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European Union

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From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	21 June 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject:	Complaint 360/2021/TE to the European Ombudsman
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Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Council concerning complaint 360/2021/TE.



European Ombudsman

E-MAIL

Emily O'Reilly
European Ombudsman

IM 006558 2021
21.06.2021

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

jur.ombudsman@consilium.europa.eu

Strasbourg, 18/06/2021

Complaint 360/2021/TE

Subject: Proposal of the European Ombudsman for a solution in the above case on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions

Dear Mr Tranholm-Mikkelsen,

In accordance with Article 3(5) of the Statute of the European Ombudsman, I have decided to propose the following solution in the above case:

The Ombudsman proposes that the Council now identifies the three additional four-column documents, which it shared with the Ombudsman, as falling within the scope of the complainant's access to document request, or provides good reasons for why they do not. As these documents are the type of four-column document at stake in the *De Capitani* judgment, they should be fully disclosed upon request.

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 July 2021. 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.

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Please also find enclosed a copy of the complainant's comments on the Council's written reply on this complaint.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosures:

- Proposal for solution in complaint 360/2021/TE
- Copy of the complainant's comments on the Council's written reply



European Ombudsman

Emily O'Reilly
European Ombudsman

Proposal

of the European Ombudsman for a solution in case 360/2021/TE on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions

Made in accordance with Article 3(5) of the Statute of the European Ombudsman¹

The case concerns the Council of the EU's refusal to grant full public access to documents concerning trilogue negotiations between the European Parliament, the Council of the EU and the European Commission on draft legislation for vehicle emissions. The Council granted access to only parts of the documents identified, arguing that disclosing the remaining parts could undermine the ongoing decision-making process.

The Ombudsman's inquiry team examined unredacted copies of the documents in question and found that the redacted parts contain the Council's negotiating strategy - its 'red lines', points where it could be flexible and the Council's fall-back options - in ongoing negotiations with Parliament. The inquiry team confirmed that these redacted parts have not been shared with Parliament.

The Ombudsman acknowledges that releasing details on the Council's negotiating strategy, when no provisional agreement on the relevant parts of the draft legislative text has been reached, could seriously undermine its negotiating position. The Ombudsman therefore takes the view that there is a duly justified case to refuse access to the redacted text at this stage in the negotiations. However, once provisional compromises are found in trilogue meetings, the relevant parts of the documents could be disclosed.

In the course of the inquiry, the Council provided the Ombudsman with three additional documents, which it had shared with Parliament ahead of the first, second and third trilogue on this file. The Ombudsman's inquiry team examined these additional documents and found that they contain the provisional compromises found between the co-legislators, as well as the evolving positions, proposals and comments of the three institutions in relation to those parts of the legislative text on which no

¹ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15



agreement has yet been found. In line with recent case-law of the General Court, these are trilogue documents that should be made public upon request, so as to enable the public to participate in trilogue negotiations and to influence the legislative process at this crucial stage.

As the complainant's access request covered all documents related to the ongoing trilogue negotiations on motor vehicle emissions, the Ombudsman proposes that the Council now identifies the three additional documents as falling within the scope of the complainant's request and, in line with the General Court's case-law, fully discloses them.

Background to the complaint

1. On 23 November 2020, the complainant made a request to the Council of the EU and asked for public access to:

"The documents related to the trilogue negotiations on the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information

These should include at least:

ST 12384 2020 INIT (30-10-2020)

ST 12384 2020 REV 1 (03-11-2020)."

2. On 6 January 2021, the Council refused access to the two documents explicitly mentioned in the complainant's request (documents ST 12384/20 and ST 12384/20 REV1), based on the need to protect an ongoing decision-making process.²

3. On the same day, the complainant filed a confirmatory application.³ He contested the Council's decision, referring to the judgment of the General Court in *De Capitani*.⁴ In particular, the complainant stated that trilogue documents are part of the legislative process, that citizens have a right to access them and that, far from undermining the decision-making process, this would allow citizens to follow the process in detail. The complainant also noted that his request was not restricted to documents ST 12384/20 and ST 12384/20 REV1, but covered *all* documents related to the trilogue negotiations in question.

² Article 4(3), first subparagraph, of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049>.

³ In accordance with Article 7(2) of Regulation 1049/2001.

⁴ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, <https://curia.europa.eu/juris/liste.jsf?num=T-540/15>



4. On 16 February 2021, the Council adopted its confirmatory decision. Therein, it reassessed its position and identified further documents - seven documents in total - as falling within the scope of the complainant's request.

5. The Council granted full access to one document, which contains the positions of the three institutions at the beginning of trilogue negotiations.

6. It granted partial access to the remaining six documents, including documents ST 12384/2020 and ST 12384/2020 REV1. The Council explained that it redacted⁵ the Council's negotiating strategy for those parts of the legislative text on which no agreement has yet been found with Parliament in the ongoing negotiations. The Council argued that, should information on the possible areas where the Council might be flexible be disclosed, pressure would increase for the Council to concede on some points before agreement was reached on the overall balance of the whole package. As Parliament does not share its negotiating strategy with the Council, disclosure would lead to an asymmetric situation.

7. The Council also noted that the General Court in *De Capitani* did not rule out the possibility for the institutions to refuse access to legislative documents, in order to protect the decision-making process in the context of ongoing trilogues.⁶ The Council further took the view that there was no overriding public interest in full disclosure. The arguments put forward by the complainant in his confirmatory application were based on general considerations that could not provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant full access.

8. The complainant turned to the Ombudsman on 19 February 2021.

The inquiry

9. The Ombudsman opened an inquiry into the complaint that the Council wrongly refused full public access to the requested documents.

10. In the course of the inquiry, the Ombudsman's inquiry team inspected unredacted copies of the six documents at issue.

11. The Ombudsman also received the Council's written reply on the complaint and the comments of the complainant on the written reply.

12. The Ombudsman's inquiry team then inspected additional documents held by the Council on the trilogue negotiations in question.

⁵ Based on Article 4(3), first subparagraph, of Regulation 1049/2001.

⁶ Para. 112.



Arguments presented to the Ombudsman

By the Council

13. In its written reply to the Ombudsman, the Council made three main points:

14. First, the Council argued that internal documents drawn up as part of preliminary consultations within the Council's preparatory instances, with the aim of forming the positions and negotiation strategy to be pursued by the Council in an upcoming trilogue with Parliament and the Commission, should not be treated in the same way as documents used as a basis for a trilogue meeting and which reflect the provisional compromises reached by the co-legislators.

15. Second, the Council considered that the General Court's reasoning in *De Capitani* clearly concerned documents drawn up in the framework of ongoing trilogues and which were shared between the co-legislators.

16. Third, the Council clarified that it had not refused access to the whole content of the requested documents solely because they were not shared as such with Parliament. Instead, it has given access to all those points for which significant progress had been made in the trilogue negotiations and for which provisional compromises had been reached, including parts revealing the Council's previous negotiation positions and the evolution of the Council's approach on those points.

By the complainant

17. The complainant, in his comments to the Council's written reply, challenged in particular the Council's argument that releasing information about its trilogue preparation would put it at a disadvantage vis-a-vis Parliament. This, in the complainant's view, wrongly assumes that there is an 'information level-playing field' between Council and Parliament. Parliament votes on specific amendments of the Commission proposal, and the results are made public. This implies that anyone, including the Council, is able to determine how large the majority or minority for a certain amendment was. The equivalent - knowing how many Member States supported a certain amendment in the Council - is non-existent.

18. The complainant also considers that the Council's arguments would suggest that the extent to which the Council is able to withstand pressure depends on the amount of information that is public. However, the Council is made up of professional and experienced politicians and diplomats, who, in the complainant's view, are perfectly capable of deciding whether to withstand pressure from non-governmental organisations, lobbyists or other interest groups. On the contrary, in order to have a proper public debate about a legislative file being debated in trilogues, it is of utmost importance that the public knows which Member States are in favour of certain proposed changes



to the Commission proposal. For citizens to hold their national politicians to account, they need to know what their Member States are doing in Brussels.

The Ombudsman's assessment

The importance of trilogue transparency

19. Trilogues refer to informal meetings between Parliament, Council and the Commission. They aim at reaching agreement on a set of amendments acceptable to Parliament and Council on a particular legislative file. Trilogue meetings are not held in public and the agreements reached in those meetings are subsequently adopted, often without substantive amendments, by the co-legislators.

20. In view of their nature, the General Court found in its *De Capitani* ruling of 2018 that trilogues constitute an integral part of the legislative process,⁷ and that trilogue documents are related to legislative procedures and cannot, in principle, be treated differently from other legislative documents.⁸ The General Court was seized on the matter, after Parliament refused access to the provisional compromises found in ongoing negotiations, claiming that their disclosure would actually, specifically and seriously undermine the ongoing decision-making process in question.⁹

21. The Court stressed in its judgment that, in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public. If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens' democratic rights.¹⁰

22. The Court further noted that, 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 reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure. The Court found that nothing in the *De Capitani* case file suggested that, as regards the legislative procedure in question, Parliament 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 an amendment to draft legislation.¹¹

⁷ Para. 73.

⁸ Para. 74.

⁹ Article 4(3) of Regulation 1049/2001.

¹⁰ Para. 98.

¹¹ Para. 99.



The nature of the documents at stake in this inquiry

23. The inspection of unredacted copies of the documents at stake in this inquiry showed that all six documents were prepared in view of upcoming trilogue negotiations. Each document contains a table with four columns, which set out the positions of the three institutions at the beginning of trilogue negotiations, as well as a fourth column reserved for compromise texts or comments.

24. The Ombudsman's inquiry team confirmed that three of these six documents are so-called 'Working (WK) documents', which were circulated by the German Presidency of the Council to the responsible Council Working Party. In these documents, the Presidency proposes to Working Party members a revised negotiating mandate to be discussed during the upcoming Working Party meeting.

25. The remaining documents are so-called 'Standard (ST) documents', which were circulated by the Council General Secretariat to Coreper. They invite Coreper to endorse the compromise text proposed by the Working Party. One of these documents also asks Coreper for guidance on outstanding issues.

26. In each of these documents, the Council redacted parts of the fourth column. The Ombudsman's inquiry team confirmed that the redacted parts contain the Council's strategy - its 'red lines', areas where the Council might be flexible, as well as fall-back options for the Council - in its ongoing negotiations with Parliament. For example, they mandate the Presidency to defend the Council's position on a certain article or recital, to concede on its position in other areas (if needed to reach an overall agreement), or to propose alternative wording in relation to certain articles or recitals, should Parliament show flexibility during the meetings. In short, the Council redacted its negotiating strategy as regards those parts of the legislative text for which agreement had yet to be found. The redacted parts do not contain the positions of individual Member States.

27. In contrast, the Council released those parts of the fourth column where provisional compromises had been reached with Parliament, including the Council's negotiating strategy on these points.

28. In its written reply to the Ombudsman, the Council took the position that the nature of the documents at stake in this inquiry is different from that of the documents in *De Capitani*. While *De Capitani* concerned "documents shared between the co-legislators", this case would be about "internal documents drawn-up as part of preliminary consultations within the Council's preparatory instances only so as to form the positions and negotiation strategy to be pursued by the Council in an upcoming trilogue".

29. The Ombudsman notes that two different types of documents are at stake in this inquiry, drawn up at different stages in the formation of a revised Coreper mandate: WK documents and ST documents, as set out above in paragraphs 24 and 25. The Ombudsman considered that, while the relevant WK documents could indeed be considered "internal preparatory documents", the ST documents



would not be, if they were, at the time of the refusal to grant access, approved by Coreper and shared with Parliament.

30. The Ombudsman therefore asked the Council to inspect additional documents, namely the “[four-column documents that the Council shared with Parliament during the trilogue negotiations in question, including the dates on which these documents were transmitted]”, so as to understand what the Council had shared with Parliament at the time of the refusal to grant full access.

31. Following this request, the Council provided the Ombudsman with three additional four-column documents. It explained to the Ombudsman that these documents were “shared with the European Parliament ahead of the first, second and third trilogue on this file”. The Ombudsman’s inquiry team examined these additional documents. It found that they contain, in their fourth column, the provisional compromises found between the co-legislators, as well as the evolving positions, proposals and comments of the three institutions expressed during trilogue meetings.

32. The Ombudsman’s inquiry team then compared these four-column documents with the six documents at issue in this inquiry. This review confirmed that the Council had indeed not shared the redacted parts with Parliament at the time of the refusal to grant full access.

33. In light of this, the Ombudsman agrees with the Council that the nature of the six documents at stake in this inquiry is different from that of the four-column documents shared between the co-legislators in *De Capitani*.

Application of the exception in Article 4(3), first subparagraph, of Regulation 1049/2001

34. In view of the nature of the six documents and, in particular, of the redacted parts of their fourth column, the Ombudsman assessed whether it was reasonable for the Council to refuse full public access based on the exception in Regulation 1049/2001 that relates to the protection of an ongoing decision-making process.¹²

35. In essence, the Council argued that fully releasing the six documents in question would put it in an asymmetric situation vis-a-vis Parliament, as its negotiation strategy would be exposed.

36. The Council considered its position reconcilable with the General Court’s ruling in *De Capitani*. First, the Council stressed that the General Court in *De Capitani* recognised that, “prior to the entry of the compromise text into the fourth column of trilogue tables, discussions may take place during meetings for the preparation of such text between the various participants, so that the possibility of a free exchange of views is not called into question”.¹³ Second, the Council referred to the General Court’s statement that it remains open to the institutions

¹² Article 4(3), first subparagraph, of Regulation 1049/2001.

¹³ Para. 106, emphasis added.



to refuse, on the basis of the exception in Regulation 1049/2001 which concerns the protection of an ongoing decision-making process, “to grant access to certain documents of a legislative nature in *duly justified cases*”.¹⁴

37. The Ombudsman takes the view that, if a degree of confidentiality is necessary during trilogue negotiations so as to protect the “*free exchange of views*”, the internal deliberations of the Council aimed at preparing itself for that free exchange of views should be protected as well, as long as relevant negotiations are ongoing. The Ombudsman acknowledges that releasing details on the Council’s negotiating strategy, while negotiations on the relevant parts of the legislative text are ongoing, could seriously undermine its negotiating position and, as a consequence, the ongoing decision-making process.

The existence of an overriding public interest

38. The General Court in *De Capitani* considered that the public, in a democratic system, should be able to participate in trilogue negotiations, so as to influence the legislative process at this crucial stage. To this end, the public must be given access to the positions, proposals and/or comments that the institutions have put on the negotiating table, and to know the preliminary results of trilogue negotiations. This enables the public to participate in trilogue negotiations as an observer and to take part in the public debate regarding the ongoing trilogue.

39. However, the Court in *De Capitani* did not go so far as to say that the public should be in a position to know the negotiating strategy of the participants while relevant negotiations are ongoing.

40. The Ombudsman considers this to be reasonable. In her view, it strikes the proper balance between the democratic right of EU citizens to participate in ongoing trilogue negotiations and the legitimate interest of the institutions to conduct the negotiations. If each institution’s negotiation strategy, setting out red lines, areas where flexibility can be shown and fall-back options, were made public during a negotiation, this would imply that each negotiating party would also become aware of the other’s negotiating strategy while the negotiations are ongoing. This would undermine the negotiating strategies and ultimately undermine the negotiations. It is therefore essential to the proper conduct of negotiations that each party’s negotiating strategy is not disclosed via a public access to document request whilst relevant negotiations are ongoing.

41. In the light of the above, the Ombudsman does not identify an overriding public interest in granting public access to the Council’s negotiating strategy *at this stage in the negotiations*.

42. Having said that, once provisional compromises are found in trilogue meetings, the relevant parts of the documents, including the Council’s negotiating strategy on those parts, should be disclosed. That way, the public can scrutinise the Council’s negotiating strategy *ex post*, so as to hold the institution to account for its actions during the negotiations.

¹⁴ Para. 112, emphasis added.



Additional documents identified by the Council

43. The Council provided the Ombudsman in response to her second inspection request with three additional documents. The Council explained that *“those documents that are dated, include the 4-column documents shared with the European Parliament ahead of the first, second and third trilogue on this file”*.¹⁵

44. It is not clear to the Ombudsman why these three documents were not identified as falling within the scope of the complainant’s access to document request, which covered *all* documents related to the trilogue negotiations on motor vehicle emissions.

45. Having analysed the additional documents, the Ombudsman notes that they are the type of four-column documents at stake in *De Capitani* and, therefore, should have been fully disclosed upon request.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the Council now identifies the three additional four-column documents, which it shared with the Ombudsman, as falling within the scope of the complainant’s access to document request, or provides good reasons for why they do not. As these documents are the type of four-column document at stake in the *De Capitani* judgment, they should be fully disclosed upon request.

The Council of the EU is invited to inform the Ombudsman by 31 July 2021 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly
European Ombudsman

Strasbourg, 18/06/2021

¹⁵ Their content is described above in paragraph 31 and they are dated 6 October, 26 October and 1 December 2020.

[REDACTED]

From: [REDACTED]@gmail.com>
Sent: 26 April 2021 10:51
To: Euro-Ombudsman
Subject: Re: Complaint 360/2021/TE

Dear [REDACTED]

Thanks for your letter dated 21 April 2021, with a copy of the Council's reply to my complaint, and for the possibility to provide comments. Here are my comments:

The Council repeats the argument that releasing information about its preparation to the trilogues would put the Council at a disadvantage vis-a-vis the European Parliament. This assumes that there is an 'information level-playing field' between the Council and the Parliament. This is not the case. The European Parliament determines the position which it brings to trilogues far more transparently than the Council does. The Parliament votes on specific amendments of the Commission proposal, and the results are made public. In the case of the most controversial amendments, political groups often ask for a roll-call vote, so that one can see for each and every MEP how they voted. This means that anyone, including the Council, is able to determine how large the majority or minority was for a certain amendment. It gives the Council an advantage over the Parliament, because a similar mechanism does not happen in the Council. While some general discussions between ministers are done in public, the public never sees which specific changes in the text allow the Council to reach consensus on a general approach. The equivalent - knowing how many member states supported a certain amendment - is therefore non-existent.

Point 15 seems to argue that there is a risk that member states would "become more entrenched in their positions" if their positions were made public. This is the world upside down. 'The Council' consists only by virtue of the existence of its members, namely the ministers and diplomats representing member states. Member states, in particular their democratically elected governments, should be courageous enough to defend the positions they take in the Council. The general public understands that compromises are necessary in a Union of 27 member states with diverse political backgrounds. And if they don't, it should be up to the members of the Council to explain this. Not to hide behind some fictional risk of becoming more entrenched in their positions.

Point 16 is also invalid. The Council argues that if its flexibilities are made public "pressure could increase for the Council to concede on some of its elements before reaching the overall balance on the whole package". This suggests that the extent to which Council is able to withstand pressure depends on the amount of information that is public. The Council is made up of professional and experienced politicians and diplomats, who are perfectly capable of deciding whether to withstand pressure from NGO's, lobbyists or other interest groups. The amount of information these groups exercising pressure have, does not determine their success.

However, in order to have a proper public debate about a legislative file being debated in trilogue, it is actually of the utmost importance that the public knows which member states are in favour or not of certain proposed changes to the Commission proposal. Citizens need to know what their member states are doing in Brussels, so that they can hold their politicians to account. The Court has also referred to this in the De Capitani ruling: "If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information". I believe that the level of detail should include the documents that inform us of how the Council arrives at its position.

Not having read the redacted parts, I am unable to determine the risk of their release undermining the decision-making process. The risk referred to in the Regulation should be "reasonably foreseeable and not

purely hypothetical". The Court said in the De Capitani ruling: "Although it has been recognised in the case-law that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure". I therefore would like to ask the Ombudsman to assess whether that is the case.

Point 18 seems to be a reply to my comments about the Council's initial stage. While formally correct, this reply ignores the fact that a full rejection of the entire application in the first instance, which then needed to be dealt with again at a confirmatory stage, had the de facto effect of delayed access to information. It is possible that institutions use the 2 x 15 working days deadlines to keep documents secret slightly longer, in the hope that in the meantime the trilogue has reached its conclusions and public pressure is no longer possible. I cannot prove that this was the case here, but the Council's reply has also not alleviated that suspicion in me.

I'm looking forward to the Ombudsman's final decision on the matter.

All the best,

On Wed, Apr 21, 2021 at 10:36 AM Euro-Ombudsman <EO@ombudsman.europa.eu> wrote:

Dear Sir,

Please find attached a letter from the European Ombudsman's Office regarding your complaint.

Best regards,



European Ombudsman

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