



European Ombudsman

Complaints and Inquiries Unit 2

Mr Borivoje Djordjevic
Association People's Parliament
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SERBIE

office@parlament.org.rs

Strasbourg, 06/10/2015

Own-initiative inquiry OI/7/2015/ANA

Dear Mr Djordjevic,

Please find enclosed the opinion that the European Ombudsman received from the European Commission concerning your above complaint.

If you wish to make any observations on the opinion, please send them to us before 31 October 2015.

Please note that, if we do not receive any observations from you, the Ombudsman may close the case with a decision, based on the information you have already provided and the Commission's opinion.

Yours sincerely,

Fergal O' Regan
Head of Complaints and Inquiries Unit 2

Enclosure:

- Copy of the opinion submitted by the Commission



Jean-Claude JUNCKER
President of the European Commission

Rue de la Loi, 200
B-1049 Brussels
Tel. +32 2 295 50 33

Brussels, - 1 OCT. 2015

Subject: *Own-initiative inquiry,
ref. OI/7/2015/ANA*

Dear Ms O'Reilly,

Thank you for your letter of 12 May 2015 regarding the above-mentioned case.

I am pleased to enclose the comments of the Commission on this own-initiative inquiry.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosure

*Ms Emily O'REILLY
European Ombudsman
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Comments of the Commission on a request for information from the European Ombudsman
- Own-initiative inquiry OI/7/2015/ANA

1. THE ALLEGATION AND CLAIM

On 12 May 2015, the Ombudsman informed the Commission that she had opened an own-initiative inquiry following a complaint submitted by Association People's Parliament represented by Mr Borivoje Djordjevic (hereafter «the complainant»), and invited the Commission to submit an opinion thereon.

The complainant alleges that, contrary to Regulation 1049/2001, the Commission failed to disclose its comments on the draft Serbian Free Legal Aid Act.

2. THE BACKGROUND

On 12 January 2015, the complainant introduced an initial request for access to comments of the Commission on the Draft Legal Aid Act. The complainant requested access to:
[t]he opinion that the European Commission (...) gave on the draft of Serbian Free Legal Aid Act.

On 3 February 2015, the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR) refused access to the requested comments¹.

On 19 February 2015, the complainant lodged a confirmatory application challenging the reasoning put forward in DG NEAR's reply.

On 30 March 2015, the Commission sent its confirmatory decision to the complainant. The Commission confirmed the initial refusal of access, based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001. It explained that the comments of 29 July 2014 were still part of ongoing discussions with the Serbian authorities on the adoption of the proposed legislation, which was a pre-condition to open the Chapter 23 (Judiciary and Fundamental Rights) of the accession negotiations between the European Union and Serbia. The Commission also examined the possible existence of an overriding public interest in disclosure of the document.

On 31 March 2015, the complainant lodged a complaint with the European Ombudsman.

On 12 May 2015, the Ombudsman decided to open an own-initiative inquiry and asked for an inspection on the Commission's file in this case.

¹ Commission's comments on the draft Serbian Free Legal Aid Act of 29 July 2014.

The complainant argues that the Commission wrongly refused access to the requested document by wrongly relying on the exceptions of Article 4(1)(a) and Article 4(3), first subparagraph (protection of decision-making process) of Regulation 1049/2001. In particular, the complainant:

- contests that disclosing the document in question would jeopardise the atmosphere of mutual trust between the Commission and Republic of Serbia and would also adversely affect the present and future state of the accession negotiations with Serbia and other accession or candidate countries;
- fails to see how making the comments public would deprive the Commission of the needed data and cooperation by negotiating countries in the future, and how it would undermine the decision-making process, especially as the Commission's comments have already been adopted;
- points out that the website of the Ministry of Justice of the Republic of Serbia publicly lists all existing versions of the Serbian Free Legal Aid Act, after the comments received by the Commission;
- concludes that without the requested information, civil society in Serbia cannot work together with the Commission.

3. THE COMMISSION'S POSITION

Concerning the allegation that the Commission failed to disclose its comments on the draft Serbian Free Legal Aid Act

Preliminary observation

In the framework of the Ombudsman's inquiry, the Commission carried out a renewed review of the exchanges that took place between DG NEAR and the Serbian authorities. In the process of that review, a further set of comments by DG NEAR on the Serbian Free Legal Aid Act were identified. These comments date from 8 October 2014 and 6 March 2015. Given that they were not assessed in the framework of the initial and the confirmatory applications, the Commission, in line with principles of good administration, carried out a renewed assessment of those sets of comments - i.e. the comments of 29 July, of 8 October 2014 and of 6 March 2015 - in the framework of the present inquiry. The Commission would like to underline that the sets of comments are part of a continuous and still on-going dialogue with the Serbian authorities on the evolving draft law on free legal aid.

On the substance

In its confirmatory decision, the Commission explained why the exceptions defined in Article 4(1)(a), third indent (protection of international relations) and Article 4(3), first subparagraph (protection of the decision-making process) prevented it from granting access to the comments of 29 July 2014. Following its renewed assessment, the Commission concludes that the same reasons apply also to the comments of 8 October 2014 and of 6 March 2015. In this respect, the Commission refers to its detailed reasoning laid down in its confirmatory decision.

Furthermore, the Commission wishes to add further elements that shed more light on the reasons not to grant access to the documents requested.

The Commission would like to recall that as part of the accession negotiations with Serbia, an action plan is being prepared that would allow the opening of Chapter 23. The draft legislation under review will be covered in the action plan. The Commission carefully examined the foreseeable impact of the disclosure of comments on draft legislation. In this context, the Commission would wish to emphasise that preserving sound trustworthy working relations with its national counterparts is of the utmost importance in the accession negotiations. The Commission considers that disclosure of its comments entailed a realistic risk of discouraging Serbian authorities from consulting the Commission on sensitive draft laws in the context of pre-accession.

The Commission would like to stress that the risk related to undermining the international relations with Serbia is not purely hypothetical, but real and reasonably foreseeable. Indeed, national discussions in Serbia on the envisaged reforms of the judicial sector are being carried out since July 2014 and have led to the establishment of a comprehensive consultation mechanism between national authorities, stakeholders and civil society. This mechanism is at an early stage of operation but is indispensable to ensure ownership of the foreseen reforms. Reluctance to change within the judicial sector is widespread and triggers tough reactions given the broad sensitivities at stake.

The risks were clearly exemplified by the draft law on notaries aiming at introducing a notarial system, which led to a strike of the Serbian Attorney's Bar. The strike lasted for four months (ending only in January 2015, i.e. at the same time of the request for access to documents) and paralysed the Serbian legal system. This highlights the politically delicate environment in which the Serbian Ministry of Justice operates in preparing and implementing the proposed judicial reforms.

The Commission has taken the abovementioned circumstances into consideration and finds that any disclosure of its comments would represent a serious and concrete risk to its relations with the Serbian authorities and to the accession negotiations with this country.

This assessment regarding the Commission's comments of July, October 2014 and March 2015 is not invalidated in any way by the publication, by the Serbian Ministry of Justice, of the subsequent draft versions of the Free Legal aid legislation on its own website. The subsequent drafts published by the Serbian Ministry of Justice are the result of the evaluation by the Serbian Ministry as to which of the Commission's comments it has decided to implement and in what way. Indeed, it is for the Ministry of Justice, as the main actor in the process of the reform of judiciary, to conduct the necessary consultations with the Commission services as well as with the relevant internal stakeholders. Therefore, the complainant's argument that one could infer the Commission's comments from a basic comparison between the subsequent draft versions from the Ministry of Justice's website is not correct.

With regard to the use of exception of Article 4(1)(a), third indent of Regulation 1049/2001, the Commission limits itself to pointing out that, as the Court of Justice confirmed in its judgment in case C-350/12 P², whilst the principle of transparency cannot be ruled out in

² Judgment of the Court of 3 July 2014 in case C-350/12 P, *Council of the European Union v Sophie in 't Veld*, paragraph 63, confirming its previous judgment, 2007, *Sison v Council*, C-266/05, paragraph 35.

international negotiations³, the institutions *must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest*. In that same judgment⁴, the Court acknowledged that the Council was *justified in refusing access to those parts of the document requested that related to the specific content of the proposed agreement and the strategic objectives which the European Union pursued in the negotiations*.

The Commission also contests the allegation that non-disclosure would affect its working relations with civil society. In the Commission's experience, Serbian NGOs continue to regularly provide comments to the Commission and cooperate well with it. In any case, the Commission, notably via its Delegation, holds regular meetings with civil society representatives on issues of particular concern, such as free legal aid. Owing to its public Annual Progress Report, civil society, and the public in general are informed of the general recommendations given by the Commission on the measures the Serbian authorities need to undertake to meet the accession requirements in the area of judiciary and fundamental rights.

With regard to the use of the exception of decision-making process - Article 4(3), first paragraph of Regulation 1049/2001

The Serbian national discussions on the adoption of the Free Legal Aid Act are still ongoing. As long as the final legal act has not been adopted, the Commission's successive comments reflect a temporary and continuously evolving internal position on specific issues related to the Free Legal Aid Act. Indeed, the Commission's comments may very well be adapted further in response to the subsequent versions of the draft legislation. Therefore, the argument of the complainant that the final comments of the Commission on the draft of Serbian Free Legal Aid Act have already been given is manifestly not correct as the Commission continues to react to subsequent drafts or replies to comments sent by the Serbian authorities. In addition, the Commission considers that disclosure in sensitive areas such as those covered by Chapter 23 would seriously undermine the decision-making process in the context of the accession negotiations with Serbia.

In light of the above, the Commission cannot agree with the complainant's allegation that the institution wrongly refused access to the document requested. The fact that the complainant advocates a different interpretation of the exceptions of Regulation 1049/2001 does not invalidate this conclusion.

As regards section 3 of the confirmatory decision ("No overriding public interest in disclosure"), the Commission stated that it had examined the possible existence of an overriding public interest but concluded that in this particular case there is no such overriding public interest. The balance should be more in favour of protecting trust between EU and Serbian authorities in the accession negotiations. The Commission needs to protect the public interest relating to the decision-making in accession negotiations with a third country. It specified that *the Commission will certainly highlight in its future progress reports, as it has done in the past, any irregularities or deficiencies it detects in the course of the accession negotiations. Relevant information concerning the progress to be made on the above-mentioned sensitive issues has been and is being made public at the national level, as well as European level. Therefore, I consider that the transparency concerns are sufficiently*

³ Ibid, paragraph 76.

⁴ Ibid, paragraph 109.

addressed and that the release of the document requested would not add to that transparency. To the contrary, I consider that in this case, the public interest is best served by the publication of the yearly progress reports by the Commission.

These passages demonstrate clearly that the Commission addressed, *in extenso* and in a balanced and well-reasoned manner, the possible existence of an overriding public interest. While stressing the importance of the principle of transparency of the accessions negotiations, the Commission can refuse access to documents addressing specific comments provided during the ongoing decision-making process of drafting a particular legislation, by taking into consideration the concrete circumstances of the case at hand.

4. CONCLUSION

In light of the above, the Commission concludes that there has been no maladministration in the way in which it dealt with the access-to-documents request.