the Regulation.
24. The letter attached to the email contains specific information concerning the negotiations on PSI, as well as their timeline. Negotiations on the package of measures aiming at improving the debt sustainability and refinancing profile of Greece and in particular on PSI were, as stated in the European Council's reply to *Mr Hoedeman's* confirmatory application, among the core actions aiming at solving the difficulties relating to the sustainability of the Greek debt and to the Euro area. Given the particular political and economic sensitivity and complexity of this negotiation process, where trust among involved entities is a key factor, releasing the letter would negatively affect this trust and compromise the broader negotiating process as well as possible future negotiations of a similar kind, in a context where reactions of markets in the Union and around the world to signs of disturbances have far-reaching effects on the financial, monetary and economic situation of the Union, of its Member States and of third countries. This argument applies to the entire content of the letter, including the date on which the letter was sent.
25. The email from *Mr Charles Dallara* to *Mr Herman Van Rompuy* contains considerations by *Mr Charles Dallara* on the progress on the negotiations. After examining its specific content, the European Council came to the conclusion that the same considerations applied to the email as to the letter.

26. Therefore, the European Council concluded that the requested document fell in its entirety under the exception in Article 4(1)(a), fourth indent of the Regulation.

Final remarks

27. The European Council has detailed above how it handled those aspects of request for public access on which the inquiry is based and how this specific case has been handled. Based on the reasons set out above, the European Council believes the complaints to be unfounded.
