

Decision in case 1712/2019/EWM on the European Commission's refusal to grant public access to parts of an internal legal evaluation on extending the period for negotiations concerning the United Kingdom's withdrawal from the European Union

Decision

Case 1712/2019/EWM - **Opened on** 13/09/2019 - **Decision on** 24/06/2020 - **Institution concerned** European Commission (No maladministration found) |

The case concerned the European Commission's refusal to grant partial public access to a legal opinion evaluating extension options regarding the United Kingdom's withdrawal from the European Union.

The Ombudsman found that at the time of the confirmatory decision, discussions on the decision-making process regarding the withdrawal of the United Kingdom were still ongoing.

The Ombudsman therefore considered that there was no maladministration by the Commission at the time of the formal decision not to grant public access to the requested document.

Nevertheless she made a proposal for partial access in the light of subsequent developments. The Ombudsman regrets that the Commission did not accept her proposal, thus missing an opportunity to fulfil its commitment to maximum transparency in the Brexit process.

Background to the complaint

1. On 23 June 2016, the majority of the United Kingdom's electorate who voted in the UK referendum on membership of the European Union chose to leave the EU. On 29 March 2017, the UK initiated the formal withdrawal process by notifying the European Council of its intention to leave the EU. This triggered the procedure for a Member State to withdraw from the Union, beginning a two-year countdown to withdrawal. [\[1\]](#) [\[Link\]](#)

2. At the UK's request, the European Council agreed to extend this two-year period, [\[2\]](#) [\[Link\]](#) first, on 21 March 2019 until 22 May 2019 [\[3\]](#) , then on 10 April 2019 until 31 October 2019. On 19 October 2019, the European Council agreed to another extension of this period until 31 January. On 24 January 2020, the UK and the EU signed the Withdrawal Agreement. On 1



February 2020, the UK became a third country.

3. The Ombudsman's inquiry concerned the refusal of a request for public access to a note issued in January 2019 by the European Commission's Legal Service, concerning the withdrawal negotiations between the EU and the UK. The note presented legal considerations to be taken into account in a scenario where no withdrawal agreement was concluded by 29 March 2019 and where the European Council might therefore envisage extending the two-year period that is foreseen in the EU Treaties.

4. On 20 March 2019, the complainant requested public access to an "*internal evaluation of the European Commission, i.a. on extension options regarding Brexit*" from the European Commission. The Commission informed the complainant that it had identified a note dated 17 January 2019 of the Legal Service to the attention of the Cabinet of the President of the European Commission, "*Brexit - Legal considerations on a possible extension of the two-year period*".

5. In its confirmatory decision of 6 September 2019, the Commission refused access to the requested document. It argued that the considerations by its Legal Service contained in the requested document remained relevant and extremely sensitive, since the EU had not yet concluded a withdrawal agreement with the UK at that point in time. The Commission stated that disclosure would have a serious impact on the Commission's interest in seeking and receiving legal advice. According to the Commission, disclosing this requested document would also undermine its decision-making process [\[4\] \[Link\]](#) and the protection of public interest as regards international relations. [\[5\] \[Link\]](#)

6. Dissatisfied with this decision, the complainant turned to the Ombudsman on 9 September 2019.

The Ombudsman's proposal for a solution

7. On 25 October 2019, the Ombudsman made a proposal for a solution to the complaint. She told the Commission that she accepted that parts of the note contained advice that remained highly sensitive. However, the note also contained advice that related to the legal consequences of not holding European Parliamentary elections in the UK whilst the UK remained an EU Member State. The Ombudsman accepted that this advice might have been sensitive when the note was issued on 17 January 2019 and until such time as the UK decided to hold European Parliamentary elections. However, when the Commission adopted its confirmatory decision, a few months after the election had taken place, this advice was no longer relevant. The Ombudsman therefore considered that there was then no reasonably foreseeable threat to the protection of legal advice that would warrant a refusal to disclose those parts of the note.

8. For the same reasons, the Ombudsman considered that the Commission's decision-making process and international relations would no longer be at risk of being undermined by disclosing



those parts of the requested document. The Ombudsman noted that the Commission has generally shown a high level of transparency in the withdrawal negotiations, which she has welcomed. [6] [\[Link\]](#) This transparency serves to enhance the legitimacy of the Commission and the EU in the negotiation process, which has serious and wide-ranging implications for millions of EU citizens and businesses.

9. Consistent with this commitment to transparency, the Ombudsman proposed that the Commission should release specific parts of the advice that would no longer undermine the protected interests.

10. The Ombudsman regrets that the Commission did not grant partial access to the requested documents following her proposal.

11. In its reply of 19 February 2020, The Commission said that it had reassessed the parts of the document that in the Ombudsman's view should be disclosed. It said that the views and recommendations expressed in this document remain relevant and sensitive, since the agreement on the withdrawal of the United Kingdom from the EU was not concluded at the time of the adoption of the confirmatory decision.

12. The Commission acknowledged that a number of paragraphs of the note analyse different scenarios concerning an event that, at the time of the adoption of the confirmatory decision, had already taken place. However, according to the Commission, this does not imply that such legal considerations are no longer valid or sensitive. While the EU considered the negotiations on the withdrawal agreement to be finalised, the decision-making process regarding the withdrawal of the United Kingdom, including the possibility of an extension of the two-year period, was at that point still ongoing. Therefore, the legal analysis contained in the document requested was still relevant for possible future decisions of the European Council regarding the withdrawal of the UK from the EU.

13. Finally, the Commission noted that the discussions on the withdrawal agreement concern the future international relations of the EU since one or more international agreements with the UK will be concluded. In these circumstances, the disclosure of the requested document would risk affecting the agreement(s) on the framework of the future relations with the UK.

14. In commenting on the Commission's reply to the Ombudsman's proposal for a solution, the complainant said that, given that the UK left the European Union on 31 January 2020, a further extension of the withdrawal period was no longer possible. It was therefore clear that the positions and recommendations contained in the document on a possible extension of the two-year period were no longer relevant.

The Ombudsman's assessment after the Commission's rejection of her proposal for a solution

15. The Commission issued its confirmatory decision on 6 September 2019. The Ombudsman



acknowledges that in the beginning of September 2019, the decision-making process regarding the withdrawal of the United Kingdom from the EU, including a possible further extension of the two-year period for the withdrawal, was still ongoing. The Ombudsman therefore considers that the Commission's decision not to grant access to the requested document was justified at the time of the confirmatory decision.

16. However, the Commission replied to the Ombudsman's proposal for a solution on 19 February 2020. At that time, the UK had withdrawn from the EU. While the Ombudsman appreciates that many sensitive issues remain to be negotiated with the United Kingdom, it is clear that some of the redacted text relates to issues that cannot again arise. Therefore, at least some of the redactions which were justified at the time of the confirmatory decision are no longer valid.

17. The Ombudsman notes that the Commission, in its reply, states that it has re-assessed the parts of the document she suggested should be disclosed. The Ombudsman welcomes the fact that there was a reassessment, but is disappointed to note that the Commission reached exactly the same conclusion, in spite of the changed circumstances. She maintains her position that, were a new request for public access to this document to be made, it is unlikely that the exceptions applied would still justify withholding the entire document.

18. Nevertheless, the Ombudsman recognises that, because the Commission's refusal was justified within the terms of EU rules on public access to documents at the time of the confirmatory decision, that decision was not tainted by maladministration. She notes that the complainant in this case may make a new request for access to the document. Such an application would require the Commission to examine again whether the total refusal of public access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime. [\[7\]](#) [\[Link\]](#)

Conclusion

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

There was no maladministration by the European Commission in its formal decision not to grant any public access to the requested document.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 24/06/2020



[1] [\[Link\]](#) Article 50 of the Treaty on European Union (TEU).

[2] [\[Link\]](#) Under Article 50(3) TEU.

[3] [\[Link\]](#) In the event that the House of Commons approved the Withdrawal Agreement by 29 March 2019.

[4] [\[Link\]](#) Article 4(3) of Regulation 1049/2001.

[5] [\[Link\]](#) Article 4(1)(a), third indent, of Regulation 1049/2001.

[6] [\[Link\]](#) See e.g. Closing note on the Strategic Initiative with the European Commission on the negotiations on the UK withdrawal from the EU (SI/1/2017/KR).

[7] [\[Link\]](#) Judgment of the General Court of 11 July 2018 in case T-644/16, ClientEarth v Commission, at para. 67; judgment of the Court of Justice of 26 January 2010 in case C-362/08, Internationaler Hilfsfonds v Commission