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European Union

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From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	27 June 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject:	Complaint 1499/2021/SF to the European Ombudsman
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Delegations will find in the Annex a copy of the closing decision of the European Ombudsman on complaint 1499/2021/SF.



IM 006651 2022
27.06.2022

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

jur.ombudsman@consilium.europa.eu
cc: [REDACTED]@consilium.europa.eu

Strasbourg, 27/06/2022

Complaint 1499/2021

Subject: Decision in the above case on the Council of the European Union's refusal to give full public access to documents related to negotiations on the draft 'Digital Markets Act' (case 1499/2021/SF)

Dear Mr Tranholm-Mikkelsen,

Please find enclosed my above decision, which has been sent to the complainant.

On the basis of my inquiry into this complaint, I have decided to close it with the following conclusion:

The Council has reacted positively to the Ombudsman's recommendation and granted full public access to the legislative documents at issue. However, due to the passing of over one year, the complainant cannot use the information disclosed for the purposes intended at the time of its access request, namely to inform citizens about an ongoing legislative process. The Ombudsman calls on the Council to make available legislative documents at a time that will allow the public to participate effectively in the discussion. The Ombudsman therefore confirms her finding of maladministration.

Brussels
Rue Fossart 67
B-1000 Brussels

Strasbourg
Hôtel Dailig - Allee Spach
F-67000 Strasbourg

Postal address
1 Av. du Président R. Schuman
CS 30403
F-67001 Strasbourg Cedex

+33 (0)3 80 17 23 13
ombudsman.europa.eu

Yours sincerely,



Emily O'Reilly
European Ombudsman

Enclosure: Decision on complaint 1499/2021/SF



Emily O'Reilly

European Ombudsman

Decision

on the Council of the European Union's refusal to give full public access to documents related to negotiations on the draft 'Digital Markets Act' (case 1499/2021/SF)

The complainant, a network of journalists from several European countries, requested public access to Member States' initial comments and questions on the legislative proposal for the Digital Markets Act. The Council refused full public access to the identified documents, arguing that full disclosure would undermine an ongoing decision-making process.

The Ombudsman noted that keeping the public informed about the progress of legislative procedures is a legal requirement. Timely access to legislative documents is crucial for citizens to exercise their treaty-based right to participate in the democratic life of the EU.

In this case, the Ombudsman found that the Council had not sufficiently demonstrated that disclosure of the requested documents would seriously affect, prolong or complicate its decision-making process. She therefore took the view that the Council's refusal of public access constituted maladministration. She recommended that the Council grant full public access to the requested legislative documents.

In reply, the Council granted full public access to the requested documents. The Ombudsman welcomes the Council's positive reply to her recommendation. She regrets, however, the time the Council has taken to provide public access. She notes that, due to the passage of more than one year since the request, the documents disclosed are no longer of use for the purpose the complainant had intended, that is, to inform citizens about an ongoing legislative process. Thus, the Ombudsman confirmed her finding of maladministration.

The Ombudsman calls on the Council to make available legislative documents at a time that will allow the public to participate effectively in the discussion.

Background to the complaint

1. In March 2021, the complainant, a network of journalists from several European countries, requested public access¹ to Member States' initial comments and questions on the legislative proposal for the Digital Markets Act².

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>

² The proposed regulation aims to create a safer digital space where the fundamental rights of users are protected and where a level playing field for businesses is created. The proposal imposes certain obligations on large online platforms, the so-called 'gatekeepers', to regulate their behaviour. More information available at: https://ec.europa.eu/info/strategy/whypolicies-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

Brussels
Rue Foccart 47
B-1000 Brussels

Strasbourg
Havel Building - Allee Spädi
F-67000 Strasbourg

Postal address:
1 Av. du Président R. Schuman
CS 30403
F-67001 Strasbourg Cedex

+33 (0)3 88 17 25 13
ombudsman.europa.eu



2. The Council did not disclose any Member State positions but gave access to the text of the already published legislative proposal only. It argued that full disclosure was likely to “specifically and actually” undermine its decision-making process.³

3. The complainant asked the Council to review its decision to refuse access to the Member States’ position (by making a ‘confirmatory application’).

4. In July 2021, the Council confirmed its position and the complainant turned to the Ombudsman.

The Ombudsman’s recommendation

5. The Ombudsman noted that the documents at issue are clearly legislative documents, to which the highest standard of transparency must apply. The exception invoked by the Council to refuse public access to the Member States’ initial comments and questions must therefore be applied all the more restrictively.⁴

6. The Council argued that release of the requested documents - at the time of the confirmatory decision - would have undermined the ongoing decision-making process. In particular, the Council took the view that full disclosure of Member States’ initial questions and comments was likely to

- risk misinterpretation by the public, as Member States’ final positions may depart substantially from their initial comments, questions and drafting suggestions;
- affect the discussions within the working party and thereby impede the Council’s ability to reach an agreement;
- lead to unprecedented lobbying, given the technical complexity and extreme sensitivity of the proposal.

7. In her recommendation, the Ombudsman noted that the preliminary nature of discussions in the Council relating to a legislative proposal does not, in itself, justify the application of the exception set out in Article 4(3) of Regulation 1049/2001.⁵ Rather, by its nature, a legislative proposal is designed to be discussed and debated and that “public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently.”⁶

8. While the Ombudsman appreciated that some Member States may be reluctant to disclose that their initial positions have changed in the course of the legislative process, she considered that being willing to change position and compromise is essential for democratic decision-making. If citizens are to be able to exercise their right to participate

³ In accordance with Article 4(3) of Regulation 1049/2001.

⁴ See judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 100.

⁵ See judgments of the General Court of 22 March 2011, *Access Info Europe v Council*, T-233/09, para. 69, 78: <https://curia.europa.eu/curia/juris/liste.jsf?language=en&num=T-233/09>; and of the Court of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para. 60.

⁶ *Access Info Europe v Council*, T-233/09, para. 69.



in the democratic debate, they must be able to follow it as it develops and have timely access to all the relevant information.⁷ The Ombudsman found that the redacted parts of the documents are not particularly sensitive, especially in so far as they contain Member States' technical questions addressed to the Commission to clarify their understanding of the legislative proposal.

9. Finally, the Ombudsman acknowledged that, in this case, significant lobbying is taking place. However, she took the view that lobbying is an expected aspect of the legislative process and that disclosure would allow the public, including lobbyists and journalists, to participate more effectively in the decision-making process, thereby enhancing its quality and legitimacy. For all interests to be in a position to share informed views during ongoing legislative debates, it is of particular importance that there is, to the greatest extent possible, a level-playing field in terms of access to information.

10. The Ombudsman also considered that the Council had not established, in this case, that it is reasonably foreseeable that this external pressure would have seriously undermined its decision-making.

11. In light of the above, the Ombudsman considered that the Council had not sufficiently demonstrated how full disclosure of the Member States' position would *specifically and actually* undermine the protection of an ongoing decision-making process.

12. The Ombudsman thus found that the Council's refusal to give full public access to the legislative documents at issue constituted maladministration. She made the following recommendation⁸:

The Council should grant full public access to the requested legislative documents.

13. In reply, the Council granted full public access to the requested documents.

14. The Council, however, maintained its view that, at the time of the confirmatory decision, full disclosure would have undermined the ongoing decision-making process. As the legislative process had significantly advanced and the Council had reached political agreement in the meantime, its refusal to grant full public access was now no longer justified. The Council considered that it took a balanced approach between the principle of transparency and the necessary protection of its decision-making process by reassessing the progress of the legislative procedures and disclosing the documents when the change in circumstances justified it.

15. In its comments on the Council's reply, the complainant considered that the Council's approach was not balanced, but was rather a clear violation of the EU Treaties, which guarantee that decisions should be taken as openly and as closely as possible to the citizens. Citizens can only exercise this right if they know in time how any legislative process is progressing.

⁷ *Ibid*

⁸ The full text of the recommendation and the assessment that led to it are available at: <https://www.ombudsman.europa.eu/en/recommendation/en/152996>



16. The complainant also noted that it is the task of journalists to inform citizens about the legislative process. However, the "secrecy" within the Council makes it nearly impossible to fulfil this duty. The complainant claims that the Council values the right of the Member States and civil servants to protect an ongoing legislative process more than the right of citizens to participate in the democratic life of the Union.

17. At the time of the complainant's access request, it was still open how the draft text would be revised and amended. In the complainant's view, this would have been the right time to inform the public and provide citizens, civil and social society organisations the opportunity to intervene and ask their respective national governments for explanations. However, the Council disclosed the relevant documents only after its general approach had already been taken and political agreement had been found.

The Ombudsman's assessment after the recommendation

18. The Ombudsman welcomes the Council's positive response to her recommendation and its decision to grant full public access to the documents in question.

19. The Ombudsman notes, however, that the Council maintains its position that, at the time of the adoption of its confirmatory decision, partial or full refusal of the requested documents was justified. Only the passage of time, and the advanced status of the legislative process, namely the fact that the Council had adopted a general approach, led the Council to agree to the disclosure of the requested documents.

20. The Ombudsman reiterates her view that the grounds on which the Council had based its decision to refuse access to the relevant legislative documents, at the time of the adoption of its confirmatory decision, were not convincing.

21. Due to the passage of more than one year since the complainant first submitted its request, the complainant cannot use the information that has now been disclosed for the purpose it had intended, namely to inform citizens of the ongoing legislative process.

22. The Ombudsman confirms her finding of maladministration and, once again, calls on the Council to make available legislative documents at a time that will allow the public to participate effectively in the discussion.

Conclusion

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

The Council has reacted positively to the Ombudsman's recommendation and granted full public access to the legislative documents at issue. However, due to the passing of over one year, the complainant cannot use the information disclosed for the purposes intended at the time of its access request, namely to inform citizens about an ongoing legislative process. The Ombudsman calls on the Council to make available legislative



documents at a time that will allow the public to participate effectively in the discussion. 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, 27/06/2022