

Proposal for a solution on the Council of the European Union's refusal to give full public access to a legal opinion related to the EU trade agreement with the United Kingdom (case 717/2021/DL)

Solution - 28/09/2021

Case 717/2021/SF - Opened on 21/04/2021 - Recommendation on 24/02/2022 - Decision on 17/06/2022 - Institution concerned Council of the European Union (Maladministration found) |

Made in accordance with Article 2(10) of the Statute of the European Ombudsman [1]

Background to the complaint

1. Following the United Kingdom's withdrawal from the European Union on 31 January 2020, the EU and UK started negotiating the important details of a trade agreement. These negotiations resulted in the 'EU-UK Trade and Cooperation Agreement', which was signed on 30 December 2020 and entered into force on 1 May 2021. [2]
2. In the course of the negotiations, specifically in a meeting held in November 2020, the Legal Service of the Council of the EU expressed its views on the legal nature of this Agreement [3] . In particular, it set out its position as to whether the Agreement could be concluded as an 'EU-only agreement' [4] .
3. The Legal Service then set out these views in writing, by issuing, on 25 January 2021, an internal opinion " *on the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*" [5] .
4. In February 2021, the complainant, from the University of Helsinki, asked the Council to grant her public access to the opinion of 25 January 2021.
5. The Council decided to disclose only some parts of the opinion. In refusing full access, the Council invoked several exceptions under the EU's rules on public access to documents [6] , stating that disclosure would undermine the protection of the public interest as regards international relations, legal advice and the decision-making process. [7]



6. The complainant then asked the Council to review its decision to refuse full access (making what is known as a 'confirmatory application').

7. In April 2021, the Council confirmed its decision.

8. Dissatisfied with the Council's decision, the complainant turned to the Ombudsman in April 2021.

The inquiry

9. The Ombudsman opened an inquiry into the Council's refusal to give full public access to the legal opinion in question.

10. In the course of the inquiry, the Ombudsman's inquiry team inspected the non-redacted version of the opinion.

Arguments presented

Arguments presented by the Council

11. The Council said that documents drawn up in the framework of the negotiation and conclusion of an international agreement, such as the one at issue, do not require the same degree of access as those documents related to the Council's legislative activities. [8]

12. The Council contended that the opinion was issued in the context of an ongoing decision-making process, forming an important part of the political discussions which led to the provisional application of the Trade and Cooperation Agreement. At the time the public access request was made, the Agreement had not yet entered into force: the consent of the European Parliament was pending and it was still awaiting conclusion by the Council [9] . Consequently, disclosure could have adversely affected the ongoing internal discussions.

13. The Council set out that it has wide discretion in determining whether disclosure could undermine the protection of the public interest as regards international relations. [10] It considered that full disclosure would undermine its international relations both with the UK, as it would affect its capacity to negotiate with the UK if the latter would lose confidence in the EU to be its exclusive counterpart, as well as with third countries. According to the Council, the fact that the Agreement was agreed upon does not preclude the risk that disclosure would reveal the strategic interests and objectives pursued by the EU thereby weakening its negotiating position [11] . Moreover, the opinion is an internal document that was the basis for the Council's decision on whether it could conclude the agreement as an 'EU only agreement'.

14. The Council further argued that the opinion clearly contains legal advice which is sensitive and wide in scope. It was drafted "*in haste*" and was solely meant for internal use. The opinion contains critical elements for the political discussions that were then ongoing and which are



particularly prone to litigation: disclosure could thus affect the Council's ability to defend itself before the EU courts. Disclosure could also expose the Legal Service to external pressure, harming its capacity to express its views free from external influences, and affecting the Council's ability to seek and receive *frank, objective and comprehensive advice* . [12]

15. The Council did not consider that there was an overriding public interest justifying disclosure.

Arguments presented by the complainant

16. The complainant said that the Council's argument that the opinion relates to its non-legislative activities does not mean that it falls outside the scope of the EU's rules on public access to documents, which apply to *"all documents held by an institution, drawn up or received by it and in its possession, in all areas of EU activity"* [13] .

17. The complainant said that the Council could no longer rely on the exception related to the ongoing decision-making process since the Agreement had been published in the Official Journal of the EU and had been provisionally applied since January 2021. This meant that the internal discussions were concluded and that the EU and UK were under an obligation to apply the Agreement.

18. The complainant claimed that the Council failed to set out sufficiently how disclosure would *specifically and actually* undermine the protection of international relations. [14] She considered that, since the choice of legal basis to negotiate and conclude an agreement rests on objective factors and is not discretionary, the mere fear of adverse consequences from disclosing the opinion is not sufficient. [15] Rather, the provisional application of the Agreement shows that the Council was already convinced of the EU's competence to conclude the Agreement, and both the EU's and the UK's positions were already made publicly available.

19. The complainant contended that since the Legal Service itself indicated that the opinion *"does not provide an in-depth examination of all its aspects, nor does it provide a comprehensive and detailed competence analysis"* [16] and since it had already expressed these views orally, it could not be considered 'legal advice' within the meaning of the rules on public access [17] . The hypothetical risk of court proceedings cannot render the requested document sensitive in character, nor could the fact that the area was 'prone to litigation' be a lawful basis for invoking one of the exceptions. Lastly, the complainant considered that the Council could take measures to prevent it from becoming subject to external pressure. [18]

20. The complainant considered 'the principle of democracy and citizen participation' to be an overriding public interest in disclosing the opinion. She further referred to the fact that seven EU Member States favoured more extensive disclosure of this opinion [19] .

The Ombudsman's assessment

21. While the EU's rules on public access to documents set out that *wider* access should be granted to documents in cases where the institution is acting in a legislative capacity [20] , the



fact remains that the public access rules provide for the “*widest possible access*” [21] . Consequently, even if the document does not concern the Council’s legislative activities, it is still under the duty to apply the exceptions under the public access rules restrictively.

This sentence/paragraph was deleted because it was considered confidential by the Council.

The opinion does not in any way undermine the public position that the EU took towards the UK as regards the ratification of the Agreement, nor does it reveal information on the EU’s negotiating position or strategy [22] . The Ombudsman finds that disclosure could in fact foster confidence in the legality of trade negotiations rather than undermine it.

24. The Ombudsman also notes that the type of trade agreements that can be concluded is part of EU law and therefore known by third parties. Most information contained in the opinion is already publicly available and has, in the past, been published by the Council itself. [23] It is thus unclear how disclosure could affect the trade negotiations with the UK when they were ongoing, as well as future EU negotiations.

25. In light of the above, the Ombudsman considers that the Council has not sufficiently demonstrated how full disclosure would *specifically and actually* undermine the protection of the public interest as regards international relations. [24]

26. Concerning the protection of legal advice, the Ombudsman takes note of the recent judgment of the Court of Justice of the EU which also concerned the issue of full disclosure of an opinion of the Council Legal Service (hereafter: ‘the Pech judgment’). [25] The Court noted in that judgment that the question whether an opinion is particularly sensitive depends on whether the *content of the opinion itself is particularly sensitive* . [26] In this regard, the Ombudsman already noted that the information contained in the opinion cannot be regarded as sensitive.

27. Similarly, mentioning in general terms hypothetical legal action does not show how disclosure would specifically present a risk that the Council’s ability to defend itself might be undermined. [27] Moreover, “ *the ability to defend its position in court proceedings* ” is an argument of a general nature which cannot justify the exception in this case. [28]

28. Possible disclosure of a legal opinion cannot be considered to harm legal advice simply because it is a legal opinion: the assessment should be made on a case by case basis, taking into account the content of the document and the prevailing circumstances. [29] *This sentence was deleted because it was considered confidential by the Council.*

29. The Council’s argument concerning potential external pressure on the Legal Service is not substantiated. There is no tangible evidence in the file to establish the reality of such pressure. [30] It is not clear who would exert such pressure and what its nature could be.

30. In light of the above, it is not clear how full disclosure of the opinion would undermine the possibility to receive “ *frank, objective and comprehensive advice* ” [31] .



31. *This paragraph was deleted because it was considered confidential by the Council.*

32. That said, irrespective of the different views about whether disclosure of the legal opinion at the time the confirmatory decision was adopted could seriously undermine the Council's decision-making process, it has to be noted that the Agreement has now entered into force. The Ombudsman therefore urges the Council to take this development into account when reviewing the possibility to grant full or greater access to this opinion.

33. The Ombudsman finds that the complainant's general reference to 'the principle of democracy and citizen participation' cannot justify an overriding public interest in disclosure. However, it is necessary to demonstrate an overriding public interest only if disclosure of the legal opinion would undermine a protected interest. That said, the Ombudsman is of the opinion that greater transparency of the opinion could reinforce the legitimacy of the Agreement, in particular regarding the choice of legal basis. It could also create greater legal certainty in relation to such international agreements.

34. In conclusion, the Ombudsman proposes that the Council now grant the widest possible access to the opinion of its Legal Service of 25 January 2021.

The proposal for a solution

The Ombudsman proposes that the Council grant the widest possible access to the opinion of its Legal Service of 25 January 2021.

Emily O'Reilly European Ombudsman

Strasbourg, 28/09/2021

[1] Available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3
[Link].

[2] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)&from=EN)
[Link].

[3] According to the Council, these views were expressed during a 'Coreper' meeting, which is



the Committee of Permanent Representatives of the Governments of the Member States to the European Union and the Council's main preparatory body. Coreper consists of two parts: Coreper I, which is composed of each country's deputy permanent representatives and prepares the work of six Council configurations, and Coreper II, which is composed of each member states' permanent representatives and prepares the work of four other Council configurations. More information can be found here:

<https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/> [Link].

[4] For more information, see:

https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf [Link].

[5] Council document with reference number 5591/21.

[6] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049> [Link].

[7] In accordance with Article 4(1)(a), third indent, Article 4(2), second indent, and Article 4(3) of Regulation 1049/2001.

[8] Judgment of 27 February 2015, *Breyer v Commission*, T-188/12, paragraph 70.

[9] Council Decision 2020/2252 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D2252&from=EN> [Link]

[10] Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, paragraph 34; *Besselink v Council*, T-331/11, paragraph 32, and *Jurasinovic v Council*, T-63/10, paragraph 32.

[11] Judgment of 10 March 2020, *ClientEarth v Commission*, C-612/18 P, paragraphs 41 and 42.

[12] Judgment of 7 February 2018, *Access Info Europe v Commission*, T-852/16, paragraph 88.

[13] Judgments of 3 July 2014, *Council v Sophie in't Veld*, C-350/12 P, paragraph 107, and *Sweden v MyTravel and Commission*, C-506/08 P, paragraphs 87, 88, 109.

[14] *Council v Sophie in 't Veld*, paragraph 52.

[15] *Ibid*, paragraph 20.



[16] As set out in paragraphs 2 and 3 of the legal opinion.

[17] Article 4(2), second indent, of Regulation 1049/2001.

[18] Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P, paragraph 64.

[19] See the joint statement by the Netherlands, Latvia, Finland, Estonia, Denmark and Belgium, and that

of Sweden, in the written procedure concerning the public access to documents request:

<https://data.consilium.europa.eu/doc/document/CM-2496-2021-INIT/en/pdf> [Link].

[20] Recital 6 of Regulation 1049/2001.

[21] Article 1(a) of Regulation 1049/2001.

[22] Judgment of 11 July 2018, *ClientEarth v Commission*, T-644/16, paragraph 48; *ClientEarth v Commission*; C-612/18 P, paragraphs 41 and 42.

[23] See, for example, the recitals in Council Decision 2020/2252 (see footnote 9).

[24] *Council v Sophie in't Veld*, paragraph 52.

[25] Judgment of 21 April 2021, *Pech v Council*, T-252/19.

[26] *Pech v Council*, paragraph 85.

[27] *Pech v Council*, paragraph 90.

[28] Judgment of 18 September 2015, *Miettinen v Council*, T-395/13, paragraph 31.

[29] Decision in case 1150/2019/FP on the European Parliament's refusal to grant full access to a legal opinion on the composition of the European Parliament 2019-2024 and the withdrawal of the United Kingdom from the European Union, available at:

<https://www.ombudsman.europa.eu/en/decision/en/120684> [Link].

[30] *Pech v Council*, paragraph 92.

[31] Judgment of 1 July 2008, *Sweden & Turco v Council*, C-39/05 P and C-52/05 P, paragraph 42.