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NOTA PUNTO "I/A"

del:	Grupo "Información"
al:	Coreper (2.ª parte)/Consejo
n.º doc. prec.:	11011/09
Asunto:	Reclamación 1170/2009/KM formulada por Klaus-Dieter SOHN al Defensor del Pueblo Europeo

Se adjunta a la atención de las Delegaciones un proyecto de respuesta del Consejo a la carta enviada el 4 de junio de 2009 al Consejo por el Defensor del Pueblo Europeo en relación con la reclamación 1170/2009/KM, en los términos en que quedó tras su examen por el Grupo "Información" en su reunión del 25 de junio de 2009.

La Delegación finlandesa ha hecho la declaración siguiente:

FI: *"Finlandia no tiene ninguna objeción contra el proyecto de respuesta como tal, pero confirma su posición anterior, según la cual no está de acuerdo con la interpretación de que la información que contienen los documentos solicitados sería especialmente sensible o afectaría a un ámbito especialmente amplio."*

Por consiguiente, se pide al Comité de Representantes Permanentes que sugiera al Consejo que, como punto "A" de su próxima sesión, deje constancia de su acuerdo con el proyecto de respuesta que se adjunta en Anexo.

El Anexo sólo existe disponible en inglés.

DRAFT

Brussels,

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

Subject: Complaint made by Mr Klaus-Dieter SOHN (1170/2009/KM) relating to an application for public access to a document containing an opinion of the Council Legal Service
- your letter dated 4 June 2009

Sir,

Thank you for your letter of 4 May 2009 concerning a complaint by Mr Klaus-Dieter SOHN (1170/2009/KM) in which you ask the Council to submit observations on the above matter. I am pleased to inform you of the Council's position on this question.

(Complimentary close)

Pierre de Boissieu

I. THE COMPLAINT

1. In his complaint against the Council, lodged with the Ombudsman on 30 April 2009, Mr Sohn alleges that the Council failed to reply to a confirmatory application in which he requested full public access to document 10673/02, containing an opinion of the Council Legal Service on the proposal for a Regulation of the European Parliament and of the Council on genetically modified food and feed. The complainant invokes procedural and substantive errors in the handling of his application under Regulation (EC) No 1049/2001.
2. In his letter to the Ombudsman of 7 May 2009, the complainant explains that, after lodging the above complaint against the Council's alleged implicit negative decision on his confirmatory application, he actually received the Council's decision denying full public access to the document concerned. The complainant, nevertheless, maintains his allegations against the Council as contained in his complaint of 30 April 2009, and, furthermore, submits comments on the substance of the Council's confirmatory decision.

II. THE FACTS

a) Initial application

3. In his application, registered on 21 January 2009, the complainant requested public access to Council document 10673/02, containing an opinion of the Council Legal Service concerning the proposal for a Regulation of the European Parliament and of the Council on genetically modified food and feed.
4. By letter dated 23 February 2009, the General Secretariat of the Council granted partial access to the requested document, notably to paragraphs 1-12 thereof, while refusing public access to the remaining parts of the document, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001 (protection of legal advice).

Confirmatory application

5. In his confirmatory application, registered on 10 March 2009, the complainant contested the initial reply, disputing the reasons put forward by the General Secretariat for refusal to grant public access to paragraphs 13-20 of the document concerned.
6. By letter of 31 March 2009, the General Secretariat informed the complainant that the time-limit for processing his confirmatory application had had to be extended in accordance with Article 8(2) of Regulation No 1049/2001, because the Council's responsible preparatory bodies had not concluded examination of the complainant's confirmatory application.
7. On 24 April 2009, that is to say on the last day of the extended time-limit, the Council adopted a decision on the complainant's confirmatory application. The General Secretariat informed the complainant of the decision on the same day. In the cover letter, the complainant's attention was brought to the remedies open to him pursuant to Articles 230 and 195 TEC.
8. In its above-mentioned decision, the Council identified paragraphs 13-20 of the legal advice contained in the document - notably an analysis by the Legal Service of the powers of the Community legislator to establish a centralised Community procedure for the authorisation of products - as particularly wide in scope and particularly sensitive in nature. After substantiating the reasons for the need to protect the legal advice contained in the said paragraphs, the Council refused public access to those parts of the document pursuant to the second indent of Article 4(2) of the Regulation (protection of legal advice).

b) Complaint to the Ombudsman

9. In his complaint 1170/2009/KM, the complainant makes the following allegations against the Council on both procedural (i) and substantial grounds (ii):
 - i) The complainant alleges that the Council failed to respect the rule of law and transparency by

- not specifying in its letter of 31 March 2009 the final date of the extended time-limit for handling the complainant's confirmatory application;
 - not giving reasons for the extension of the time-limit for handling the confirmatory application;
 - failing to provide reasons for the refusal of the complainant's confirmatory application; and
 - failing to indicate the legal remedies open to the applicant.
- ii) The complainant submits that the Council's reasons for refusing public access in its decision of 24 April 2009 are contradictory and also contrary to the principle of the rule of law. Furthermore, he argues that the Council has not established to the necessary legal standard the need to protect the legal advice contained in the requested document.

III. LEGAL FRAMEWORK

10. Article 2(1) of Regulation No 1049/2001, regarding beneficiaries and scope, provides as follows:

"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."

11. The second indent of Article 4(2) of the Regulation, regarding exceptions to the right of public access, states:

"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."

12. Pursuant to Article 8, on the processing of confirmatory applications:

"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 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.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty."

IV. OBSERVATIONS

13. The procedural and substantive issues raised in the complaint are discussed separately.

a) *Alleged procedural errors in the handling of the confirmatory application*

14. First of all, the Council would point out that, contrary to the complainant's allegation, the General Secretariat did indicate in its holding letter dated 31 March 2009 the extended timeframe for handling the complainant's confirmatory application (see in Annex I). In fact, it specified that the *"time limit available to the General Secretariat for replying to your application has (...) been extended pursuant to Article 8(2) of the Regulation"* (emphasis added). Since Article 8(2) of Regulation No 1049/2001 fixes the additional time-limit for handling confirmatory applications as fifteen working days, a reference to that provision in the holding letter could not leave any doubt as to the expiry of the extended time-limit for processing the confirmatory application.

15. Secondly, the Council cannot agree that it failed to give reasons for the extension of the time-limit. In its above-mentioned letter, it justified the extension by reference to the fact that *"[t]he Council's preparatory bodies which are charged with processing your application have not yet completed that processing"*. In this context, the Council would point out that, in accordance with Article 8 of Annex II of its Rules of Procedure, confirmatory applications are decided by the Council. The Council's decision is prepared by the working party responsible and by Coreper. Since replies to confirmatory applications need to be examined and approved by all these bodies, it is not unusual for the processing of applications to run beyond the normal time-limit provided for in Article 8(1) of Regulation No 1049/2001. However, applicants are always informed of an extension of the normal time-limit pursuant to Article 8(2) of the Regulation, and, where possible, are provided with an indicative date for the Council's decision.

16. Thirdly, the Council would emphasise that in its decision of 24 April 2009, sent to the applicant on the same day (see in Annex II), it gave detailed reasons for refusal of the complainant's confirmatory application and also replied to the arguments adduced by the

complainant. Hence, the Council cannot understand how it can be reproached for not giving reasons for the refusal of the complainant's confirmatory application.

17. Fourthly, it is important to clarify that, pursuant to Article 8(1) of Regulation No 1049/2001, *"in the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her (...)"*. In full compliance with that provision, the General Secretariat stated in the cover letter sent to the applicant together with the Council's decision on 24 April 2009 that *"Under Article 8(1) of Regulation (EC) No 1049/2001, you may institute proceedings against the Council before the Court of First Instance of the European Communities or make a complaint to the Ombudsman."*
 18. In this context, the Council would also point out that under Article 8(1) of the Regulation, the obligation to inform the applicant of the legal remedies falls on the institution in the event of a total or partial refusal. However, a holding letter extending the time-limit for the processing of a confirmatory application is merely a procedural measure which may not, in itself, be open to challenge. The indication of legal remedies in a holding letter may, on the contrary, be misleading, since it would give the false impression that such letter constituted a measure producing binding effects of such kind as to alter the applicant's legal position, and hence be open to challenge.
- b) *Alleged misinterpretation of the exception relating to the protection of legal advice in Regulation No 1049/2001*
19. At the outset, the Council rejects the claim that the reasons for the Council's refusal of the complainant's confirmatory application were contradictory and contrary to the rule of law. Furthermore, it cannot accept that its statement of reasons revealed, in the complainant's words, "ill-concealed contempt for the ECJ".
 20. Firstly, the complainant invokes the Court of Justice judgment of 1 July 2008 in order to show that the Council's interpretation of the second indent of Article 4(2) of the Regulation is contradictory and contrary to the rule of law. On this point, the Council regrets that the complainant has misunderstood paragraphs 5-7 of the Council's statement of reasons in its decision of 24 April 2009, notably on the relationship between the rule and the exception in the context of the protection of legal advice.

21. The Council would emphasise that in its handling of the complainant's confirmatory application, it did not, by any means, disregard either the wording of Regulation No 1049/2001 or the aforementioned judgment of the Court of Justice. On the contrary, as is apparent from paragraphs 7 and 8 of its decision of 24 April 2009, it relied on the exception provided by Article 4(2) of the Regulation, and furthermore, since the requested legal advice fell under the Court of Justice's recent case law on the protection of legal advice given in a legislative process, it invoked and applied the principles established by the said Court of Justice judgment to the confirmatory application.
22. In accordance with the second indent of Article 4(2) of the Regulation and the criteria laid down in the Court of Justice judgment, it established, first, that the requested document contained legal advice. Then, it examined whether disclosure of the legal advice contained in the document would undermine the protection of that advice. In so doing, it balanced the public interest in the protection of legal advice against the public interest in increased openness of the institution's legislative process and the greater accountability of the institution to the citizens, invoked by the complainant in his confirmatory application.
23. Secondly, the complainant disagrees with the Council's reasons for refusing public access to paragraphs 13-20 of the requested document, and considers that legal advice relating to a particular legislative file should, in any case, be disclosed after the conclusion of the legislative process. The Council cannot share the complainant's argument, since it restricts and distorts the interpretation given by the Court of Justice to the second indent of Article 4(2) of the Regulation in the aforementioned judgment. It is important to bear in mind that the Court recognised two cases where legal advice, given in the context of a legislative process, necessitates protection: if the legal advice is particularly sensitive in nature or if it has a particularly wide scope going beyond the context of the legislative process in question. In those cases, the legal advice is protected against disclosure for the period during which protection is justified. It follows from the foregoing that the Court did not state that the date of the conclusion of the legislative process was determinant in this regard.
24. In fact, the Council specified in its decision that the question analysed by the Legal Service in paragraphs 13-20 of the requested document relates to the powers of the Community

legislator to establish a centralised Community procedure for the authorisation of products. It considered that the legal advice given by the Legal Service on this question remained particularly relevant in view of the Council's ongoing and future legislative work, justifying continued protection of the relevant parts under the second indent of Article 4(2) of the Regulation. The Council substantiated the need for protection with concrete and specific reasons, in full compliance with the principles established by the Court of Justice in its judgment of 1 July 2008.

25. Thirdly, the complainant considers that the possibility that the Council may lose all interest in requesting written opinions from its Legal Service is irrelevant. Once again, the Council does not agree with the complainant. In fact, the second indent of Article 4(2) of the Regulation aims to protect the institution's interest in seeking legal advice and receiving frank, objective and comprehensive legal advice. Disclosure of documents containing legal advice given in a legislative context and considered as being particularly sensitive or particularly wide in scope would mean that the Council would have to take the risk of disclosure into account in the future, which might lead in practice to a reluctance by the Council to ask for written opinions. Furthermore, the Legal Service might itself refrain from putting into writing views which might expose the Council to risk in the future. As a result, the very purpose of the protection of legal advice laid down by the Community legislator in the second indent of Article 4(2) of the Regulation would be undermined.
26. For the reasons set out above, the Council believes the complaint to be unfounded.

(Complimentary clause)

Pierre de Boissieu

Enclosures:

1. Letter by the General Secretariat of the Council of 31 March 2009, extending the time-limit for handling the complainant's confirmatory application
 2. Letter by the General Secretariat of the Council of 24 April 2009, including the Council's decision on the confirmatory application and a cover letter with an indication of legal remedies
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