

Recommendation on how the Council of the European Union handled a request for public access to the legal opinion on the proposed EU directive on adequate minimum wages (case 1834/2022/NH)

Recommendation

Case 1834/2022/NH - Opened on 25/10/2022 - Recommendation on 04/04/2023 - Decision on 25/09/2023 - Institutions concerned Council of the European Union (Maladministration found) | Council of the European Union (Recommendation agreed by the institution) |

The case concerned a request for public access to an opinion of the legal service of the Council of the EU on a draft law on adequate minimum wages.

The Council granted the complainant access to parts of the opinion in May 2021. It invoked two exceptions under the EU legislation on public access to documents to justify redacting the remaining parts of the document, arguing that full disclosure could undermine the decision-making process (since negotiations on the law were still ongoing at the time) and the protection of legal advice.

The Ombudsman found that the Council had not demonstrated how disclosure of the document would undermine its decision-making process or its capacity to seek and obtain frank, objective and comprehensive advice. Her view is that greater transparency when the negotiations were still ongoing would have greatly facilitated public participation in the EU's legislative process.

The Ombudsman therefore considered that the Council's refusal to grant full public access to the legal opinion at the time of the confirmatory decision constituted maladministration. As the complainant is still interested in receiving full public access to the opinion at this stage, the Ombudsman made a corresponding recommendation.

Made in accordance with Article 4(1) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The complainant made a request for public access [2] to an opinion by the legal service of the Council of the EU on a legislative proposal for a directive on minimum wages. [3] He made his request in March 2021, when the negotiations on the directive were still ongoing between



the EU co-legislators.

2. The Council disclosed only a very limited part of the opinion. [4] It argued that full disclosure would undermine the protection of legal advice and the ongoing decision-making process. [5]

3. Dissatisfied with the Council's decision to give only partial access, the complainant turned to the Ombudsman in October 2022, after the directive had been adopted.

The inquiry

4. The Ombudsman opened an inquiry into the Council's refusal to grant full public access to the opinion.

5. In the course of the inquiry, the Ombudsman inquiry team inspected the non-redacted version of the opinion. The Ombudsman also asked the Council whether it wishes to provide any views in addition to those set out in its confirmatory decision, to be taken into account by the Ombudsman during this inquiry. The Council chose not to do so.

6. The Ombudsman is proceeding directly to a recommendation as she takes the view that the Council in this case is not giving full effect to the case-law of the Court when it comes to the transparency of Council legal opinions issued in the course of a legislative procedure.

Arguments presented to the Ombudsman

As regards the exception relating to the protection of legal advice

7. The **Council** in its confirmatory decision argued that the requested document, if disclosed, would undermine the protection of legal advice. The Council relied on EU case law, [6] which establishes that an opinion of the legal service of an EU institution issued in the context of a legislative process should, in principle, be disclosed, unless it has a particularly sensitive nature or a particularly wide scope that goes beyond the context of the legislative process in question. The Council said that the requested document was indeed particularly sensitive because the issues contained therein were highly controversial and critical for the negotiations on the draft legislative act. It argued that disclosure would diminish the possibility to reach an agreement in a context where Member States were - at the time - divided on specific legal issues contained in the Commission's proposal. The Council further said that the document had a particularly wide scope because it addressed a novel and unusual legal issue, as it was the first time that EU legislation would establish minimum requirements addressing a constituent part of pay.

8. The Council also argued that there was an important and concrete risk that the adopted legislation would be challenged before the EU courts. This was because the adopted act would



have a significant impact on social law and because several Member States had already expressed deep concerns about the proposal. The Council said that disclosing the opinion would reveal the legal advice received by the Council and would negatively affect the ability of the Council's legal service to defend its position in front of the court in case of litigation. It would also compromise the Council's interest in receiving frank, objective and comprehensive advice from its legal service.

9. The complainant disagreed with the Council's arguments. He believed that the fact that the Council's legal opinions are "*honest, frank and straightforward*" is an argument for disclosure rather than the opposite. The fact that the issue at stake is a novel and unusual legal issue should constitute even more reason for disclosure.

10. Further, the complainant argued that, should the directive be challenged in court, a completely different document than the requested opinion would be prepared by the Council's legal service. He failed to understand how disclosure of the opinion could negatively affect the ability of the legal service to defend effectively decisions taken by the Council before the court. In his view, "*justice is not a sport where thieves and rogue players attempt to win in court. The one that is just and right can afford to be open and transparent with his arguments*."

As regards the exception relating to the institution's decision-making process

11. The Council argued in its confirmatory decision that the requested document was drawn up by its legal service for internal use, and related to a matter on which the decision-making process was still ongoing. In fact, the Council explained that the request for public access had been made at a time when the deliberations within the Council were very preliminary as Member States were still exploring the text. The proposed directive on minimum wages touched upon a controversial issue with a high degree of involvement of stakeholders at the EU and national levels, which showed, the Council said, the delicate dynamics and high complexity of the decision-making process at issue. The Council underlined that disclosure of the document would limit its margin of manoeuvre in the discussions, run counter to the efficiency of the decision-making process and limit the Council's options during the upcoming negotiations with the European Parliament. Full disclosure would also make the Council's legal service vulnerable to external interference.

12. The complainant disagreed with the Council's arguments. He said that the requested document contains information that is of interest to all EU citizens who wished to engage in the debate on the minimum wages directive on equal terms with politicians and legislators, creating a strong public interest for full disclosure. He added that the document would provide an assessment of the legal basis for the proposal for a directive on minimum wages, and does not describe the actual negotiations. He failed to understand how the document could be considered as controversial with the potential of harming or impeding the legislative process, since it is merely an assessment of the legality of the proposed directive. According to the complainant, it is important to distinguish between an initial legal assessment of a draft



legislation and what happens during the negotiations. He remained unconvinced by the Council's argument that disclosing a legal opinion could make its legal service vulnerable to external interference, arguing that *"no lawyer lives in a bubble without some kind of external influence from the media or from other stakeholders"*.

13. The complainant also argued that the Council had already distributed the legal opinion at issue to a news agency in March 2021. As such, it should make it available to the public. In reply, the Council denied having distributed the legal opinion to the press. It argued that any possible leak of the opinion would have been unlawful, and relied on EU case law [7] to conclude that press leaks do not have any impact on the possibility for the EU administration to refuse public access.

The Ombudsman's assessment leading to a recommendation

14. Under the EU Treaties, citizens have the *"right to participate in the democratic life of the Union"*. [8] Therefore, all EU decisions must be taken *"as openly and as closely as possible to the citizens"*. [9] This is particularly important when EU institutions act in their legislative capacity. [10] The principle of legislative transparency is enshrined in the EU Treaties [11] and is reflected in the EU legislation on public access to documents, which states that legislative documents must be directly accessible to the public, unless their disclosure would undermine one or several public or private interests explicitly protected. [12] The possibility for citizens to scrutinise all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights. [13]

15. As regards Council legal opinions issued in the course of legislative procedures, the Court of Justice has held that *"Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process"*. [14] It added that, *"[t]hat finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal."* [15]

16. Given the nature of the document at issue, in particular, that it was issued in the course of a legislative procedure to which the highest standards of transparency must apply, the exceptions invoked by the Council in refusing full public access must be applied all the more restrictively. [16]

As regards the exception relating to the protection of legal advice

17. EU case law has established a three-stage approach [17] that the EU institution concerned



must follow when examining whether a document containing legal advice should be disclosed. Firstly, the document in question must indeed relate to legal advice. Secondly, the institution concerned must examine whether the disclosure of the legal advice would be harmful to its interest in seeking and receiving frank, objective and comprehensive legal advice. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. Thirdly, if an institution takes the view that disclosure of a document would undermine the protection of legal advice, that institution must ascertain whether there is any overriding public interest justifying disclosure.

18. While the Ombudsman has no doubt that the document at issue relates to legal advice, she finds it difficult to see how its full disclosure would be harmful to the Council's interest in seeking and receiving frank, objective and comprehensive legal advice.

19. Having reviewed the document in question, the Ombudsman confirms, as the Council stated, that the legal opinion examines whether the Commission's proposal remains within the limits of Article 153(5) TFEU, in other words, whether the chosen legal basis is appropriate.

20. The General Court has held that questions relating to the choice of the appropriate legal basis are “ *legal questions not going beyond the normal context of the examination of legislative proposals* ”. [18] Whether the chosen legal basis for a legislative act is appropriate is a standard and expected question in almost every legislative process. The Ombudsman thus fails to see how the analysis of these standard legal questions could render the content of the opinion “ *particularly sensitive* ”.

21. As regards the Council's argument that the document had a particularly wide scope, as it addressed a novel legal issue, the fact that the legal opinion deals with questions which are novel does not imply automatically that the content of the document is sensitive. As the Court noted, “ *conferring particularly sensitive character on all legal advice concerning a novel question would result in impeding in practice the disclosure of a large proportion of that advice. It is precisely when they are dealing with novel questions that the institutions request advice from their legal service* ”. [19]

22. The Council further argued that there was an important and concrete risk that the adopted legislation would be challenged before the EU courts, because the adopted act would have a significant impact on social law and because several Member States had already expressed deep concerns about the proposal. The Ombudsman notes that these observations do not imply that the disclosure of the legal advice would negatively affect the Council's ability to defend its position before the court in case of litigation.

23. As regards the assertion of the Council that several Member States had expressed “ *deep concerns* ” about the proposal, this does not imply that these Member States were likely to challenge the act before the EU courts. Indeed, Member States may regularly express concerns about aspects of proposed legislation and eventually support the adoption of that legislation. Even if they were ultimately to vote against the adoption of the legislation in the Council, this would not necessarily imply that they would challenge the adoption of the legislation before the



EU courts.

24. Furthermore, the assertion that some Member States might challenge the act does not, even if it were well-founded [20] , imply that the disclosure of the content of the legal advice would somehow prevent the Council from defending its position in any such litigation. In this respect, and notwithstanding the fact that the Council has not substantiated its views in any way, the Ombudsman notes that the Member States already have access to the requested document: opinions by the Council legal service are distributed to the Member States' representatives. The Ombudsman is therefore not convinced that public access to that document could undermine the position of the Council legal service in potential future litigation.

25. Finally, as regards whether there is an overriding public interest in disclosure, the Council argued that the requested document was so sensitive that the public interest invoked by the complainant (he argued that disclosure would allow citizens to participate more closely in decision-making processes) did not outweigh the need to preserve the Council's interests. The Ombudsman considers that the complainant has put forward a cogent argument as to why there would be, if needed, an overriding public interest in disclosure. She finds the Council's argumentation aimed at rebutting that assertion too general, in particular in view of her above assessment that the content of the legal opinion is not particularly sensitive. On the contrary, wider transparency on the proposal's legal basis would allow higher quality input from individuals interested in this legislative process.

As regards the exception relating to the institution's decision-making process

26. As regards the argument put forward by the Council concerning the preliminary nature of the deliberations at the time of the confirmatory decision, the EU courts have found that “ *the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 .* ” [21] The review of the requested document confirmed that it contains an examination of the appropriateness of the chosen legal basis. As such, the Council's reliance on the fact that disclosure would limit the necessary margin of manoeuvre during the negotiations is not convincing. Legislative proposals are designed to be debated, in particular as regards the choice of legal basis. [22] The transparency of the choice of legal basis does not weaken the decision-making process, but strengthens it.

27. It is also difficult to understand how disclosure could have put the Council legal service at risk of undue external pressure. As the Court of Justice noted in the past, “[a] s regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it ”. [23]



28. The Council also argues that disclosing the content of the document would have undermined the Council's negotiating position when facing the European Parliament in inter-institutional negotiations (so-called "trilogues"). Following the inspection of the opinion, the Ombudsman fails to see how its content could have been used at the Council's expense during negotiations. However, the fact that the requested document had already been leaked to the press, as argued by the complainant, cannot play a role in the assessment of whether the Council was justified not to disclose it.

29. In light of the above, the Ombudsman finds that the Council's refusal to disclose the opinion to the public at the time it was requested constituted **maladministration**. She therefore makes a corresponding recommendation below.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Council:

The Council should grant full public access to the opinion of its legal service.

In addition, the Ombudsman again calls on the Council to make sure that, in future requests concerning public access to documents related to the legislative process, the widest possible access is granted while negotiations are ongoing. Timely access to legislative documents is crucial for citizens to exercise their Treaty-based right to participate in the democratic life of the Union.

The Council and the complainant will be informed of this recommendation. In accordance with Article 4(2) of the Statute of the European Ombudsman, the Council shall send a detailed opinion by 3 July 2023.

Emily O'Reilly European Ombudsman

Strasbourg, 04/04/2023

[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%3A
[Link]

[2] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:



<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link]

[3] The European Commission published a proposal for a directive on adequate minimum wages in the EU in October 2020 (document COM/2020/682 final). After two years of negotiations between the European Parliament and the Council, the directive was approved by both co-legislators, with the Council adopting the final text on 4 October 2022:

<https://www.consilium.europa.eu/en/press/press-releases/2022/10/04/council-adopts-eu-law-on-adequate-minimum> [Link]

[4] The document partially disclosed on 31 May 2021 is available here:

<https://data.consilium.europa.eu/doc/document/ST-6817-2021-INIT/en/pdf> [Link]

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

[6] Judgment of the Court of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v [Link] Council of the European Union* , Joined cases C-39/05 P and C-52/05 P, paragraph 69.

[7] See Order of the General Court of 20 May 2020, *Nord Stream 2 v [Link] Parliament and Council* , T-526/19, paragraph 56.

[8] Article 10 of the Treaty on European Union (TEU).

[9] Articles 1 and 10(3) TEU.

[10] Recital 6 of Regulation 1049/2001.

[11] Article 15(2) TFEU.

[12] Article 12(2) and Recital 6 of Regulation 1049/2001.

[13] See, to that effect, paragraph 46 of the *Sweden and Turco v [Link] Council* judgment referred to above. See also the judgment of the Court of 17 October 2013, *Council v [Link] Access Info Europe* , case C-280/11 P, paragraph 33.

[14] Paragraph 68 of the *Turco* judgment.

[15] Paragraph 69 of the *Turco* judgment.

[16] Judgment of the Court of Justice of 4 September 2018, *ClientEarth v [Link] Commission* , case C-57/16, paragraph 100

[17] Paragraphs 37-46 of the *Turco* judgment.

[18] See judgment of the General Court of 18 September 2015, *Samuli Miettinen v [Link] Council of the European Union* , case T-395/13, paragraph 41.



[19] Paragraph 43 of the *Miettinen* judgment.

[20] The validity of the legislative act was not challenged by direct actions before the EU courts in the time frame allowing for such actions.[See additional letter of 15 May 2023 concerning this footnote, available at: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/169794> [Link]].

[21] See paragraph 80 of the *Access Info Europe* judgment referred to above.

[22] Paragraph 70 of the *Miettinen* judgment.

[23] See paragraph 64 of the *Sweden and Turco v [Link]Council* judgment referred to above..