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From: Ms Emily O'Reilly, European Ombudsman
date of receipt: 24 February 2022
To: Mr Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the
European Union

Subject: Complaint 717/2021/DL to the European Ombudsman

Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Secretary-General of the Council of the European Union, concerning complaint 717/2021/DL.

Personal data have been blanked out.

EMAIL



European Ombudsman

IN 001867 2022
24.02.2022

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
Council of the European Union

DELETED@consilium.europa.eu
cc: DELETED@consilium.europa.eu

Strasbourg, 24/02/2022

Complaint 717/2021/DL

Subject: Recommendation in the above case 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

Dear Mr Tranholm-Mikkelsen,

Please find enclosed my recommendation in the above case.

My recommendation is as follows:

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

In accordance with the Statute of the European Ombudsman, the Council shall send a detailed opinion before 24 May 2022.

A copy of my recommendation will be sent to the complainant.

Finally, please find enclosed a copy of the complainant's comments on the Council's reply to my proposal for a solution.

Yours sincerely,



Emily O'Reilly
European Ombudsman

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Enclosures:

- Recommendation to the Council
- Complainant's comments on my proposal for a solution



European Ombudsman

Emily O'Reilly
European Ombudsman

Recommendation

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)

Made in accordance with Article 4(1) of the Statute of the European Ombudsman¹

The complainant sought public access to an opinion of the Legal Service of the Council of the European Union on the legal nature of the Trade and Cooperation Agreement concluded between the United Kingdom and the EU.

The Council provided only very limited access to the opinion, arguing that full disclosure would harm its international relations, legal advice and the ongoing decision-making process.

The Ombudsman considered that the information contained in the opinion was not sensitive. She found that the Council had not demonstrated how disclosure would specifically and actually undermine the public interest concerning international relations. She also found that it was unclear how disclosure would undermine the Council's capacity to obtain frank, objective and comprehensive advice. Rather, the Ombudsman took the view that greater transparency would reinforce the legitimacy of the Agreement.

The Ombudsman proposed as a solution that the Council grant the widest possible access to the opinion of its Legal Service. The Council did not follow this solution proposal.

As the Council did not rebut or address the arguments in the Ombudsman's proposal for a solution, the Ombudsman maintains her position. She considers that the Council's refusal to grant wide public access to the opinion constitutes maladministration and made a corresponding recommendation to address this.

Background to the complaint

1. Following the United Kingdom's withdrawal from the European Union in January 2020, the EU and UK started negotiating the details of a trade

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%3A2021%3A253%3AITOC.



agreement. These negotiations resulted in the 'EU-UK Trade and Cooperation Agreement', which entered into force in May 2021.³

2. In a meeting held in November 2020, the Legal Service of Council of the EU expressed its opinion as to whether the Agreement could be concluded as an 'EU-only agreement'⁴. The Legal Service then set out its views in writing by issuing, in January 2021, a legal 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" ('the opinion')⁵.

3. In February 2021, the complainant, from the University of Helsinki, sought public access to the opinion.⁶

4. The Council disclosed only a very limited part of the opinion, saying that full disclosure would undermine the protection of the public interest as regards international relations, legal advice and the decision-making process⁶.

5. Dissatisfied with the Council's decision to give only partial access, the complainant turned to the Ombudsman in April 2021.

The Ombudsman's proposal for a solution

6. The Ombudsman opened an inquiry into the Council's refusal to grant full public access to the opinion. In the course of the inquiry, the Ombudsman's inquiry team inspected the non-redacted version of the opinion.

7. Following the inspection of the document, the Ombudsman took the view that the information contained in the opinion could not be regarded as sensitive. She considered that the opinion does not in any way undermine the public position that the EU took as regards the ratification of the agreement, nor does it reveal information on the EU's negotiating position or strategy. The type of trade agreements that can be concluded is part of EU law and therefore known by third parties. It was thus unclear to the Ombudsman how disclosure could affect the trade negotiations with the UK when they were ongoing, as well as future EU negotiations. To the contrary, the Ombudsman considered that disclosure could foster confidence in the legality of trade agreements.

8. The Ombudsman further referred to the General Court's judgment in 'Pech v Council'⁷, taking the view that the legal opinion could not be considered

³ 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: [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).

⁴ For more information, see: https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149619.pdf.

⁵ Council document with reference number 5591/21.

⁶ In line with Regulation 1049/2001/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001R1049>.

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



sensitive as the content itself was not sensitive. Therefore, the opinion's disclosure could not undermine the protection of legal advice.

9. Moreover, 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, the Agreement had now entered into force. The Ombudsman therefore urged the Council to take this development into account when reviewing its decision in light of potential further disclosure.

10. In light of the above, the Ombudsman proposed as a solution⁸ that the Council grant the widest possible access to the opinion of its Legal Service of 25 January 2021.

11. The Council did not accept the Ombudsman's proposal for a solution.

12. In its reply, the Council argued that, while the internal procedures for the adoption of the decision are now terminated, the subject matter of the legal opinion remains sensitive in the context of the opening, negotiation and conclusion of other agreements with the UK or with other third countries, since it reveals a strategy that could also be applicable for other agreements. The Council said that the sensitivity of the document is not automatically removed simply because the internal procedures in the Council have been concluded in relation to one specific agreement when that legal advice is relevant for other agreements for which the exception concerning international relations equally applies.

13. The Council thus considered that 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.

14. The complainant found it regrettable that the Council chose not to follow the Ombudsman's proposal for a solution and considered this a worrying practice for EU citizens. She also expressed her disappointment about the Council's decision to deny her full access to the Ombudsman's solution proposal and the Council's reply thereto⁹.

The Ombudsman's assessment after the proposal for a solution

15. The Council did not seize the opportunity to review its position on the complainant's access request, in light of the detailed arguments provided by the

⁸ 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>.

⁹ In its reply to the Ombudsman's solution proposal, the Council identified parts of the solution proposal that it considered to contain confidential information. It further signalled that elements in its reply to the solution proposal were confidential. As such, the Ombudsman is not in a position to disclose these elements in this recommendation.



Ombudsman in her solution proposal. Rather, the Council sent a very brief reply which did not address the Ombudsman's arguments.

16. In essence, the Council set out that the content of the opinion remains sensitive in light of potential future negotiations of other international agreements. However, the Ombudsman had already put forward arguments as to why she considers that the information contained in the opinion cannot be considered sensitive, and that the Council had not sufficiently set out how disclosure could harm its international relations.

17. Since the Council did not rebut the Ombudsman's arguments, the Ombudsman maintains her position. She emphasizes once more that the type of trade agreements that can be concluded is part of EU law and therefore known by third parties. Most of the information contained in the opinion is already publicly available¹⁰. The Ombudsman therefore takes the view that disclosing the opinion is unlikely to undermine the EU's negotiation position or reveal its strategy, either now or in future trade negotiations.

18. The Council further argued that the document remained sensitive even if the Council internal procedures had been concluded in relation to this specific agreement. However, the Ombudsman had already referred to a recent judgment of the General Court, in which the Court had noted that the question whether a legal opinion is particularly sensitive depends on whether the content of the opinion itself is particularly sensitive.¹¹ In this regard, the Ombudsman noted that the information contained in the opinion at issue cannot be regarded as sensitive.

19. The Council did not address these arguments. While the Ombudsman is aware that the Council appealed the judgment in 'Pech v Council', she notes that it is bound by the findings of the General Court while the appeal procedure is ongoing. The Ombudsman thus finds it regrettable that the Council for now has chosen to disregard the judgment in assessing the potential disclosure of this opinion.

20. In light of the above, the Ombudsman finds that the Council's refusal to grant the widest possible access to the opinion constituted maladministration. She therefore recommends that the Council should review the opinion of its Legal Service, with a view to granting the widest possible access.

Recommendation

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

¹⁰ 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>.

¹¹ *Pech v Council*, paragraph 85 (see footnote 7).



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

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 **24 May 2022**.



Emily O'Reilly
European Ombudsman

Strasbourg, 24/02/2022

Comments on the Proposal for a solution and the Council's reply thereto

Case 717/2021/DL

Helsinki 16/12/2021

Dear European Ombudsman,

Thank you for your proposal for a solution in relation to my complaint 717/2021/DL. As for your invitation to comment, I hereby respectfully submit my comments on the proposal for a solution and the Council's reply thereto.

I fully agree with the European Ombudsman's finding that disclosure of the Council Legal Service opinion could foster confidence in the legality of trade negotiations and reinforce the legitimacy of the EU–UK Trade and Cooperation Agreement (hereinafter, the Agreement), in particular regarding the choice of legal basis. Her finding that disclosure could also create greater legal certainty in relation to such international agreements is easy to agree with as well. As the Agreement provides, the United Kingdom and the European Union and its Member States may adopt supplementing agreements which shall be an integral part of the overall bilateral relations and shall form part of the overall framework. Therefore, greater transparency would in fact reinforce the legitimacy and foster confidence in the legality of the future cooperation negotiations as well.

In her proposal, the Ombudsman finds that general references to the principle of democracy and citizen participation cannot justify an overriding public interest in disclosure. Admittedly, general reference may not itself serve as justification in disclosure. However, given the Ombudsman's finding that no protected interests are undermined in disclosure, and the speeded conclusion process of the agreement that in practice shut down 'pathways for appropriate scrutiny'¹, greater transparency would address concerns raised as regards the legitimacy of the decision-making as regards the Agreement.²

Regrettably, despite the Ombudsman's assessment, the Council has maintained its position as regards the alleged sensitiveness of the requested document. It is still my submission that in its reply, the Council unfortunately has not sufficiently demonstrated how full disclosure would specifically and actually undermine the protection of the public interest as regards international relations. I

¹ Niamh Nic Shuibhne, *Did Brexit Change EU Law?* Current Legal Problems 2021, Vol. 60 pp. 1–40, at 20.

² See, e.g., Christina Eckes and Päivi Leino-Sandberg, *The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?*, Modern Law Review [2021] 1–34.

respectfully submit that the Council's argument concerning the speculative future application of a strategy employed vis-à-vis the Agreement is not substantiated.

I find it very regrettable that the Council chose to reject the Ombudsman's assessment and not to follow the solution proposal. The EU citizen's possibility to file a complaint to the European Ombudsman rebalances the relationship between an individual and the EU administration, and the protecting effect of the complaint to the citizen's rights is hindered if the Ombudsman's assessments are ignored. I also find it unfortunate and discouraging that both the proposal and the reply thereto are partially considered as confidential. In search for greater transparency and additional review on the legitimacy of non-disclosure, I respectfully submit that it is regrettable that the person concerned is denied full access to the solution proposal that relates to their complaint.

Yours sincerely,

