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From:	Ms Emily O'REILLY, European Ombudsman
date of receipt:	28 February 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Complaint 1499/2021/TE to the European Ombudsman

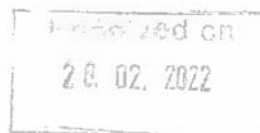
Delegations will find in the Annex a copy of a letter from the European Ombudsman to the Secretary-General of the Council of the European Union concerning complaint 1499/2021/TE, together with her Recommendation.

Personal data have been redacted



European Ombudsman

Emily O'Reilly
European Ombudsman



IN 002062 2022
02.03.2022

Mr Jeppe Tranholm-Mikkelsen
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Strasbourg, 28/02/2022

Complaint 1499/2021/SF

Subject: Recommendation in the above case on the Council of the EU's refusal to give full public access to documents related to the discussions on the 'Digital Markets Act' proposal [SGS 21/002866]

Dear Mr Tranholm-Mikkelsen,

Please find enclosed my recommendation in the above case.

My recommendation is as follows:

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

In accordance with the Statute of the European Ombudsman, the Council shall send a detailed opinion before 30 May 2022.

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

Yours sincerely,



Emily O'Reilly
European Ombudsman

Enclosure:

- Recommendation to the Council

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European Ombudsman

Emily O'Reilly
European Ombudsman

Recommendation

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)

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

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 access to the identified documents, arguing that their full disclosure would jeopardise an ongoing decision-making process.

Keeping the public informed about the progress of legislation is a legal requirement. It is crucial for citizens to be able to exercise their treaty-based right to participate in the democratic life of the EU. While there may be a reluctance by some Member States to disclose that their position has evolved in the course of a particular legislative process, being willing to change position, and achieve a compromise, is a central part of democratic decision making.

In this case, the inspection carried out by the Ombudsman inquiry team revealed that the Council did not disclose any Member State positions on the legislative proposal in response to the complainant's request. The Ombudsman found that the Council had not demonstrated that disclosing the documents in question would seriously affect, prolong or complicate the proper conduct of its decision-making.

The Ombudsman therefore considers that the Council's refusal to grant public access to the positions of Member States constituted maladministration. She recommends that the Council grant full public access to the documents at issue.

Background to the complaint

1. On 15 December 2020, the European Commission proposed a regulation on contestable and fair markets in the digital sector (Digital Markets Act).² The

¹ Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&loc=OJ%3A%3A2021%3A253%3ATOQ

² Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>



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 established. The proposal imposes **certain obligations**³ on large online platforms, the so-called '*gatekeepers*⁴', to regulate their behaviour.

2. In March 2021, the complainant asked for public access to documents held by the Council reflecting Member States' initial comments and questions within the scope of discussions on the Digital Markets Act proposal.

3. The Council identified 26 working documents as falling within the scope of its request, but refused access arguing that public disclosure would affect the negotiations within the Council, thereby undermining the on-going decision-making process.⁵

4. In April 2021, the complainant requested that the Council review its decision (by making a 'confirmatory application'). He considered that the Council had not explained how disclosure would undermine the decision-making process and argued that it was a basic principle of democracy that citizens could participate in the legislative process.

5. The Council replied that it had identified two further documents as falling within the scope of the request (28 working documents in total). It granted full public access to five documents, partial access to ten documents and refused access to the remaining 13 documents. The Council maintained that the full disclosure of those documents would seriously undermine the ongoing decision-making process.

6. Dissatisfied with the outcome of the review, the complainant turned to the Ombudsman on 25 August 2021.

The inquiry

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

8. In the course of the inquiry, the Ombudsman inquiry team obtained copies of the non-redacted versions of the documents and met with officials of the General Secretariat of the Council with a view to obtaining clarifications on the Council's reasons for refusing full public access. The Ombudsman then provided the complainant with a report on this meeting and, subsequently, received the complainant's comments.

³ More information available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

⁴ Gatekeepers are large online platforms that meet certain criteria such as a strong economic position, linking a large user base to a large number of businesses, and that has a stable market position, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

⁵ Article 4(3) 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:32001R1049>



Arguments presented to the Ombudsman

Complainant's arguments

9. The complainant stated that, in a democratic society, it is the task of journalists to report about ongoing legislative processes. However, it could not fulfil this duty without access to the relevant information.
10. It was argued that it is a basic principle of democracy that citizens could affect the negotiation and exert influence in an ongoing legislative process. The Council's refusal to grant access to the positions that Member States take denies EU citizens their democratic right to scrutinise how their national governments deal with the proposed law.
11. The complainant also considered that the Council did not explain how the disclosure of the Member States' position would seriously undermine its decision-making process.

Council's arguments

12. The Council argued that full disclosure of the documents was likely to *"specifically and actually"* undermine its decision-making process and that the likelihood of that interest being undermined was *"reasonably foreseeable and not purely hypothetical"*.
13. It explained that, at the time of the request, the responsible Working Party on Competition was engaged in technical discussions on the legislative proposal of the Commission.
14. The requested documents are preparatory documents, drawn up for internal use. They contain Member States' first preliminary comments and requests for clarification in order to understand the scope of the proposal. These comments and questions are neither exhaustive nor final and were not meant to become public at the stage of analysing the proposal. Disclosure at such an early stage could lead to misinterpretation by the public and put into question the choices Member States may make at a later stage. In addition, it would seriously undermine the mutual trust and confidence that allow the Working Party to perform its tasks.
15. The Council noted that the proposal for the Digital Markets Act was technically complex and extremely sensitive. It considered that full disclosure could lead to *"unprecedented lobbying"* by online platforms, which could *"diminish the chances that discussions take place in a sound and effective manner"* thereby seriously affecting its decision-making process. Moreover it would put pressure on Member States to concede at the political level before having reached an overall balance on the proposal.
16. Finally, the Council considered that the legitimate interest in a public debate on legislative proposals cannot automatically override the legitimate need to protect its decision-making process and that the complainant's arguments are of a general nature.



The Ombudsman's assessment leading to a recommendation

17. The inspection revealed that the 23 documents at issue in this inquiry contain Member States' preliminary comments, positions, questions and some drafting suggestions on the Digital Markets Act proposal. They date from February to March 2021. All documents were recorded as 'Working documents'. The Council did not disclose any Member State positions (drafting suggestions, comments and questions), but granted access to the text of the Commission's legislative proposal only.

18. Under the EU Treaties, citizens have the "right to participate in the democratic life of the Union".⁶ Therefore, all EU decisions must be taken "as openly and as closely as possible to the citizens".⁷ This is particularly important when EU institutions act in their "legislative capacity".⁸ The principle of legislative transparency is enshrined in the EU Treaties⁹ and is reflected in the EU law on public access to documents, which states that "legislative documents" must be directly accessible to the public, unless their disclosure would undermine one or several public or private interests explicitly protected.¹⁰ The possibility for citizens to scrutinise all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights.¹¹

19. The documents at issue in this inquiry are clearly legislative documents, to which the highest standards 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.¹²

20. The Council argued that release of the requested documents - at the time of the confirmatory decision, when the working party was engaging in technical exchanges to further understand the Commission's proposal - would have undermined the ongoing decision-making process.¹³

21. In particular, the Council took the view that 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.

⁶ Article 10 of the Treaty on European Union (TEU).

⁷ Articles 1 and 10(3) TEU.

⁸ Recital 6 of Regulation 1049/2001.

⁹ Article 15(2) TFEU.

¹⁰ Article 12(2) and Recital 6 of Regulation 1049/2001.

¹¹ See, to that effect, judgments of the Court of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, para. 46: <https://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en>, and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para. 33: <https://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN>

¹² See judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 100.

¹³ Article 4(3) of Regulation 1049/2001.



22. The Ombudsman notes that, in accordance with well-established case-law¹⁴, the preliminary nature of discussions in Council working parties relating to a Commission proposal does not, in itself, justify the application of the exception set out in Article 4(3) of Regulation 1049/2001. That provision makes no distinction “according to the state of progress of the discussions”. The preliminary nature of the ongoing discussions and the fact that the Council has not yet reached its final position does not establish that the Council’s “decision-making” process will be seriously undermined. Rather, by its nature, a legislative proposal is designed to be discussed and debated and “public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently”.¹⁵

23. In view of this, the Ombudsman is not convinced by the Council’s argument that disclosure of Member States’ initial questions and comments was likely to risk misinterpretation by the public.

24. The Council further argued that full disclosure of the requested documents was likely to affect the discussions within the working party and thereby impede the Council’s ability to reach an agreement. It emphasised that, at the time of the Council’s confirmatory decision, members of the Working Party on Competition were still seeking technical clarifications from the Commission to ensure their correct understanding of the legislative proposal, given the complexity of the file. Disclosure of such preliminary comments and views of Member States would increase the pressure on Member States later to concede at the political level before reaching the overall balance on the proposal.

25. Having inspected non-redacted versions of the requested documents, 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.

26. The Ombudsman appreciates that there may be reluctance by some Member States to disclose that they have changed position in the course of discussions. However, being willing to change position and achieve a compromise is a normal and even an expected part of democratic debate. If citizens are to be able to exercise their democratic rights to scrutinise and participate in this democratic debate, they must be able to follow the debate as it develops and have timely access to all relevant information.¹⁶

27. The Council further claimed that disclosure at such an early stage was likely to lead to unprecedented lobbying, given the technical complexity and extreme sensitivity of the proposal.

¹⁴ See judgments of the General Court of 22 March 2011, *Access Info Europe v Council*, T-233/09, para. 69, 76, and of the Court of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para. 60

¹⁵ para. 69.

¹⁶ See judgment of the General Court of 22 March 2011, *Access Info Europe v Council*, T-233/09, para. 69



28. EU case-law recognises that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process. However, 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 would be substantially affected owing to that external pressure.¹⁷

29. Lobbying, be it by professional groups, consumer groups or members of the public, is an expected and even welcome aspect of the legislative process. It reflects the fact that the public, and specific interest groups, have a legitimate interest in following and participating in the legislative process. For all interests to be in a position to share informed views during ongoing legislative debates, however, it is of particular importance that there is, to the greatest extent possible, a level-playing field in terms of access to information.

30. While the Ombudsman appreciates that, in this case, there *is* external pressure and that significant lobbying *is* taking place, she considers that the Council has not explained why it considers that external pressure would be *further increased* due to disclosure of these documents.

31. Even if it were increased, she considers that the Council has not established, in this case, that it is reasonably foreseeable that this external pressure would seriously undermine its decision-making. It has not differentiated potential future lobbying from the lobbying that already occurs or suggested that the latter has negatively impacted the process.

32. To the contrary, 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 the legitimacy of that process.

33. In light of the above, the Ombudsman finds that the Council's refusal to grant full public access to Member States' positions on the draft Digital Markets Act constituted maladministration. She recommends that the Council now discloses the requested documents in full.

34. The Ombudsman notes that the complainant asked for access to the Member State positions on the legislative proposal at an early stage in the negotiations, that is, several months *before* the Council adopted its general approach on the file in November 2021. *Timely* access to legislative documents is crucial for citizens to exercise their Treaty-based right to participate in the democratic life of the Union. She again calls on the Council to make available legislative documents at a time that will allow the public to express their views on the different options discussed.

35. Finally, the Ombudsman notes that all requested documents are recorded as "Working documents". Working documents are, however, not automatically

¹⁷ See judgment of the General Court of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, para. 99



listed in the Council's public register at the time they are drafted. Instead, the Council's General Secretariat publishes every few months a standard document in the public register, which contains a list of working documents that have been distributed to the respective working party. Working documents thus have no separate entry in the Council's public register of documents and are made available only with some delay. The Ombudsman has already identified this practice as problematic in previous strategic inquiries concerning the transparency of the Council's legislative process¹⁸ and the transparency of the Council's decision-making during the COVID-19 crisis¹⁹. She therefore **reiterates her suggestion from her previous inquiries** that the Council should list in its public register all types of documents at the time they are issued, regardless of their designation and whether it is possible to access the document (or parts thereof) or not.

Recommendation

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

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

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 30 May 2022.



Emily O'Reilly
European Ombudsman

Strasbourg, 28/02/2022

¹⁸ Own-initiative inquiry OI/2/2017/TE Into the transparency of legislative decision making in the Council of the EU. All inquiry-related documents are available here:
<https://www.ombudsman.europa.eu/en/case/en/49461>

¹⁹ Own-initiative inquiry OI/4/2020/TE on the transparency of decision making by the Council of the EU during the COVID-19 crisis. All inquiry-related documents are available here:
<https://www.ombudsman.europa.eu/en/decision/en/139715>