

## **Decision in case 1413/2018/KR concerning the refusal by the European Commission to disclose a “mapping exercise” drawn up in the context of the Brexit negotiations**

Decision

**Case 1413/2018/KR - Opened on 29/08/2018 - Decision on 09/11/2018 - Institutions concerned** European Commission ( No maladministration found ) | European Commission ( No further inquiries justified ) |

The case concerned the refusal of the European Commission to grant the complainant public access to a document drawn up in the context of the on-going Brexit negotiations. The document relates to a “mapping exercise” that seeks to identify the EU legal and policy framework relevant for North-South cooperation on the island of Ireland.

Having reviewed the document, its purpose and context, the Ombudsman is of the view that it should clearly be made public. However, she has decided that, at this specific time in the EU/UK negotiations, the document is subject to a valid exception under the EU Regulation on public access to documents. This is despite the lack of inherent confidentiality of the content and the high level of public interest in the negotiations.

The Ombudsman therefore closed the inquiry with a finding of no maladministration, but strongly urges the Commission to publish the document as soon as the relevant negotiations have been concluded. When the elected representatives of EU and UK citizens vote on the outcome of these negotiations, this document is essential to the making of informed decisions in the public interest.

## **Background to the complaint**

1. On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the EU. In accordance with Article 50 of the Treaty on European Union, withdrawal will occur on 29 March 2019 [1] .

2. The terms of withdrawal are expected to be set out in a so-called “Withdrawal Agreement”, currently being negotiated between the UK and the Commission.



3. On 29 April 2017, the European Council issued Guidelines [2] to the Commission regarding how it should negotiate the Withdrawal Agreement with the UK.

4. At the end of 2017, the Commission and UK negotiators took stock of the progress made. This progress was documented in a “Joint Report”, which was published [3]. The Joint Report states that the parties “reached agreement” “in principle” in three areas under consideration in the first phase of negotiations, namely a) protecting the rights of EU citizens in the UK and UK citizens in the EU; b) the framework for addressing the unique circumstances in Northern Ireland; and c) the financial settlement.

5. As regards the framework for addressing the unique circumstances in Northern Ireland, paragraph 47 of the Joint Report noted that cooperation between Ireland and Northern Ireland is a central part of the “Good Friday” or “Belfast” Agreement reached on 10 April 1998 by the UK Government, the Irish Government and the other participants in the multi-party negotiations (the ‘1998 Agreement’). That cooperation, the Joint Report stated, is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland. In this regard, the Commission and the UK negotiators recalled the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including its cross-community provisions) as set out in the 1998 Agreement. The Joint Report noted that the parties had carried out a “ **mapping exercise** ” showing that *“North-South cooperation relies to a significant extent on a common European Union legal and policy framework”*. In that context, the Joint Report noted, the United Kingdom’s departure from the European Union “ *gives rise to substantial challenges to the maintenance and development of North-South cooperation* ”.

6. On 31 January 2018, the complainant requested public access to the “mapping exercise” referred to in paragraph 47 of the Joint Report.

7. On 8 March 2018, the Commission refused to disclose the document.

8. On 26 March 2018, the complainant requested the Commission to review its decision to refuse access (in a so-called “confirmatory application”).

9. On 12 April 2018, the complainant wrote to the Commission with a reference to a speech that the EU Chief Negotiator, Mr Michel Barnier, who heads the Taskforce on Article 50 negotiations with the UK (the Taskforce), gave in the European Parliament on 10 April 2018. In the speech, Mr Barnier said that: “ *[t]ransparency is key for the public debate that we need on Brexit. This negotiation will not and cannot be secret.* ” [4]

10. On 15 May 2018, the complainant wrote to the Commission with a reference to a reply of 14 May 2018 to a UK Parliamentary Question, in which the UK Government “ *commits to publishing the results of the North-South cooperation mapping exercise as soon as they are available. Currently the joint mapping exercise remains part of the ongoing negotiations with the EU and further work has been agreed to finalise it. We are hopeful that we can conclude this soon. We would, of course, seek to coordinate any release of information with the European* ”



## Commission

11. On 24 May 2018, the UK House of Commons Exiting the European Union Committee published a report on “The Progress of the UK’s negotiations on EU withdrawal (March to May 2018)” in which it noted the joint mapping exercise, the UK Government’s refusal to release it at that point and its commitment to do so “soon”. The report stated: “ *We welcome the Secretary of State’s commitment to publishing the joint mapping exercise on areas of North/South cooperation but we note that no timetable for this has been provided. We request that the Government set out what work on the exercise is ongoing along with a timetable for when it will be concluded and the results published. This is important because this mapping exercise will show us exactly what is needed to meet the commitment made in the agreement reached between the UK and the EU in December 2017 .*”

12. On 7 June 2018, the Commission confirmed its refusal to disclose the requested document.

13. On 7 August 2018, the complainant turned to the Ombudsman.

## The inquiry

14. On 29 August 2018, the Ombudsman opened an inquiry into the following aspects of the complaint:

- 1) The Commission did not correctly identify the document sought by the complainant;
- 2) The Commission wrongly refused access to the requested document; and
- 3) The Commission did not respect the time limits for responding to the request.

15. The complainant argues that these failures show that the Commission has failed to live up to its commitments to be transparent regarding the negotiations.

16. On 7 September 2018, the Ombudsman’s inquiry team inspected the document at issue and met with staff of the Commission so as to understand better the document and the relevant context.

## The Ombudsman's assessment

### The identification of the document falling within the scope of the request for public access

17. The complainant says that the Commission erred when identifying the document falling within the scope of the request for access to documents.



18. The complainant requested “ documents which **make up** the ‘**mapping exercise**’ relating to North-South cooperation in the context of the Good Friday Agreement referred to in paragraph 47 of the Joint Report of the EU and UK negotiators ” (emphasis added).

19. The Commission’s confirmatory decision describes the document it identified as relevant as: “ a mapping table relating to North-South cooperation in the context of the Good Friday Agreement referred to in paragraph 47 of the Joint Report of the EU and United Kingdom negotiators. The mapping table aims to identify the European Union legal and policy framework, which is relevant for North-South cooperation on the island of Ireland in the areas within the remit of the North-South Ministerial Council. This document originates from the United Kingdom authorities. The latter communicated the document to the European Commission in the context of the negotiations under Article 50 of the Treaty on European Union on the United Kingdom’s orderly withdrawal from the European Union .”

20. On 11 June 2018, the complainant asked the Commission to clarify whether the mapping exercise was deemed to be “complete”. On 22 June 2018, the Commission replied. It said “ the mapping exercise , which is a joint EU-UK endeavour to preserve all commitments of the Good Friday Agreement, has to be distinguished from the document ‘North South cooperation: scoping exercise,’ produced by the UK authorities to facilitate the negotiators’ work in this field. ” It also said “ the issues of the mapping exercise are linked to aspects of EU acquis communautaire and their possible reflection in the Withdrawal Agreement , which is subject to ongoing negotiations ” (underscore added).

21. The complainant argued that even if the mapping exercise was an on-going process, the content of the document must cover issues where agreement had already been reached. He based this view on the wording of the Joint Report, which referred to agreement having been reached on certain issues.

22. The Ombudsman has examined the document that is the “mapping table” forwarded to the Commission by the UK. It identifies all parts of the EU law that the authors considered relevant to maintain North-South cooperation on the island of Ireland in the areas within the remit of the North-South Ministerial Council. It is marked “Confidential” and bears the following annotation: “ Draft: This information has been communicated in confidence and should not be released without prior written agreement by the UK Government ”. The Commission confirmed to the Ombudsman that this was the document referred to in the Joint Report on progress during phase 1 of the UK withdrawal negotiations on 8 December 2017. The Commission also confirmed that this was the only document used in the mapping exercise, leading up to the adoption of the Joint Report.

23. The Ombudsman notes that the complainant, in his request for review specified that he was “ seeking disclosure of the documents which make up the mapping exercise itself”.

24. The Ombudsman accepts that this is the one document correctly identified as falling within the scope of the request. The document at issue, “the mapping table” produced by the UK



government, is, apparently, the only document that was considered in the joint mapping exercise referred to in the Joint Report.

**25.** The Ombudsman has found no maladministration in the way the Commission interpreted the complainant's request for access to documents.

## **The refusal to disclose the document**

**26.** As the requested document originated from the UK, the Commission consulted with the UK about potential disclosure. The UK told the Commission that disclosure at this time would undermine international relations and on-going decision-making processes. However, the refusal decision is that of the Commission. A Member State has no veto over the disclosure of a document in the possession of the Commission. It must consider whether the reasons for refusal suggested by the Member State justify the application of the exceptions, at least on a *prima facie* basis.

**27.** The Commission's confirmatory decision included two grounds for refusal, namely the protection of the public interest as regards international relations, and the need to protect the Commission's decision-making processes. The Ombudsman has found it necessary to consider only the international relations exception.

**28.** The Commission argued that disclosure of the requested document, which originated from the UK government, against the UK's express wishes, would undermine the trust between the UK and the Commission at this sensitive time in the negotiations. This was particularly so, given the confidential marking of the document and the context of confidential negotiations. Public disclosure at this stage would also risk upsetting the negotiations on the sensitive issue of North-South cooperation, jeopardising a successful outcome. This, the Commission said, would clearly undermine the EU public interest as regards international relations.

**29.** The complainant argued that disclosure of the requested document would facilitate public debate about the withdrawal agreement as far as it relates to the island of Ireland. This, he argued, is a prerequisite for the legitimacy of any eventual withdrawal agreement.

**30.** The Ombudsman recognises the importance and sensitivity of attempting to reconcile the withdrawal of the United Kingdom from the EU with the commitments made in the 1998 Agreement. These are matters of significant public interest, directly affecting the lives of millions of EU and UK citizens and especially on the island of Ireland. The document does cover a wide array of cross-border topics such as trade, animal health, tourism, the environment, cross-border fraud prevention, the mutual recognition of professional qualifications, and farming. There is therefore a very strong case in favour of the right of citizens to know how these issues are being taken into account in the negotiations between the UK and the Commission and indeed simply to raise awareness of the extent to which an EU legal and political framework underpins cooperation on many important areas of life on both sides of the Irish border.



**31.** As this decision is completed, the negotiations on this aspect of the withdrawal negotiations are still ongoing and it is clear that issues in respect of the border between Ireland and Northern Ireland are proving difficult to resolve in the context of those negotiations.

**32.** The Ombudsman notes that the international relations exception in Regulation 1049/2001 cannot be overridden by other public interest considerations. This is not the case in all public access to documents regimes. For example, in UK law, the equivalent exemption in the Freedom of Information Act 2000 is subject to a 'public interest balance' test.

**33.** The Commission did engage with the complainant as regards whether there was any public interest in disclosure of the document at this time. The Commission, in the confirmatory decision, stated that “ *although [the Commission shares] your view that North-South cooperation is an important issue, [it does] not see how disclosure of the requested document would contribute to its enhancement* ”. It added, “ *Public disclosure of the requested document during the ongoing negotiations, against the opposition of the United Kingdom authorities, at a stage where both sides are still exploring 'flexible and imaginative' solutions, would significantly restrict the European Commission's ability to collaborate with the United Kingdom in an atmosphere of trust and obtain useful information from the United Kingdom authorities. This, in turn, would seriously undermine the European Commission's informed margin of manoeuvre [sic] in the ongoing negotiations and undermine the Commission's ability to perform its function as the Chief Negotiator of the European Union. Public disclosure of the requested documents would seriously undermine the decision-making process concerning the actual negotiation of the arrangements for the withdrawal of the United Kingdom from the European Union, which include finding good solutions for the North-South cooperation.* ”

**34.** The Commission also stated that “ *Public disclosure of the requested document, which has a preparatory nature, to the extent covered by your application, could also result in their content being misunderstood or misused, thereby impairing the serenity of the ongoing decision-making process.* ” The Ombudsman does not accept that these arguments justify the refusal of public access. She further notes that when, on 8 December 2017, the existence of the mapping exercise was revealed in a joint EU/UK communique, there was no indication that the mapping exercise was 'preparatory' in nature but stated rather that: 'The two parties have carried out a mapping exercise which shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework'.

**35.** The Ombudsman accepts nonetheless that the content gives rise to political sensitivities as it shows – in a single document – the significant extent to which EU membership impacts on North-South cooperation within the remit of the North-South Ministerial Council, an issue which is the subject of ongoing discussions in the context of difficult withdrawal negotiations. She concludes that the Commission's argument that disclosure could foreseeably undermine the *negotiations* and international relations has some force at the current time. The international relations exception therefore applies. This is so despite the strong case, noted above, for the document to be made public as soon as possible. As stated, under EU law, this public interest cannot override the international relations exception, which is applicable in this case. In the event that it could, there might be a strong case for arguing that the public interest in fully



informing citizens about the extent of EU underpinning of significant elements of cross border cooperation would override the public interest in safeguarding the 'serenity' of the ongoing negotiations. To the extent that different views may be held in relation to the strength of that underpinning, this would not necessarily undermine the public interest argument, given the open public disagreements over this aspect of the negotiations.

36. While the refusal to grant public access at this time is legally justified, the Ombudsman understands and expects that the Commission will change its position once agreement on this aspect of the negotiations has been reached. The Ombudsman expects the document to be disclosed directly after the conclusion of the relevant negotiations in order to allow future decisions to be made in full awareness of all relevant issues.

## The delay in responding to the request for public access

37. The complainant has raised the Commission's delay in replying to his access request. In particular, the complainant alleges that the Commission has failed to apply Regulation 1049/2001 correctly, as it did not complete the confirmatory review within the time limits laid down in Article 8.

38. Article 8 stipulates, "*In exceptional cases [...] the time limit provided for in paragraph 1 [i.e. 15 working days] may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*"

39. On 23 April 2018, the Commission extended the time limit for replying to the request for review by 15 working days, saying that this was due to "*the fact that [the Commission's] consultations with the UK authorities relating to the requested documents [were] not yet finalised*".

40. On 16 May 2018, the Commission told the complainant that it was impossible to reply to the request for review within the extended time limit, as the Commission "*[had] not yet finalised internal consultations*". The Commission told the complainant that he would receive a final reply **as soon as possible**.

41. This open-ended extension to the time limit thus came after the *exceptional* extension of 15 days for replying to the request for review.

42. Article 8 states that failure to reply within the prescribed time limit shall be considered as a negative reply, which equates to a refusal to disclose the requested documents.

43. In this case, it is clear from the Commission's explanation that the delay occurred because the Commission wanted to conclude the consultation with the UK, as required by law. The Ombudsman considers this understandable, given the sensitivities of the issues involved.

44. On 4 June 2018, the complainant wrote to the Commission proposing that the Commission





would adopt the confirmatory decision within the next 15 working days, stating that he would go to the Ombudsman should he not have received the outcome of the Commission's confirmatory review by 8 June. The Commission's final decision on the review was adopted on 7 June, and communicated to the complainant on 8 June.

**45.** Requests for public access to documents should be dealt with promptly, within the time limits set out in Regulation 1049/2001. In this case, the Ombudsman accepts that the delay was at least partly caused by the Commission awaiting the UK's response to the necessary consultation.

**46.** Given all the circumstances, in particular the fact that the delay was not unreasonable and the constructive engagement between the complainant and the Commission, the Ombudsman does not find that the delay amounted to maladministration.

## **The Commission's commitment to transparency**

**47.** The complainant argued that the Commission is failing to comply with its commitment to transparency in the withdrawal negotiations.

**48.** Given the importance of the negotiations for citizens, the Ombudsman has urged the Commission to ensure an appropriate level of transparency around the UK withdrawal negotiations. Even before the UK notified the European Council formally of its intention to leave the EU, the Ombudsman asked the Commission to set out the arrangements that it planned to put in place to ensure transparency and to secure appropriate stakeholder input during the withdrawal negotiations [5] .

**49.** The Ombudsman argued it would be helpful to adopt a proactive approach from the start and give citizens access to relevant information and documents at the appropriate time and without the need to ask for them.

**50.** On 28 April 2017 the Commission stated that it agreed with this approach, its aim being, "*[w]ithin the framework of the European Council's Guidelines, [...] to ensure a maximum level of transparency*" [6] .

**51.** The Ombudsman will assess the overall level of transparency of the Brexit negotiations once the Withdrawal Agreement has been finalised and before the ratification process begins.

**52.** The Ombudsman notes and welcomes the statement of intent to publish the finalised results of the North-South mapping exercise on cross border cooperation between Northern Ireland and the Republic of Ireland. As stated above, she expects the document which is the subject of this complaint to be disclosed directly after the conclusion of the relevant negotiations.

## **Conclusion**





Based on the inquiry, the Ombudsman closes this case with the following conclusion [7] :

**The Ombudsman has found no maladministration by the European Commission in how it handled the request for public access. However, she urges the Commission to publish the document as soon as the relevant negotiations have been concluded.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 09/11/2018

[1] A copy of the 'Treaty on European Union' is available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT> [Link].

[2] 'Guidelines following the United Kingdom's notification under Article 50 TEU', available here:

<http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf> [Link]

[3] The Joint Report is available here:

<https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-governm>  
[Link]

[4] The speech is available here:

[http://europa.eu/rapid/press-release\\_SPEECH-18-3162\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-3162_en.htm) [Link]

[5] Letter from the Ombudsman to President Juncker concerning information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU, 28 February 2017: <https://www.ombudsman.europa.eu/en/correspondence/en/76528> [Link].

[6] Reply from President Juncker to the Ombudsman's letter concerning information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU, 28 April 2017: <https://www.ombudsman.europa.eu/en/correspondence/en/78650> [Link].