

Decision 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/SF)

Decision

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) |

The case concerned the refusal by the Council of the European Union to disclose in full an opinion of its Legal Service on the nature of the Trade and Cooperation Agreement concluded between the United Kingdom and the EU. The Council argued that full disclosure would harm the EU's international relations, legal advice and the ongoing decision-making process.

The Ombudsman found that the information contained in the opinion was not sensitive and that the Council's arguments were not convincing. The Ombudsman therefore proposed as a solution that the Council grant the widest possible access to the opinion.

The Council did not accept this solution proposal. The Ombudsman concluded that the Council's refusal to grant wide public access to the opinion constituted maladministration and made a corresponding recommendation.

The Council rejected the Ombudsman's recommendation. The Ombudsman therefore closes the case, confirming her finding of maladministration.

Background to the complaint

1. In February 2021, the complainant, a researcher from the University of Helsinki, asked the Council of the EU for public access [1] to an opinion issued by its Legal Service in January 2021 “ *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*” (‘the opinion’) [2] .

2. The Council disclosed only limited parts of the opinion. It said that full disclosure would undermine the protection of the public interest as regards international relations, the protection



of legal advice and the protection of the decision-making process in question [3] . Following a request for review (a 'confirmatory application'), the Council confirmed this position in April 2021.

3. The complainant then turned to the Ombudsman.

The Ombudsman's proposal for a solution

4. The Ombudsman inspected the opinion and found that the information it contained was not sensitive. She considered that the Council had not demonstrated how disclosure would specifically and actually undermine the public interest concerning international relations. It was also unclear how releasing the opinion in its entirety would harm the Council's capacity to obtain frank, objective and comprehensive advice.

5. Therefore, and since the Ombudsman considered that greater transparency would reinforce the legitimacy of the trade agreement, the Ombudsman proposed as a solution [4] that **the Council grant the widest possible access to the opinion of its Legal Service of 25 January 2021.**

6. The Council did not accept the Ombudsman's solution proposal. It argued that, albeit the trade agreement had entered into force in the meantime, the exceptions related to the protection of the public interest as regards international relations and the protection of legal advice still justified the non-disclosure of the opinion.

The Ombudsman's recommendation

7. The Ombudsman considered that the Council's concise reply did not address her arguments. In fact, the Council put forward arguments which the Ombudsman had already rebutted in her proposal for a solution.

8. The Council argued that the opinion remained sensitive in light of possible future negotiations of other trade agreements. It also said that the document remained sensitive even if the Council's internal procedures had been concluded in relation to this specific agreement. However, the Ombudsman had already argued that the information contained in the opinion could not be considered sensitive in light of the recent '*Pech v Council*' Court judgment [5] . While the Ombudsman was aware that the Council appealed this judgment, she noted that the Council is bound by the findings of the General Court while the appeal procedure is ongoing. The Ombudsman also underlined that most of the information contained in the opinion was already publicly available. [6] She therefore pointed out that disclosure was unlikely to undermine the EU's negotiation position or reveal its strategy, either now or in future trade negotiations.

9. In this context, the Ombudsman found that the Council's refusal to grant the widest possible access to the opinion constituted maladministration. She made the following recommendation [7] :

The Council should grant the widest possible access to the opinion of its Legal Service.

10. The Council rejected the Ombudsman's recommendation and maintained its position that it



could not grant wider public access to the opinion.

11. The Council considered that the parts of the opinion that have not been disclosed remain sensitive. It maintained that their disclosure would undermine the protection of the public interest as regards international relations and the protection of legal advice. [8]

12. The Council reiterated it was not acting in its legislative capacity. Thus, documents drawn up in the context of negotiations and conclusions of international agreements are not subject to the same breadth of access to documents as the Council's legislative activities. The negotiation and conclusion of international agreements fall within the domain of the executive and public participation is necessarily restricted in view of the legitimate interest of the negotiations. [9]

13. The Council contended that its arguments were also not called into question by the General Court's judgment in '*Pech v Council*' [10], as this case concerned a legal opinion given in the context of a legislative process and not in the context of negotiating and concluding an international agreement. Furthermore, the exception concerning international relations was not raised in the administrative proceedings leading to this Court case.

14. The complainant found it regrettable that the Council disregarded both the General Court's findings and the Ombudsman's arguments in assessing whether to disclose the opinion.

15. In her comments on the Council's reply, the complainant considered that the Council has still failed to substantiate how full disclosure of the opinion would harm the EU's international relations.

16. The complainant maintained that the opinion does not fall outside the scope of the EU's rules on public access to documents merely because it relates to the Council's non-legislative activities. These rules apply to "*all documents held by an institution, drawn up or received by it and in its possession, in all areas of EU activity.*" [11] Thus, the complainant considers that the non-legislative nature of the Council's activity in this case should have no impact on the applicability of the General Court's finding in '*Pech v Council*'.

The Ombudsman's assessment after the recommendation

17. The Ombudsman regrets that the Council did not follow her recommendation.

18. She maintains her view that disclosure of the opinion would not in any way undermine the public position 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. [12] The Ombudsman finds that disclosure could foster confidence in the legality of trade negotiations rather than undermine them.

19. The Ombudsman also maintains that the Council has not sufficiently demonstrated how increased access would *specifically and actually* undermine the protection of the public interest as regards international relations.

20. The Council contended that its arguments are not called into question by the General



Court's judgment in '*Pech v Council*', as this case concerned a legal opinion given in the context of a *legislative* procedure.

21. Even if the Council did not act in its legislative capacity, it still has to apply the exceptions under the rules governing public access restrictively. The Court has found that the question whether a legal opinion is particularly sensitive depends on whether *the content of the opinion itself is particularly sensitive*. The fact that the legal opinion in this case was given in the context of negotiating and concluding an international agreement, and thus of a non-legislative activity, is thus not relevant to the assessment of whether the legal opinion is particularly sensitive.

22. Given that, as the Ombudsman has already noted, the information contained in the opinion at issue cannot be regarded as sensitive, the Council should have given the complainant significantly increased access to this document.

Conclusion

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

The Council did not accept the Ombudsman's recommendation. It thus failed to grant the widest possible access to the legal opinion at issue. The Ombudsman therefore confirms her finding of maladministration.

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

Emily O'Reilly European Ombudsman

Strasbourg, 17/06/2022

[1] In line with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

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

[2] Following the United Kingdom's withdrawal from the EU in January 2020, the EU and the UK started negotiating the details of a trade agreement. These negotiations resulted in the 'EU-UK Trade and Cooperation Agreement', which entered into force in May 2021. In a meeting held in November 2020, the Legal Service of the Council of the EU expressed its opinion as to whether the Agreement could be concluded as an 'EU-only agreement'. The Legal Service then set out its views in writing by issuing a legal opinion in January 2021.

[3] In accordance with Article 4(1)(a), third indent, Article 4(2), second indent, and Article 4(3) of



Regulation 1049/2001.

[4] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's proposal for a solution available at: <https://www.ombudsman.europa.eu/en/solution/en/149544> [Link].

[5] Judgment of the General Court (Second Chamber) of 21 April 2021, *Pech v Council*, T-252/19: <https://curia.europa.eu/juris/liste.jsf?language=en&num=T-252/19> [Link]. The judgment is currently under appeal.

[6] The Council has published most parts itself. See, for example, the recitals in 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]. Moreover, the types of trade agreements that may be concluded are publicly known as they are part of EU law.

[7] The full text of the Ombudsman's recommendation may be consulted at the following link: <https://www.ombudsman.europa.eu/en/recommendation/en/152863> [Link].

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

[9] The Council referred to the judgment of the General Court (Second Chamber) of 19 March 2013, *Sophie in 't Veld v Commission*, T-301/10, paragraph 120: <https://curia.europa.eu/juris/liste.jsf?num=T-301/10&language=EN> [Link]; judgment of the General Court (Fifth Chamber) of 4 May 2012, *Sophie in 't Veld v Council*, T-529/09, paragraph 88: <https://curia.europa.eu/juris/liste.jsf?num=T-529/09&language=EN> [Link].

[10] See footnote 5 above.

[11] The complainant refers to Judgments of 3 July 2014, *Council v Sophie in't Veld*, C-350/12 P, paragraph 107: <https://curia.europa.eu/juris/liste.jsf?num=C-350/12> [Link], and *Sweden v My Travel and Commission*, C-506/08 P, paragraphs 87, 88, 109: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-506/08> [Link]

[12] Judgment of 11 July 2018, *Client Earth v Commission*, T-644/16, paragraph 48: <https://curia.europa.eu/juris/liste.jsf?num=T-644/16&language=en> [Link]; *ClientEarth v Commission*, C-612/18 P, paragraphs 41 and 42; <https://curia.europa.eu/juris/liste.jsf?num=C-612/18> [Link].