



**СЪВЕТ НА  
ЕВРОПЕЙСКИЯ СЪЮЗ**

**Брюксел, 4 юли 2011 г. (05.07)  
(OR. en)**

**11286/11**

**OMBUDS 3  
INST 302  
INF 101  
API 56  
JUR 294**

**БЕЛЕЖКА ПО ТОЧКИ „I/A“**

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От: :           Работна група „Информация“

До: :           Корепер (II част)/Съвета

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№ предх. док.: 11285/11

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Относно:       Предложение на Европейския омбудсман за намиране на приятелско решение във връзка с разгледаната от него жалба 1170/2009/КМ на г-н Klaus-Dieter SOHN срещу Съвета

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Приложено се изпраща на делегациите проект за отговор от Съвета, разгледан от работна група „Информация“ на 30 юни 2011 г., на писмото, изпратено от Европейския омбудсман до Съвета на 27 май 2011 г. относно жалба 1170/2009/КМ на г-н Klaus-Dieter SOHN.

Делегациите на Дания, Финландия и Швеция заявиха, че ще гласуват против проекта за отговор и направиха следните изявления:

DK и FI:       *„Дания и Финландия приветстват приноса на Европейския омбудсман. По отношение на проекта за писмо Дания и Финландия не могат да се съгласят с тълкуването на решението по делото „Turco“.“*

SE: *„Швеция не може да се съгласи с проекта за отговор по отношение на тълкуването на решението по делото „Turco“. Освен това Швеция е съгласна с Европейския омбудсман и по двата процедурни въпроса.“*

Повечето делегации се съгласиха резултатът от гласуването да бъде публикуван.

Във връзка с това Комитетът на постоянните представители се приканва да предложи Съветът на следващото си заседание:

- да впише като точка „А“ съгласието си по проекта за отговор, приложен към настоящия документ, като отбележи, че делегациите на Дания, Финландия и Швеция гласуват против,
- да вземе решение за публикуване на резултата от гласуването.

Приложението е само на английски език.

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DRAFT

Brussels,

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

**Subject: Complaint 1170/2009/KM relating to an application for public access to a document containing an opinion of the Council Legal Service**  
- your proposal of 27 May 2011 for a friendly solution

Sir,

Thank you for your letter of 27 May 2011, received by the Council on 8 June 2011, by which you propose a friendly solution in complaint 1170/2009/KM. I am pleased to inform you of the Council's position on this question.

(Complimentary close)

Uwe Corsepius

The friendly solution proposed by the Ombudsman in his inquiry into complaint 1170/2009/KM against the Council is as follows:

*"Taking into account the Ombudsman's findings, the Council could consider granting the complainant access to document No 10673/02 in its entirety, unless it can 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 Council could also consider improving its communications with the citizens who request access to a document 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."*

#### Regarding the proposals on the substance

First, the Council would like to comment on the Ombudsman's findings in points 35 and 37 of his proposal. The Ombudsman concludes that the Council's reasons for refusing full public access to the requested document pursuant to the second indent of Article 4(2) of Regulation 1049/2001, by reference, first, to the Council's interest in requesting and receiving written opinions from its legal service, and second, to the legal service's capacity to present and defend the Council's position in court proceedings in the future, do not meet the legal standard of the *Turco*<sup>1</sup> case-law of the Court of Justice.

In fact, the Court of Justice accepts the use of general considerations for refusing public access to documents. This is clear from *T.G. Ilmenau*<sup>2</sup> and *API*,<sup>3</sup> where the Court of Justice found that *"it is, in principle, open to the Community institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature"*.

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<sup>1</sup> Case C-39/05 P and C-52/05 P, *Turco vs Council*, Judgment of the Court (Grand Chamber) of 1 July 2008, ECR 2008 p. I-4723.

<sup>2</sup> Case C-139/07 P, *Technische Glaswerke Ilmenau vs Commission*, Judgment of the Court (Grand Chamber) of 29 June 2010 (not yet reported), § 54.

<sup>3</sup> Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Commission vs API*, Judgment of the Court (Grand Chamber) of 21 September 2010 (not yet reported), § 74.

This principle also applies to legislative files, as is confirmed in the *Turco* judgment<sup>4</sup> of the Court of Justice. This being so, in its reply to the complainant, the Council did not content itself with invoking general considerations to justify refusal. In accordance with the above-mentioned case-law<sup>5</sup>, it established in the specific case how the general considerations normally applicable to written opinions by the legal service of an institution are in fact applicable to the requested document. It relied in this regard upon concrete and specific reasons demonstrating the particularly wide scope and the particular sensitive nature of the refused part of the document.

Second, the Council would like to make the following observation regarding point 41 of the Ombudsman's proposal where he disapproves, by referring to the General Court's findings in *Access Info Europe*<sup>6</sup>, the Council's arguments in favour of establishing the particularly sensitive nature of the document. The Council considers that it does not follow from Regulation 1049/2001 nor, for that matter, from *Access Info Europe*, which judgment does not address the question of the interpretation of the exception relating to the protection of legal advice but that of the protection of the institution's decision-making, that the exception provided in the second indent of Article 4(2) of the Regulation regarding the protection of legal advice would only be applicable when “*a fundamental interest of the European Union or of the Member States would be jeopardised*”. In any event, the Council respectfully notes also that it has appealed the aforementioned judgment of the General Court<sup>7</sup>.

Third, the Council observes that in point 44 of his proposal, the Ombudsman accepts the Council's argument brought in order to demonstrate the particularly wide scope of the legal advice discussing the choice of the legal basis for establishing a centralised Community procedure for the authorisation of products. The Ombudsman notably draws attention to the fact that one legislative procedure was still ongoing at the time of the Council's confirmatory decision where the same question had been raised<sup>8</sup>. Nevertheless, he then notes that this legislative procedure has, in the meantime, been concluded. Overall, the Ombudsman considers that the Council's arguments are insufficient to establish the "particularly wide" scope of the document.

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<sup>4</sup> *Sweden and Turco vs Council*, § 50.

<sup>5</sup> *Ibid*, § 50.

<sup>6</sup> Case T-233/09 *Access Info Europe vs. Council*, Judgment of 22 March 2011 (not yet reported), § 130.

<sup>7</sup> See Case C-280/11 P *Council vs. Access Info Europe* (currently pending).

<sup>8</sup> Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market - COM(2006) 388 final.

The Council would like to point out in this regard that the exception relating to the protection of legal advice, as laid down in the second indent of Article 4(2) of Regulation 1049/2001, also protects the institutions' capacity in the future to request and receive frank, objective and comprehensive legal advice from their legal services. Therefore, it should suffice for the institution to make a reasonable forecast that more questions similar to those addressed in the legal opinion will follow in the future – as the Council has actually done in point 9 of its confirmatory application –, in order to establish the particularly wide scope of the legal advice justifying refusal of the requested document on account of the protection of legal advice.

For the above-mentioned reasons, the Council respectfully disagrees with the arguments advanced by the Ombudsman in favour of a full release of the requested document.

Notwithstanding the above observations, the Council has re-examined the requested document to ascertain the applicability of the protection of legal advice pursuant to the second indent of Article 4(2) of Regulation 1049/2001 to the retained parts of the document, taking into account in particular the time which has passed since the Council's confirmatory decision of 24 April 2009. The Council has concluded that, at present, neither Article 4(2) second indent nor any of the other exceptions provided for in Article 4 of Regulation 1049/2001 is applicable to the said document any more. Consequently, the Council will forward a publicly accessible version of document 10673/02 to the applicant.

#### Regarding the respect of procedural requirements

Firstly, in point 53 of his proposal, the Ombudsman concludes that in the case of the extension of time-limits under Regulation 1049/2001, the Council should indicate, in accordance with the principle of good administration, the actual date on which the extended time-limit expires. According to the Ombudsman, failing to do so could amount to an instance of maladministration.

The Council would respectfully draw the Ombudsman's attention to the fact that the time-limits prescribed in Articles 7(3) and (8)(2) of Regulation 1049/2001 for extending the processing of initial and confirmatory applications are expressed in working days which, in accordance with the Regulation, are notified to the applicant in advance. The calculation of these time-limits on the basis

of the rules in force should not pose any difficulty to members of the public. As it is the case for any other time-limits fixed in acts adopted by the institutions pursuant to the Treaties, those determined in Regulation 1049/2001 are also calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits<sup>9</sup>. According to Article 2(2) of Regulation No 1182/71, "working days" means all days other than public holidays, Sundays and Saturdays, where "public holidays" are determined according to a list published by the Commission in the Official Journal<sup>10</sup>. Consequently, members of the public applying for documents of the institutions are in fact in a position to calculate the expiry of the deadlines in accordance with the above-mentioned rules, which in any event constitute a direct source of rights and duties not only for the institutions but also for the individuals affected by those rules.

Nevertheless, in order to promote good administration, the Council is ready to indicate, in the letters extending the time limit for the Council to reply to a confirmatory application, the actual date on which the extended time limit expires. Furthermore, in order to further improve the service rendered to members of the public having introduced an initial request for access, the actual date on which the extended time limit expires will also be indicated in the letters extending the time limit for the General Secretariat of the Council to reply to an initial application.

Secondly, in point 58 of his proposal, the Ombudsman suggests that, in accordance with the principle of good administration, the institution should provide applicants with information in good time and, in any event, before the expiry of any relevant time-limit, on the legal remedies available in case of total or partial refusal. This would ensure that applicants have knowledge of the legal remedies open to them even in cases where the institution fails to take an explicit decision on the applicant's request.

The Council would like to reiterate in this regard that it would be unusual to indicate legal remedies concerning a future act to be adopted in an acknowledgment of receipt or a holding letter sent to the applicant. According to the information available to the Council, none of the institutions falling under the scope of Regulation 1049/2001 follow such a practice at present. In fact, these are not

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<sup>9</sup> OJ C 171 of 24.7.2007, p. 10.

<sup>10</sup> Schedule of Public Holidays for 2009, OJ C 171, 24.7.2007, p. 10.

more than procedural measures and do not produce binding effects, and hence, are not open – in themselves – to challenge. An indication of legal remedies in these conditions might even lead to misunderstandings and, in addition, give the citizen a wrong impression as regards the Council's capacity to give a final decision and could even give an erroneous signal to the applicant that the institution is considering rejecting his application.

The Council would also refer back to the facts of the case, notably that it did reply to the complainant's confirmatory application within the statutory time-limits provided in Regulation 1049/2001 and informed the complainant of the remedies open to him in accordance with Article 8(1) of that Regulation. Hence, the Council's handling of the complainant's confirmatory request should be beyond any criticism. In addition, it is important to note that the Council has a record of providing explicit confirmatory replies to applicants within the statutory time limits <sup>11</sup>, together with information on the possible legal remedies in cases where the reply is negative or partially negative. For these reasons, the Council does not see any legal or any pressing practical reason for making arrangements for an event where it would fail to reply, in the future, within the time-limits laid down in Regulation 1049/2001.

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<sup>11</sup> See the Council's annual report on access to documents 2010, set out in document 9322/10, page 35, table 15.