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European Union

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COVER NOTE

From:	Ms Emily O'REILLY, European Ombudsman
date of receipt:	3 February 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

Subject:	Complaint 788/2022/SF to the European Ombudsman
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Delegations will find in the Annex a copy of a letter from the European Ombudsman to the Secretary-General of the Council of the European Union concerning complaint 788/2022/SF, together with her proposal for a solution.

Personal data have been redacted.



Emily O'Reilly
European Ombudsman

In 001780 2023
03.02.2023

Ms Thérèse Blanchet
Secretary-General
Council of the European Union

[REDACTED]@consilium.europa.eu

Strasbourg, 02/02/2023

Complaint 788/2022/SF

Subject: Proposal for a solution in the above case on the Council of the EU's refusal to give public access to documents related to negotiations on the draft 'Digital Markets Act' and the draft 'Digital Services Act' [your reference: 5GS 21/05406]

Dear Ms Blanchet,

I have decided to propose the following solution in the above case:

The Ombudsman proposes that the Council should review its position with a view to granting the widest possible public access to the requested documents.

Where the Council considers that access cannot be granted, it should explain, in detail and with reference to the individual documents, how disclosure of these documents would undermine one or several of the public or private interests listed in Article 4 of Regulation 1049/2001, if needed in a confidential annex to its reply to this solution proposal.

Please find enclosed my assessment leading to the proposal for a solution. I would be grateful to receive your reply to my proposal by 31 March 2023. Once we have received your reply to the proposal, we will send a copy of it to the complainant together with a copy of the proposal. I would therefore appreciate if you could also include a translation of the reply in the language of the complaint.

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Yours sincerely,



Emily O'Reilly
European Ombudsman

Enclosure: Proposal for solution in complaint 788/2022/SF



Emily O'Reilly

European Ombudsman

Proposal

for a solution on the Council of the European Union's refusal to give public access to documents related to negotiations on the draft 'Digital Markets Act' and the draft 'Digital Services Act' (case 788/2022/SF)

Made in accordance with Article 2(10) of the Statute of the European Ombudsman¹

Background to the complaint

1. On 15 December 2020, the European Commission proposed two legislative acts to upgrade the rules governing digital services in the EU: the Digital Services Act (DSA)² and the Digital Markets Act (DMA)³ (together the 'Digital Services Package'). The proposed regulations aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field to foster innovation, growth and competitiveness.
2. On 25 November 2021, the Council adopted a general approach⁴ for the Digital Services Package and on 25 March 2022 and 23 April 2022, it reached a political agreement with the European Parliament on the DMA⁵ and the DSA⁶ respectively. Both acts entered into force in November 2022.
3. In September 2021, the complainant, a media outlet, requested public access⁷ to the exchanges on the draft DSA and the draft DMA between the Council legal service, its internal working parties and the European Commission.
4. The Council identified 15 documents as falling within the scope of the complainant's request: Six documents concerning the DSA and nine documents concerning the DMA. The Council refused access to all 15 documents in their entirety, arguing that their disclosure would undermine the protection of legal advice and future court proceedings⁸ as well as the Council's ongoing decision-making process⁹. Furthermore, the Council took the view that there was no overriding public interest in the disclosure of the documents.

¹ Available at: <https://eur-lex.europa.eu/eli/reg/2019/1052/oj>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R1024-01&ENR&as=OJ%3A%3A2021%3A25%3A01%3A01>

³ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A482%3A01%3A01>

⁴ Available at: <https://eur-lex.europa.eu/eli/reg/2021/1535/oj>

⁵ Available at: <https://eur-lex.europa.eu/eli/reg/2022/1535/oj>

⁶ More information available at: <https://www.commission.europa.eu/en/topics/digital-services-package>

⁷ See https://ec.europa.eu/commission/presscorner/detail/en/22_1878

⁸ See https://ec.europa.eu/commission/presscorner/detail/en/22_2545

⁹ Under Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R1049&from=EN>

¹⁰ Article 4(2) second indent of Regulation 1049/2001.

¹¹ Article 4(3) first subparagraph of Regulation 1049/2001.

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5. In November 2021, the complainant requested that the Council review its decision (by making a 'confirmatory application'). It argued that the Council had not sufficiently explained how disclosure would undermine the protected interests. Furthermore, it considered that the crucial importance of the two legislative acts and its role as 'public watchdog' constitute an overriding public interest that would prevail over the protected interests.

6. On 20 December 2021, the Council replied. It maintained its initial refusal and informed the complainant that it had identified an additional document (16 documents in total) as falling within the scope of the complainant's request.¹⁰

7. Dissatisfied with the outcome of the review, the complainant turned to the Ombudsman on 8 April 2022.

The inquiry

8. The Ombudsman opened an inquiry into the Council's refusal to give full public access to the requested documents.

9. In the course of the inquiry, the Ombudsman inquiry team reviewed the documents at issue and met with officials of the Council General Secretariat with a view to obtaining clarifications on the Council's reasons for refusing public access. The Ombudsman then provided the complainant with a report on this meeting.¹¹

Arguments presented to the Ombudsman

Complainant's arguments

10. The complainant argued that the Council did not explain how disclosing the documents would specifically and actually undermine the interests protected by the exception set out in Article 4 of Regulation 1049/2001.

11. The complainant stated that the risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical. It considered that the Council referred to undue external influences without specifying what exactly these influences are or how disclosure of the requested documents would contribute to them. The complainant thus took the view that this risk of undermining the protected interests was purely hypothetical.

12. The complainant further argued that there was an overriding public interest in disclosing the documents. It considered that the two proposed legislative texts are of crucial importance, as they will have a concrete impact on the lives of EU citizens. Thus, disclosure of the Council legal service's view would be essential to the public's discussions. Furthermore, the complainant took the view that refusing to disclose the

¹⁰ This document was created after the complainant had made its request but before the Council issued its initial decision.

¹¹ Available at <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/182072>



documents interferes with the complainant's role as 'public watchdog' and the principle of the 'freedom of the press'. The complainant referred to the European Court of Human Rights, which held that the collection of information is an essential step in journalism and as such protected by the freedom of press. The obstruction of collecting information could become a form of indirect censorship.¹²

Council's arguments

13. The Council stated in its confirmatory decision that the two legislative proposals are of an exceptionally technical regulatory nature and of particular international sensitivity. The requested documents are contributions from the Council legal service to assist the presidency and/or delegations in the preparatory work necessary for the deliberations in the working parties and subsequently in the Committee of Permanent Representatives (Coreper)¹³ and in the Council, with the ultimate objective to adopt a position of the co-legislator at first reading on the two legislative proposals. As such, the Council considered that they fall within the scope of the protection of legal advice and of the ongoing decision-making process.

14. The Council contended that, while increased transparency applies where institutions act in their legislative capacity, this does not deprive them of the possibility to justify a refusal based on the need to protect an ongoing decision-making process, where this is necessary to preserve their capacity to fulfil their tasks.

15. The Council noted that it may refuse access to documents linked to a legislative process, where disclosure could specifically and actually undermine the protected interest and the risk of such harm is reasonably foreseeable and not purely hypothetical. The Council stated that it is sufficient to point to tangible evidence from which it can be concluded that the risk is reasonably foreseeable and not purely hypothetical.

16. The Council argued that the documents in question are exchanges within the relevant working parties, which were of a technical and preparatory nature. Their disclosure at this stage could seriously jeopardise the Council's ongoing decision-making process by weakening its position in the upcoming trilogue¹⁴ discussions with the Parliament. It considered that disclosure would allow Parliament to anticipate the points, which the members of the Council would be reluctant or willing to settle. Furthermore, the Council considered that disclosure could expose its members to undue external pressure, given the sensitive nature of the proposed texts, which aim to regulate gatekeepers and may affect third-country operators. Disclosure would also facilitate targeted attempts by third parties with economic, strategic and/or political interests to influence Member States, as it would reveal the points of (dis-)agreement between them. Therefore, disclosure would reduce the

¹² Judgment of 14 April 2009 in Case of *Társaság A Szabaddisjóságiért v Hungary*, 37374/05, available at http://hudoc.echr.coe.int/0908020152200015220001_92171%23

¹³ Coreper is the Committee of Permanent Representatives of the Governments of the Member States to the European Union and the Council's main preparatory body. Coreper consists of two parts: Coreper I, which is composed of each country's deputy permanent representatives and prepares the work of six Council configurations, and Coreper II, which is composed of each Member States' permanent representatives and prepares the work of four other Council configurations. More information can be found here: <https://www.consilium.europa.eu/en/council-eu/preparatory-body/>

¹⁴ Trilogue refers to informal meetings between the Parliament, Council and the Commission. These meetings aim to reach an agreement on a set of amendments acceptable to Parliament and Council on a particular legislative file. Trilogue meetings are not held in public.



likelihood that discussions within the preparatory bodies and within Coroper take place in a manner that is *"calm, effective and free from undue external pressure"*.

17. The Council further contended that, in accordance with EU case-law, it may refuse public access to a legal opinion, given in the context of a legislative process, that is particularly sensitive. It stated that the requested documents contain legal advice formulated in the context of preparatory discussions with a view to preparing broader discussions. Disclosure at this stage could affect the way in which legal advice is drafted and would undermine the possibility for the legal service to express its position free from any external influence. It would thus reduce its ability to provide *"honest, frank and full opinions"*.

18. The Council argued that EU case-law recognises the particularly sensitive nature of legal advice provided by an institution's legal service when it concerns matters which are open to litigation. The Council considered that, given the impact of the proposed texts on online platforms, it is *"highly likely"* that they will be challenged in court. The Council claimed that it was reasonably foreseeable that disclosure could affect the legal service's ability to defend effectively decisions adopted by the Council before the EU courts thereby affecting the integrity of these future court proceedings.

19. The Council further took the view that there was no overriding public interest in disclosing the documents. It considered that the complainant's argument that the two legislative texts are of crucial importance is too general and as such insufficient to establish that transparency should override the protect interests. On the contrary, the Council considered that the sensitivity and importance of these texts justify not giving access. As regards the complainant's arguments that it cannot fulfil its duty as 'public watchdog' and that the refusal to disclose would interfere with the freedom of the press, the Council argued that, in accordance with EU case-law, the overriding public interest must be different from these principles. The Council considered that the sensitivity and importance of these texts justify not giving access. The Council stated that it had already published a number of documents related to the Digital Services Package on its public register of documents.¹⁹

The Ombudsman's assessment

The nature of the requested documents

20. The inspection revealed that the 16 documents at issue in this inquiry are email exchanges, including attachments, between the members of the Council legal service, individual delegations, the Council Presidency, and the responsible Commission services, relating to the draft DMA and the draft DSA. They date from April to October 2021.

21. During the meeting with the Ombudsman inquiry team, the officials from the Council General Secretariat confirmed that, while the Council legal service did not provide a formal legal opinion in either of the two legislative procedures in question, it provided legal advice to individual delegations, the Commission services or the Council Presidency

¹⁹ The Council did not provide a list of these documents or a link to where they are available.



making process. That provision makes no distinction according to the “state or progress of the discussion”. Thus, the preparatory nature of the discussions and the fact that the Council has not yet reached its final position at the time of disclosure does not establish, in itself, that the Council’s decision-making process will be seriously undermined.

27. The Ombudsman has previously found that internal Council documents setting out the Council’s negotiating strategy (its ‘red lines’, areas where the Council might be flexible, or fall-back options for the Council) in its ongoing trilogue negotiations with the European Parliament could be protected as long as the relevant negotiations are ongoing.²³ The Ombudsman considered, in that previous inquiry, that revealing the Council’s negotiating strategy *before* it has been deployed by the Council and shared with the Parliament could seriously undermine the Council’s negotiating position and, thus, the ongoing decision-making process.

28. The documents at issue in this inquiry are of a different nature. They do not contain the Council’s negotiating strategy. Rather, they contain legal advice of the Council legal service to assist the Council presidency and Member State delegations in the discussion on the two legislative proposals within the relevant working parties. As such, the Ombudsman considers it difficult to see how the Council’s later negotiating strategy during trilogues (which took place in early 2022) could have been derived from these exchanges or how their disclosure would have weakened the Council’s negotiating position during its negotiations with the Parliament. By way of example only, the information exchanged in documents 6, 13, 14 and 16, as well as the legal advice given in the form of tracked changes in the attached draft proposal texts, seem not to be particularly sensitive nor to set out the Council’s red lines and thus its negotiating strategy.

29. The Council further argued that, due to the sensitive nature of the proposed legislative texts, disclosure could expose the members of the Council and its legal service to undue pressure or other external interference.

30. While the risk of external pressure can constitute a legitimate ground for restricting access, the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there is a reasonable foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure.²⁴

31. In this case, the Council did not provide any evidence, nor is there anything in the case file, which suggests that the Council could reasonably expect there to be a reaction beyond what could be expected from the public by any member of a legislative body who proposes amendments to draft legislation.²⁵ By way of example, documents 1, 4, 12 and 15 contain questions raised and/or legal views expressed by Member States. The questions were answered by the Council legal service orally in calls with the respective Member States’ delegation and later shared during working party meetings with all Member States. The withheld information does not seem particularly sensitive, especially in so far as it consists

²³ See the Ombudsman’s proposal for a solution in case 360/2021/UE, para 37: <https://www.ombudsman.europa.eu/en/rapport/144725>.

²⁴ See judgments of the General Court of 26 January 2023, *De Captrian v Council*, T-163/21, para 85, and of 22 March 2018, *Enfio de Captrian v European Parliament*, T-640/15, para 99: <https://curia.europa.eu/eur-lex/en/77000/T-54018>.

²⁵ *Ibid.*



of Member States' questions to understand the legislative proposal. It is thus not apparent how disclosure, at the time of the confirmatory decision, would have seriously undermined the decision-making process. In view of this, the Ombudsman finds the Council's argument not substantiated.

32. The Council also claimed that disclosure would reveal the points of (dis-)agreement between its members and could thereby facilitate targeted interventions by third parties aimed at influencing the position of some Member States.

33. The Ombudsman notes that lobbying, be it by members of the public, consumer groups or professional groups with an economic and/or political interest, is an expected and even welcome part of the legislative process. It shows that these interest groups and the public have a legitimate interest in following and participating in the legislative process. However, for all interests to be in a position to exchange informed views during the ongoing legislative process, it is crucial that there is, to the greatest extent possible, a level-playing field in terms of access to information. Thus, the Ombudsman takes the view that disclosure would allow the public - including lobbyists, but also the general public and journalists - to participate more effectively and on an equal footing in the decision-making process, thereby enhancing the quality and legitimacy of that process.

Protection of legal advice and court proceedings

34. The Council further argued that the documents at issue contain legal advice and that their disclosure would undermine the Council legal service's ability to provide honest, frank and full opinions that are free from external influence. The Council also considered that it was highly likely that the two legal texts will be challenged in Court and that it was reasonably foreseeable that disclosure would affect the integrity of these future court proceedings.

35. The Ombudsman notes that, in accordance with EU case-law²⁶, the question whether an opinion is particularly sensitive depends on whether the *content of the opinion itself is particularly sensitive* and not on whether the legislative process can be regarded as sensitive. It is irrelevant that the legal issues raised may be controversial and subject to disagreement.

36. Having inspected the documents at issue, the Ombudsman takes the view that the information contained in the email exchanges cannot be regarded as sensitive throughout (see also the examples given in the previous section).

37. The Ombudsman further notes that, in accordance with EU case-law²⁷, a general reference to the risk of undermining an institution's ability to defend itself in *hypothetical* court proceedings is not sufficient to justify an exception to the openness required for legislative documents. The Ombudsman thus takes the view that the Council has not established how (partial) disclosure would undermine its ability to defend itself in court.

²⁶ Judgment of the General Court of 21 April 2021, *Pech v Council*, T-252/19, para 85.

<https://eur-lex.europa.eu/eli/jt/2021/0077/oj>

²⁷ See Judgment of the General Court of 6 April 2017, *French Republic v Commission*, T-344/15, para 76; and Judgment of the General Court of 21 April 2021, *Pech v Council*, T-252/19, para 89.



38. In light of the above, the Ombudsman is not convinced by the Council's explanations that disclosure would undermine the interests protected by the exceptions set out in Article 4 of Regulation 1049/2001.

39. The Ombudsman therefore considers that the Council should review its position, with a view to granting the widest possible public access to the requested documents.

The proposal for a solution

The Ombudsman proposes that the Council should review its position, taking into account the above observations, with a view to granting the widest possible public access to the requested documents. Where the Council considers that access cannot be granted, it should explain, in detail and with reference to the individual documents, how disclosure of these documents would undermine one or several of the public or private interests listed in Article 4 of Regulation 1049/2001, if needed in a confidential annex.

The Council is invited to inform the Ombudsman by 31 March 2023 of any action it has taken in relation to the above solution proposal.



Emily O'Reilly
European Ombudsman

Strasbourg, 02/02/2023