

## Decision of the European Ombudsman closing her inquiry into complaint 167/2013/RT against the Council of the European Union

Decision

**Case** 167/2013/AN - **Opened on** 30/01/2013 - **Decision on** 17/01/2014 - **Institution concerned** Council of the European Union ( Critical remark ) |

### The background to the complaint

1. On 2 February 2012, the complainant submitted to the European Council a request for public access to a legal opinion drawn up in the context of the Union for a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the 'Fiscal Compact Treaty'). On 16 March 2012, the Secretariat General of the Council of the EU [1] rejected the complainant's initial application. On 30 March 2012, the complainant made a confirmatory application, in accordance with the provisions of Article 8 of Regulation (EC) No 1049/2001 [2] concerning public access to documents held by the European Parliament, the Council of the European Union or the European Commission ('Regulation 1049/2001') but did not receive a reply.

2. On 25 April 2012, the complainant turned to the Ombudsman [3] for the first time and, on 22 May 2012, the Ombudsman opened an inquiry into that complaint (reference 862/2012/RT). On 29 May 2012, the complainant informed the Ombudsman's services that, on 24 May 2012, the Council had replied negatively to his confirmatory application. On 4 October 2012, the complainant withdrew his initial allegation that the Council failed to handle properly and in a timely manner his request for access to documents but raised a new allegation and claim instead. In these circumstances, the Ombudsman closed case number 862/2012/RT and registered the complainant's letter of 4 October 2012 as a new complaint (current complaint 167/2013/RT). Since the new allegation and claim were already covered by the complainant's earlier contacts with the Council, the Ombudsman started a new inquiry, to which this decision relates.

### The subject matter of the inquiry

3. In his complaint, the complainant submitted the following allegation and claim:



## **Allegation:**

The Council of the EU wrongly rejected the complainant's request for access to the legal opinion of its Legal Service concerning the role of the Court of Justice in the context of the Fiscal Compact Treaty (reference number 5788/12).

## **Claim:**

The Council of the EU should grant access to the requested document.

## **The inquiry**

4. On 30 January 2013, the Ombudsman opened an inquiry and asked the Council to submit an opinion on the complainant's allegation and claim by 30 April 2013.
5. On 6 May 2013, the Council sent its opinion.
6. On 14 May 2013, in accordance with Article 3(2) of the Ombudsman's Statute [4] , the Ombudsman's services carried out an inspection of the relevant document in the Council's file. The Council considered the inspected document to be confidential [5] . This meant that the public and the complainant could not have access to it.
7. On 23 May 2013, the Ombudsman forwarded to the complainant a copy of the Council's opinion and of the inspection report and invited him to submit observations on them by 30 June 2013. The complainant did not send observations.

## **The Ombudsman's analysis and conclusions**

### **A. Alleged wrong rejection of the request for access to a legal opinion**

#### **Arguments presented to the Ombudsman**

8. In support of this allegation, the complainant argued that excerpts of the legal opinion, to which the Council refused to grant access, have already been published in a research paper of the UK House of Commons Library.
9. In its opinion, the Council first noted that the document to which access is sought is an



opinion of its Legal Service drawn up in the context of intergovernmental negotiations for the Fiscal Compact Treaty. This Treaty is an agreement concluded outside the legal and institutional framework established by the EU Treaties [6] . The Council outlined that the Fiscal Compact Treaty is the result of a highly sensitive and political negotiation arising from a serious economic and financial situation.

**10.** The legal opinion was requested on 23 January 2012, at the Ministerial Meeting on a draft Fiscal Compact Treaty. It analyses whether Article 8 of the Fiscal Compact Treaty, conferring jurisdiction on the European Court of Justice, as regards compliance by Member States with the so-called "balanced budget rule", is compatible with EU law. The Council also noted that the Fiscal Compact Treaty does not constitute Union legislation but an international agreement between 25 Member States signed and ratified outside the legal and institutional framework established by the EU Treaties. Therefore, the Council contended that the requested document did not as such concern a matter relating to the policies, activities and decisions falling within the Council's sphere of responsibility under article 3 of Regulation 1049/2001. However, the Council agreed to deal with the access request having regard to the provisions of this regulation.

**11.** The Council reiterated its view that the document to which the complainant seeks access is covered by two exceptions provided for by Regulation 1049/2001, concerning (i) protection of the financial, monetary or economic policy of the Union or a Member State (Article 4 (1) (a), fourth indent) and (ii) protection of legal advice (Article 4 (2), second indent).

**12.** According to the Council, the *exception concerning the protection of the financial, monetary or economic policy of the Union or a Member State (i)* applied because the requested document provides legal advice on an enforcement mechanism that is essential for the efficient implementation of the economic and financial policy of Member States covered by the Fiscal Compact Treaty. It covers matters which are of particular legal and political sensitivity in that regard and which have been, and remain, the subject of intensive debate. The Fiscal Compact Treaty was concluded in response " *to an exceptional economic and financial crisis bearing directly on the financial, monetary and economic policies of the Union and Member States and is a key part of the Union's response to that crisis* ". The aim of that Treaty is to strengthen economic governance by introducing a so-called "balanced budget rule". The legal opinion to which access is sought deals directly with the arrangements for ensuring compliance with that rule.

**13.** Moreover, the Council argued that, at the time of the request for access, the Fiscal Compact Treaty had only recently entered into force and the ratification process was still ongoing. Disclosure of the requested document could therefore have an impact on that political and legal debate as well as on the on-going ratification process. This disclosure would moreover happen in the context of " *an economic situation where the smooth establishment and functioning of this new element in the financial and economic policies of participating Member States is essential* ".

**14.** The Council outlined that the financial, monetary and economic policies of the Union were at the heart of the discussion regarding the Fiscal Compact Treaty and, given its content and



subject-matter, and the ongoing sensitivity of the issue, access to the whole opinion in question would undermine the public interest as regards the policies of the Union and Member States on such aspects.

**15.** The Council also noted that the exception concerning the protection of the financial, monetary or economic policy of the Union or a Member State is a mandatory exception. Once it is established that the disclosure of the requested document would undermine the protection of the public interest as regards financial, monetary or economic policy, the institution must refuse public access. Article 4(1)(a) of the Regulation 1049/2001 does not allow the institution to balance the protected interest against other interests.

**16.** Furthermore, the *exception concerning protection of legal advice (ii)* applied because the relevant document contains legal advice, namely, it analyses whether Article 8 of the draft Fiscal Compact Treaty, conferring jurisdiction on the European Court of Justice as regards compliance by the signatories with the obligation to transpose into national law the balanced budget rule, would be compatible with European Union law. It also contains citations from an intermediate draft of the relevant Article and recitals of the Fiscal Compact Treaty as well as a short outline of the background and reasons and the political framework in which it was sought. Those elements are intrinsically linked to the legal advice and have therefore been considered to form part of that advice.

**17.** The document contains legal advice on issues of an extreme sensitivity regarding a Fiscal Compact Treaty which is the subject of a continuing and intense political process and which deals with on-going matters of the highest economic and financial significance. In the Council's view, there is a real and concrete risk that elements of the Fiscal Compact Treaty, including its Article 8, will be subject to legal scrutiny before national and Union Courts. The Legal Service's opinion could, if released, be invoked in such proceedings. In such a case, public release of the requested document would negatively affect the capacity of participating Member States to defend their position in court as noted above in an economic situation which requires a smooth set-up of this new element of the financial and economic policy of participating Member States. This combination of sensitive circumstances would create a particular risk that Member States and the Council would be deterred from requesting such sensitive legal advice in similar situations in the future.

**18.** Because the Fiscal Compact Treaty does not constitute a piece of Union legislation but an international agreement between member states, the requested document does not fall under the (rebuttable) presumption which follows from the *Turco* judgement in favour of openness with regard to legal opinions relating to a legislative process [7] . Moreover, in the same judgement, the Court of Justice recognised the possibility for an Institution to refuse public access to a specific legal opinion " *being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question* " [8] . These considerations would apply *a fortiori* in this case where the document does not relate to a legislative process because the Fiscal Compact Treaty is an international agreement.

**19.** After having carefully weighed the interests at stake, the Council concluded that the public



interests invoked by the complainant, namely transparency, openness and public participation do not establish an overriding public interest in disclosure, which in any case would only be relevant to the exception relating to the protection of legal advice.

**20.** However, since the reply to the complainant's confirmatory application, the Council examined another request for access to the same document and decided to grant partial access by disclosing to the public the point (2) of the requested document, entitled "*A special agreement*". This part deals with a question that has been resolved by a recent ruling of the Court of Justice of the European Union in a case concerning the Treaty Establishing the European Stability Mechanism ("ESM Treaty") [9]. The Council enclosed with its opinion a redacted version of the document and added that the parts blacked out of the document address elements of Article 8 which are substantially different from the mechanism foreseen in the ESM Treaty and which therefore remain unresolved and sensitive and therefore could not be disclosed.

**21.** As regards the complainant's argument that the requested document is already accessible to the public, the Council outlined that it has granted only partial access to the requested document and has not agreed to public release of other parts or of the entire document. In this respect, "according to the established case-law of the Court", where a document has been the subject of unauthorised disclosure that does not, and cannot, affect the application of Regulation 1049/2001 and in particular the obligation of that Regulation to grant or refuse access. It follows that, even if it were the case that certain members of the public were in possession of the entire document as the result of such unauthorised disclosure that does not oblige the Council to release the document.

## **The Ombudsman's assessment**

**22.** The Ombudsman notes that the Council relied upon two exceptions under Regulation 1049/2001 concerning (i) *first*, the protection of the financial, monetary or economic policy of the Union or a Member State (Article 4 (1) (a), fourth indent) and (ii) *second*, protection of legal advice (Article 4 (2), second indent), in order to refuse full disclosure of the requested document.

**23.** As regards the applicability of the *first* exception, the Court of Justice recognised the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation 1049/2001, which confers on the decision concerning a request for access, a complex and delicate nature [10]. Such a decision requires a margin of appreciation [11] and calls for the institution to exercise particular care when assessing the request for access. Access must be refused by the institution, under the above provision, if disclosure of a document to the public would undermine those interests. Consequently, the Court limited its review of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation 1049/2001 to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest



error of assessment of the facts or a misuse of powers [12] . The Ombudsman will thus adopt, for her review, the same standards as the Court.

**24.** On the basis of the inspection of the document, the Ombudsman considers that the Council provided an accurate description of its content in its opinion (summarised in paragraphs 9 to 10 above). In this respect, it is clear that the document to which the complainant sought access is an opinion of the Council's Legal Service, issued in the context of the negotiations for the adoption of the Fiscal Compact Treaty. As the Council explained, the legal opinion concerns in essence the compatibility with the Treaty of Article 8 of the Fiscal Compact Treaty, which confers jurisdiction on the Court of Justice as regards compliance by the signatories with the obligation to implement into national law the balanced budget rule.

**25.** The document was drawn up specifically in the context of negotiations between Member States with an eye to finding arrangements for ensuring compliance with the balanced budget rule contained in the Fiscal Compact Treaty. Having regard to its content and the context in which this legal opinion was drawn up, it could indeed be covered by the exception concerning the protection of the financial, monetary or economic policy of the Union or a Member State.

**26.** In these circumstances, the Ombudsman has now to analyse whether the Council has demonstrated that access to the redacted paragraphs could specifically and actually undermine the public interest concerned. [13] .

**27.** In this respect, the Council has merely advanced the argument that the protected interest will be endangered because the disclosure of the requested document " *could impact on that on going political and legal debate, as well as on the on going ratification process, since it refers to matters which are of particular legal and political sensitivity and which have been, and remain, the subject of intensive debate* ".

**28.** The Ombudsman is not entirely convinced by the Council's general view. She does not see how disclosing the Council's legal analysis on the compliance of an intergovernmental treaty provision (or international treaty provision) with the EU law could establish the existence of a threat to the financial, monetary or economic policy of the Union or a Member State. Such threat can hardly be inferred from the existence of a political or legal debate as to whether the Court of Justice could check the compliance by Member States with the so-called "balanced budget rule". She further notes that the fact that the disclosure of a document " *can impact on an ongoing legal and political debate* " is obviously not the same as showing that it could specifically and actually undermine a protected interest.

**29.** Moreover, a legal analysis concerning the compliance of an intergovernmental treaty provision with EU law relies on objective arguments, which could be subject to judicial review. A divergence of opinions on such matters is different from a debate on issues concerning for instance the choice of a specific financial, monetary or economic policy, which the Union or Member States should implement.

**30.** The Ombudsman takes the view that, on the contrary, public knowledge of the document in



question could only be beneficial for the protected interest. As held by the Court of Justice [14] , account should be taken of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Any political or legal debate on an enforcement mechanism that is essential for the efficient implementation of the economic and financial policy of Member States could only foster and enhance citizens' trust in the EU's ability to properly handle sensitive economic and financial matters.

**31.** In these circumstances, the Ombudsman considers that the Council has failed to establish the risk of a threat to the public interest in the field of the financial, monetary or economic policy of the Union or a Member State concerning the undisclosed parts of the document requested.

**32.** With reference to the *second* exception relied upon by the Council, and as regards the question whether disclosure of the document could undermine the protection of legal advice, the Ombudsman notes that Article 4(2), second indent of Regulation 1049/2001 encompasses the need to ensure that an institution can receive frank, objective and comprehensive legal advice. However, as the Court of Justice has pointed out, in order to be able to invoke the risk of an interest in question being undermined as grounds for denying public access, such risk must be reasonably foreseeable and not purely hypothetical [15] .

**34.** The Council argues that if the document were to be disclosed, Member States would be deterred from requesting such sensitive legal advice in similar future situations. The Ombudsman finds that this general statement is not substantiated by any specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's/Member States' interest in seeking and receiving frank, objective and comprehensive advice.

**35.** Regarding the Council's second argument concerning the risk of a threat to the Member States' capacity to defend their position in proceedings before national and Union Courts, even if such proceedings have not yet begun,, the Ombudsman recalls that, as the Court has observed on a number of occasions, an argument of such a general nature cannot justify an exception to the transparency required by Regulation No 1049/2001 [16] .

**35.** In light of the above, the Ombudsman considers that the Council has failed to justify why it applied the two exceptions in question in the present case. It follows that it is not necessary for her to examine the Council's explanation concerning an overriding public interest in disclosure.

**36.** This Council failure constitutes an instance of maladministration. Since the document appears to be in the complainant's possession and he did not submit observations on the Council's opinion, the Ombudsman will not pursue the case further but closes it with a critical remark below.





## B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman makes the following critical remark:

**By failing to justify why it cannot grant full access to the requested document, the Council has committed an instance of maladministration.**

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

Emily O'Reilly

Done in Strasbourg on 17 January 2014

[1] The Secretariat General of the Council of the EU handles the requests for access to documents submitted to the European Council.

[2] OJ 2001 L 145, p. 43.

[3] At that time, Professor Nikiforos Diamandouros was holding the office of the European Ombudsman. Starting from 1 October 2013, Ms Emily O'Reilly is the European Ombudsman.

[4] Article 3(2) of the Ombudsman's Statute reads as follows: "*The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested from them and give him access to the files concerned. Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to compliance with the rules on security of the Community institution or body concerned.*"

[5] The document inspected was the following: *Opinion of the Council Legal Service on the compatibility of Article 8 the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union with EU law (reference number 5788/12)*.

[6] In this respect, the Heads of State or Government of the euro area Member States, decided on 9 December 2011, to create a "*reinforced architecture for economic and monetary union*" in order to urgently address the EU increasingly difficult economic and financial situation. Subsequently, following intensive negotiations in the context of the Euro Group Working Group ad hoc Working Group on a Fiscal Stability Union, on 30 January 2012, the Heads of States or Governments of the euro area Member States agreed on the draft Fiscal Compact Treaty. On 2 March 2012, 25 Member States signed the Fiscal Compact Treaty, but not all the member states of the Euro zone had ratified it yet. The Treaty only entered into force on 1 January 2013 after the ratification by 12 euro area Member States. This condition was met when Finland, the twelfth euro area Member State to ratify the treaty, deposited its instrument of ratification on 21





December 2012.

[7] Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* , [2008] ECR I-4723 paragraph 68.

[8] See paragraph 69 of the judgement.

[9] Case C-370/12 of 27 November 2012, paragraph 172.

[10] Case T-331/11, *Leonard Besselink v Council* , not published in the ECR, paragraphs 32-34.

[11] Case C-266/05 P, *Sison v Council* , [2007] ECR I-1233, paragraph 29 et paragraph 35.

[12] Case T-529/09 *Sophie in 't Veld v. Council* , not published in the ECR, paragraph 25

[13] Case T-529/09 *Sophie in 't Veld v. Council* , not published in the ECR, paragraph 30 and Case T-167/10 *Evropaïki Dynamiki v Commission* , not published in the ECR, paragraph 64

[14] Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 45.

[15] See Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69, and the case-law cited. See also *Sweden and Turco v Council* above, paragraphs 40, 42 and 43.

[16] See, to that effect, *Sweden and Turco v Council* , paragraph 64 above, paragraph 65, and Case C-506/08 P *Sweden v MyTravel and Commission* , paragraph 116. See also Case T-529/09 *Sophie in 't Veld v. Council* , not published in the ECR, paragraphs 78 and 79.