

## EU Ombudsman complaint – registered on 17 February 2016

**From:** kirsten.fiedler@edri.org

**Date:** Wednesday, February 17, 2016 5:05:54 PM CET

## Complaint about maladministration

### Part 1 - Contact information

**First name:** Kirsten

**Surname:** Fiedler

**On behalf of (if applicable):** European Digital Rights (EDRi)

**Address line 1:** Rue Belliard 20

**Town/City:** Brussels

**Country:** Belgium

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### Part 2 - Against which European Union (EU) institution or body do you wish to complain?

European Commission

### Part 3 - What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

This complaint is directed at the European Commission's treatment of various access to document requests, five in total, made by us between 11 April 2015 and 6 January 2016 (relevant correspondence has been attached), with regard to the EU Internet Forum, also known as the EU IT-Forum. More specifically, it is directed at the Commission's decisions to systematically delay their responses and at their failure to observe appropriate deadlines.

### Part 4 - What do you consider that the EU institution or body has done wrong?

The Commission has failed to handle our requests in accordance with Regulation 1049/2001 ("the Regulation") and has failed to respect principles of good administration. As explained below, the Commission has (I) systematically extended time limits for their responses without adequate clarification and seemingly without adequate grounds; (II) has subsequently ignored even these unilaterally extended deadlines; (III) sought to 'join' requests, without an appropriate legal basis (or even an obvious logic), thereby delaying overdue responses even further; and (IV) partially refused to release documents in a way that does not appear to be in line with the conditions set in the Regulation.

- I. The Commission has systematically invoked Article 8(2) of the Regulation in order to

extend the period for handling our requests (please refer to the letters from the Commission to EDRi of 19 June 2015 (GestDem 2015/2271), 21 August (GestDem N° 2015/4066), 1 September (2015/3658) and 21 December (GestDem 2015/6363)). This article may only be invoked in 'exceptional cases', but the Commission appears to do so by default. Moreover, it does not offer any evidence to explain that the requests qualify as 'exceptional cases'. Furthermore, Article 8(2) requires the institution involved to provide 'detailed reasons' for the delay. However, the Commission has also systematically neglected to provide such reasons (please refer to the aforementioned letters). After further inquiries as to these reasons, the Commission still failed to provide any credible justifications. In two cases out of three, this further inquiry did not receive a response (see the two letters from EDRi to the Commission of 28 September 2015 (GestDem 2015/4066 and GestDem 2015/3658). In the one case where the Commission did respond to this further inquiry (letter from the Commission to EDRi of 19 June 2015 (GestDem 2015/2271)), the Commission briefly described the incomplete status of the request response under their standard procedures, without indicating any 'exceptional circumstances' nor giving 'detailed reasons' which could justify this delay. In short, the Commission has systematically invoked article 8(2) of the Regulation with disregard to its formal requirements and seemingly without appropriate grounds, leading to unnecessary delays in the handling of our requests.

- II. Even despite the Commission's systematic time limit extensions for granting access to documents in relation to the EU Internet Forum, the Commission has failed to meet the extended deadlines in two out of five dossiers. The eventual response for dossier GestDem 2015/4066 was overdue by almost two weeks, and the response for dossier GestDem 2015/3568 by almost two months. Furthermore, dossier GestDem 2015/6363 has been overdue since 27 January 2016 and has not yet received an adequate response. These delays are not provided for in the Regulation and therefore constitute a breach of the Commission's obligations.
- III. Upon expiration of the time limit for dossier GestDem 2015/6363, the Commission has - without any clear legal basis - sought to 'join' this dossier with the subsequently submitted dossier GestDem 2016/0095 (please refer to the letter from the Commission to EDRi of 27 January 2016). The Commission asserted that the two requests pertained to the same topic and therefore saw grounds to 'join' them, despite the fact that the two requests referring to different types of documents. The Commission subsequently claimed that the initial, expired deadline for dossier GestDem 2015/6363 no longer applied to that request, and that the extended deadline for dossier GestDem 2016/0095 could be applied to both requests. In effect, the Commission has thereby sought the further extend the response period for dossier GestDem 2015/6363 beyond what is permitted by the Regulation.
- IV. Our final objection relates to the Commission's substantive assessment of our requests. In the dossier GestDem 2015/3658, the Commission argued in its note of 10 June 2015 that they could not disclose the requested documents in order to remain 'free from external pressure'. They relied on article 4(3) of the Regulation to (partially) refuse our request. This is not a convincing argument, since the EU Internet Forum discusses the content of these documents with the online services sector, and hence with external stakeholders. As the

discussion is with external stakeholders, this logic seems very tenuous. Furthermore, this argument contradicts the European Commission's announcement to include civil society in the EU Internet Forum, in accordance with:

- Section 2.6 of the Commission's Communication COM (2013) 941 final "Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's response". According to the PREVENTION Communication, the EU Internet Forum is an action under the Commission's strategy to "Cooperate more closely with civil society and the private sector to address challenges faced online". Cf. [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/crisis-and-terrorism/radicalisation/docs/communication\\_on\\_preventing\\_radicalisation\\_and\\_violence\\_promoting\\_extremism\\_201301\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/crisis-and-terrorism/radicalisation/docs/communication_on_preventing_radicalisation_and_violence_promoting_extremism_201301_en.pdf)
- The European Agenda on Security: "The Commission will launch in 2015 an EU-level Forum with IT companies to bring them together with law enforcement authorities and civil society" cf. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0185&from=en>
- The EU Commission's statement of October 2014: [http://europa.eu/rapid/press-release\\_STATEMENT-14-304\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-304_en.htm)

We therefore believe the Commission's partial refusal is not justified by the grounds they put forth.

In addition, Article 4(3) of the Regulation only provides grounds for refusal where there is no overriding public interest in disclosure. As EDRi argued in its confirmatory request, online communications are affected by the EU Internet Forum project and it is very likely that some policy options discussed have therefore a broader impact on human rights and on the fundamental right to freedom of expression in particular. Consequently, the significant public interest at stake in EDRi's access to these documents also precludes the Commission's application of Article 4(3) of the Regulation.

**The complete correspondence can be accessed online at the "Ask The EU" portal at the following links:**

1. Request and correspondence, including a confirmatory application: Forum with the Internet service providers community (20 April 2015) - GestDem 2015/2271  
[http://www.asktheeu.org/en/request/forum\\_with\\_the\\_internet\\_service](http://www.asktheeu.org/en/request/forum_with_the_internet_service)
2. Request and correspondence, including a confirmatory application : Forum with the Internet service providers community (29 May 2015) - GestDem No 2015/3658  
[http://www.asktheeu.org/en/request/forum\\_with\\_the\\_internet\\_service#outgoing-4224](http://www.asktheeu.org/en/request/forum_with_the_internet_service#outgoing-4224)

Documents received by the Commission:

[https://edri.org/files/FAO\\_EU-IT-Forum-letter\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum-letter_20151006.pdf)  
[https://edri.org/files/FAO\\_EU-IT-Forum\\_01\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_01_20151006.pdf)  
[https://edri.org/files/FAO\\_EU-IT-Forum\\_02\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_02_20151006.pdf)  
[https://edri.org/files/FAO\\_EU-IT-Forum\\_03\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_03_20151006.pdf)  
[https://edri.org/files/FAO\\_EU-IT-Forum\\_04\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_04_20151006.pdf)

3. Request and correspondence: Participants in the EU Internet Forum - GestDem 2015/4066  
[http://www.asktheeu.org/en/request/participants\\_in\\_the\\_eu\\_internet](http://www.asktheeu.org/en/request/participants_in_the_eu_internet)

- response by the EU Commission on 2 October 2015:

[http://www.asktheeu.org/en/request/forum\\_with\\_the\\_internet\\_service#incoming-8009](http://www.asktheeu.org/en/request/forum_with_the_internet_service#incoming-8009)

4. Request and correspondence: EU Internet Forum launch - GestDem 2015/6363 (7 December 2015)

[http://www.asktheeu.org/en/request/eu\\_internet\\_forum\\_launch](http://www.asktheeu.org/en/request/eu_internet_forum_launch)

5. Request and correspondence: Agreed documents at the EU Internet Forum - GestDem 2016/0095 (8 January 2016)

[http://www.asktheeu.org/en/request/agreed\\_documents\\_at\\_the\\_eu\\_inter](http://www.asktheeu.org/en/request/agreed_documents_at_the_eu_inter)

## **Part 5 - What, in your view, should the institution or body do to put things right?**

1. For currently pending access to document requests and for future requests, the Commission should fully observe the requirements laid down in Article 8 of the Regulation. More specifically, they should limit any extension of the time period to truly exceptional cases and where the situation is indeed exceptional, they should also provide their detailed reasons for this designation. They should also observe the time limits resulting from this provision. Finally, the Commission should refrain from ignoring extended deadlines.

2. The Commission should avoid using standardised answers and give detailed reasons for any delays in its responses.

3. Regarding point IV, the Commission should disclose the requested documents under GestDem 2015/3658 in full and in unredacted form as per our initial request.

4. In order to achieve the above, we believe the Commission would do best to have their non-confidential documents directly accessible per default, as provided for in Article 12 of the Regulation. Finally, the Commission should open the EU Internet Forum to civil society and other impacted actors, not only to industry.

## **Part 6 - Have you already contacted the EU institution or body concerned in order to obtain redress?**

Yes (please specify and submit copies of the relevant correspondence)

We have directed two confirmatory requests at the Commission following their initial responses (letters of 29 May (2015/2271), 7 August (GestDem 2015/3658)). Furthermore, we have sent three additional letters seeking clarification as to the legality of the Commission's overdue responses (letters of 28 September (GestDem 2015/4066 and GestDem 2015/3658) and 19 June (GestDem 2015/2271)).

See :

1. Request and correspondence, including a confirmatory application: Forum with the Internet service providers community (20 April 2015) - GestDem 2015/2271

[http://www.asktheeu.org/en/request/forum\\_with\\_the\\_internet\\_service](http://www.asktheeu.org/en/request/forum_with_the_internet_service)

2. Request and correspondence, including a confirmatory application : Forum with the Internet service providers community (29 May 2015) - GestDem No 2015/3658

[http://www.asktheeu.org/en/request/forum\\_with\\_the\\_internet\\_service#outgoing-4224](http://www.asktheeu.org/en/request/forum_with_the_internet_service#outgoing-4224)

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[https://edri.org/files/FAO\\_EU-IT-Forum-letter\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum-letter_20151006.pdf)

[https://edri.org/files/FAO\\_EU-IT-Forum\\_01\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_01_20151006.pdf)

[https://edri.org/files/FAO\\_EU-IT-Forum\\_02\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_02_20151006.pdf)

[https://edri.org/files/FAO\\_EU-IT-Forum\\_03\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_03_20151006.pdf)

[https://edri.org/files/FAO\\_EU-IT-Forum\\_04\\_20151006.pdf](https://edri.org/files/FAO_EU-IT-Forum_04_20151006.pdf)

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[http://www.asktheeu.org/en/request/agreed\\_documents\\_at\\_the\\_eu\\_internet\\_forum](http://www.asktheeu.org/en/request/agreed_documents_at_the_eu_internet_forum)

**Part 7 - If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?**

Not applicable

**Part 8 - Has the object of your complaint already been settled by a court or is it pending before a court?**

No

**Part 9 - Please select one of the following two options after having read the information in the box below:**

Please treat my complaint publicly

**Part 10 - Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?**

Yes