European Ombudsman

Decision in case 21/2016/JAP on the Council of the EU's failure to grant access to legal opinions on proposals for Regulations on the establishment of the European Public Prosecutor's Office and on the European Union Agency for Criminal Justice Cooperation (EUROJUST)

Decision
Case 21/2016/JAP - **Opened on** 08/02/2016 - **Decision on** 07/03/2019 - **Institution concerned** Council of the European Union (No maladministration found) |

The case concerned the refusal of the Council of the European Union to grant full access to legal opinions on the legislative proposals for Regulations on the establishment of the European Public Prosecutor's Office (EPPO) and on the European Union Agency for Criminal Justice Cooperation (EUROJUST).

In the course of the Ombudsman's inquiry, the Council agreed to disclose two of the four documents, but maintained its refusal to disclose fully the two remaining documents, although partial access was granted.

The Ombudsman accepts that the refusal to disclose the legal opinions fully was justified on the grounds that it would undermine the protection of legal advice and court proceedings. She therefore closes the case with a finding of no maladministration, but invites the Council to review its refusal in light of the further passage of time.

Background to the complaint

1. The complainant, a Polish academic, asked the Council of the European Union to give him public access under the EU's Access to Documents Regulation [1] to four opinions of the Council's Legal Service [2] on the proposed EU Regulations on the establishment of the European Public Prosecutor's Office [3] ('EPPO') and on the European Union Agency for Criminal Justice Cooperation [4] ('Eurojust).

2. The EPPO will be an independent Union body with authority to investigate and prosecute EU fraud and other crimes affecting the Union's financial interests. The EPPO will be a body of the Union with a decentralised structure, with a view to involving and integrating the national law

enforcement authorities. EPPO investigations will in principle be carried out by European Delegated Prosecutors, located in each Member State, but fully independent from the national prosecution bodies.

3. The proposed Regulation on Eurojust regulates relations between Eurojust and the EPPO. Where the EPPO exercises its competence, Eurojust should not act. However, Eurojust should be able to exercise its competence in cases involving individual Member States.

4. The Council refused access to the documents because it considered that public disclosure would undermine the protection of legal advice and court proceedings and would undermine decision-making in the context of the (then) ongoing legislative negotiations.

5. The complainant asked the Council to review its initial decision to withhold access [5] . He argued that there were no grounds to suppose that disclosure of the requested documents would undermine the Council's need for objective and comprehensive legal advice. In his view, full disclosure of legal opinions, and in particular " *advice relating to the legislative process (where only the Council acts as legislator),* [may] *guarantee that [* any *] legally questionable initiatives will be ruled out, thus reflecting one of the fundamental principles of the European Union, the rule of law"* [6] . He added that even if there were a risk of undermining the protection of the Council's legal advice, it would be purely hypothetical and therefore insufficient to justify an exception to disclosure under Article 4(2) of Regulation 1049/2001.

6. The complainant contested the Council's view that there was no overriding public interest. He argued that public scrutiny and transparency of the legislative decision-making process were essential factors in legitimising the decisions taken.

7. On 26 October 2015, the Council's Secretary General replied, maintaining the reasons for the initial refusal.

8. Dissatisfied with the Council's reply, the complainant turned to the European Ombudsman on 6 January 2016.

The inquiry

9. The Ombudsman opened an inquiry into the Council's application of the relevant provisions of Regulation 1049/2001 when dealing with the complainant's request for access to documents.

10. In the course of the inquiry, the Ombudsman's inquiry team inspected the Council's file and obtained copies of the requested documents. On 10 January 2017, the Ombudsman received the opinion of the Council on the complaint. She asked the complainant to comment on the Council's opinion, but he did not respond. Nevertheless, the Ombudsman has taken into account the arguments and opinions put forward by both parties in the course of the inquiry.

11. During the course of the inquiry, the Council reconsidered its position and disclosed two [7]

of the four requested documents to the complainant. The Council justified its decision based on the fact that time had passed and the progress made in the decision-making processes relating to the two legislative files.

12. Regarding the two remaining documents [8] , the Council restated the reasons it had previously put forward for refusing access. It noted that it had already granted partial access to these documents.

Arguments presented to the Ombudsman

On the exception concerning the protection of legal advice

13. In the opinion it sent to the Ombudsman, the Council restated, the view it had given to the complainant, that the requested documents contained advice on sensitive, complex and controversial legal issues. Given the nature of the EPPO's powers, the Council insisted that the two opinions of its Legal Service could potentially be used in future court proceedings. Releasing them to public might therefore have a detrimental effect on the ability of the Council's Legal Service to defend its position in future court proceedings [9] . In its view, the risk of litigation was extremely high and not purely hypothetical. It noted that the Court also considered as sufficient grounds for withholding documents the fact they could likely be relevant to judicial proceedings ' *in the near future'* [10] . Finally, the 'principle of the protection of equality of arms' is " *applicable independently of the point in time when the judicial proceedings will be introduced* ".

On the exception concerning the protection of the ongoing decision-making process

14. The Council argued that disclosing its Legal Service's opinions on controversial matters, which are central to ongoing legislative negotiations, could deter its legal advisors from expressing their views in frank and straightforward terms. Such a restraint would compromise the ability of the Legal Service to perform its role and would " *seriously affect the effectiveness of the overall Council's decision-making process* " [11] . By way of background, it stated that the two legislative files, the EPPO file and the EUROJUST file, were closely interlinked and that the decision-making processes were still ongoing. (No final legislative act had yet been adopted.) The informal negotiations on the EPPO proposal between the representatives of the two legislators and the Commission (the so-called 'Trilogues' [12]) had started but were not yet completed [13] , while the Trilogues on the EUROJUST file had not yet started.

15. The Council referred to the Ombudsman's decision in inquiry OI/8/2015/JAS [14] on the transparency of Trilogues. It argued that, in the context of complex legislative negotiations, it may be necessary to limit the right of the public to participate in the legislative process in some situations, notably while informal negotiations are still ongoing. This was paramount to

safeguard the institutions' negotiating space on controversial issues. It argued that this applied to the Trilogues on the EPPO, which were still on-going, and to the Trilogues on EUROJUST, which had not yet started. The Council stated that it was prepared to disclose the legislative documents, even during informal negotiations, when it is satisfied that this would not undermine the decision-making process.

Overriding public interest in disclosure

16. Finally, the Council stated that the complainant did not substantiate his claim that there was an overriding public interest in the disclosure of the outstanding documents because his arguments were too generic and vague [15] . General arguments that the transparency of the legislative process constitutes in itself a public interest do not take account of the specific nature of each case, which may justify the refusal to grant access to documents.

The Ombudsman's assessment

17. The Ombudsman welcomes the fact that the Council disclosed two of the requested documents to the complainant and considers that **this aspect of the complaint has been settled** by the Council. The Ombudsman's analysis will be limited to the remaining two documents, to which only partial access was granted.

18. The Council invoked two exceptions provided in Regulation 1049/2001 to justify its decision to refuse access to the two remaining documents: (i) the protection of legal advice and court proceedings, and (ii) the protection of an ongoing decision -making process.

(i) The EPPO legal opinion

19. The EPPO will have the responsibility of conducting criminal investigations and prosecutions against individuals at national level. As such, it is certain that the interpretation of the provisions of the Regulation will be directly relevant in numerous investigations and subsequent court proceedings, once the EPPO is in operation. The Ombudsman therefore agrees with the Council that " *the risk of future litigation is not just realistic, but also extremely high and clearly not purely hypothetical*" .

20. Whether any legal opinion of the Council relating to the EPPO Regulation would be relevant to such court proceedings, such that the disclosure of that legal opinion would undermine the protection of legal advice and/or the court proceedings, will depend on the point at issue.

21. The Ombudsman, having inspected the document, considers that the bulk of the redacted text does relate to matters which may well turn out to be central to future court proceedings. It is foreseeable, given the content of that advice, that parties in future proceedings could attempt to use the legal advice of the Council in their support, which could be detrimental to the EPPO.

22. While it could be argued that a very small number of the redactions are excessive and unnecessary, they do not conceal anything of any significance.

23. There is a strong public interest in ensuring that litigation relating to the prosecution of criminal acts is not undermined and, in the particular circumstances of this case, the Ombudsman agrees that the public interest in further disclosure of the document does not override the public interest in non-disclosure.

24. Since it is evident that the non-disclosure of the EPPO legal opinion is justified on the basis of the need to protect legal advice and court proceedings, the additional exception applied does not need to be considered.

(ii) The EUROJUST legal opinion

25. The Eurojust legal opinion relates to the provisions to be made in the revised Regulation on Eurojust regarding the issue of public access to documents. Paragraphs 1 to 13 and 20(e) of the opinion were disclosed by the Council, but paragraphs 14 to 20(d) were withheld. The withheld parts contain legal advice on the interpretation and potential implications of the relevant provisions in the (then) draft Regulation.

26. The Ombudsman recognises that it was foreseeable there might be limited litigation relating to access to documents held by Eurojust and that disclosure of the withheld paragraphs could undermine any such court proceedings. The Ombudsman therefore accepts that the Council had some justification for not granting public access to that part of the legal opinion **at the time of the request** . Furthermore, the Ombudsman notes that the complainant has not pursued this complaint and that the Regulation itself has now been made (Regulation 2018/1727 [16]).

27. In these circumstances, the Ombudsman does not consider it appropriate to make a finding of maladministration in respect of the Council's decision to withhold parts of the requested document. She does, however, urge the Council to consider granting public access to those parts now, given the passage of time and the conclusion of the legislative procedure.

28. The Ombudsman applauds the Council' willingness to take into consideration the passage of time during the course of her inquiry and trusts that it will continue to do so in the interests of transparency and openness.

Conclusion

On the basis of the inquiry into this complaint, and the developments during its course, the Ombudsman closes the inquiry with the following conclusion:

There was no maladministration by the Council. However, she urges the Council to

consider granting public access to the withheld parts of the Eurojust legal opinion, in the light of changed circumstances.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 07/03/2019

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ (2001) L 145, p. 43, available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049.

[2] (i) Document 6267/14 on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office. The document contains an analysis of the specific 'enhanced cooperation' procedure provided for in the second and third subparagraphs of Article 86(1) in the Treaty on the Functioning of the European Union.

(ii) Document 13302/1/14 REV 1 on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office. This legal opinion specifically analyses the compatibility with the EU Treaties of certain provisions of the proposed regulation, which limit the judicial review by the Court of Justice of the EU on the procedural measures taken by the European Public Prosecutor's Office.

(iii) Document 16983/14 on the proposed Regulation on the EU Agency for Criminal Justice Cooperation (EUROJUST). This legal opinion gives a legal assessment of Article 60 of the proposal, which covers public access to documents held by EUROJUST. Document 16893/14 COR 1 is a corrigendum to paragraph 10 at page 4 of document 16983/14.

(iv) Document 8904/15 on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office. This legal opinion analyses the compatibility with Article 86 TFEU of the extension of the proposed European Public Prosecutor´s jurisdiction to certain ancillary offences. Document 8904/15 COR 1 indicates that the corrigendum does not apply to the Polish version of document 8904/15.

[3] The EPPO will be an independent EU body with the authority to investigate and prosecute

fraud and other crimes affecting the EU's financial interests.

[4] EUROJUST is an EU body that facilitates the coordination of investigations and prosecutions between the competent authorities in EU Member States and improves cooperation between them. More information at: http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx [Link]

[5] The procedure for *confirmatory applications* is set out in Article 7(2) of Regulation 1049/2001.

[6] He argued that making the legal opinions public, and thereby ensuring scrutiny, could lead to more effective legal advice and improve its legitimacy. In doing so, he referred to the judgment of the European Court of Justice of 1 July 2008, *Sweden and Turco* v *Council* , C¤39/05 P and C¤52/05 P, EU:C:2008:374, paras. 45-46.

[7] Documents referred to above: 6267/14 (a contribution of the Legal Service of the Council, relating to the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office) and 8904/15 (an opinion of the Legal Service of the Council concerning the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office).

[8] **13302/1/14 REV 1** (on the scope of the judicial review of the Court of Justice) and **16983/14** (on public access to EUROJUST).

[9] To support its view, it referred to Case T-796/14 *Philip Morris Ltd v European Commission* , paras. 66 -71.

[10] Case T-800/14 *Philip Morris Ltd v European Commission* , paras. 68-69.

[11] In this context, it referred to the judgment of the General Court in Case T-18/15 *Philip Morris Ltd v Commission.* The Court found that "[t] *he possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process".* It thus found reasonable the Commission's stance to refuse access to a document containing criticisms made by the author about certain aspects of the conduct of a certain section of the Commission because its disclosure could seriously compromise the decision-making process.

[12] The EU's two legislative bodies, the European Parliament and the Council of the European Union, enact legislation following a proposal by the European Commission. During this process, both co-legislators, assisted by the Commission, often negotiate in so-called Trilogues, which are **informal meetings** between representatives of the three institutions involved. During a Trilogue, Parliament and Council try to agree on a common legislative act, based on their initial positions. This legislation is then voted on according to the formal legislative procedure.

[13] In the meantime, the text of the EPPO Regulation has been agreed in the context of the enhanced cooperation procedure. The Regulation is now in force, but the EPPO is not yet fully operational. For more information please see Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, *OJ L 283* , 31.10.2017, p. 1, available here: https://eur-lex.europa.eu/eli/reg/2017/1939/oj [Link].

[14] Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues.

[15] In this context, it relied on the Judgment of the General Court in Case T-710/14 *Herbert Smith Freehills LLP v Council* , para. 69.

[16] Regulation 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *OJ L 295, 21.11.2018, p. 138, available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1727 [Link].