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COVER NOTE

From:	Ms Emily O'Reilly, European Ombudsman
date of receipt:	21 February 2025
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
Subject:	Complaint 444/2024/PVV to the European Ombudsman - Decision

Delegations will find in Annex a copy of a letter dated 18 February 2025 and addressed by the European Ombudsman to Ms. Thérèse Blanchet, Secretary-General of the Council of the European Union, accompanied by a decision on complaint 444/2024/PVV.

Further the complaint by the applicant, the European Ombudsman decided that no further inquiries are justified.

Personal data have been blanked out.



Emily O'Reilly

European Ombudsman

Ms Thérèse Blanchet
Secretary-General
Council of the European Union

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Strasbourg, 18/02/2025

Complaint 444/2024/PVV

Decision in the above case on how the Council of the EU dealt with a request for public access to documents concerning its deliberations on the application of the 'rule of law procedure' in Hungary [your reference for the confirmatory application - 02/c/01/24]

Dear Ms Blanchet,

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:

No further inquiries are justified.

Yours sincerely,



Emily O'Reilly
European Ombudsman

Enclosure: Decision on complaint 444/2024/PVV

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Emily O'Reilly

European Ombudsman

Decision

on how the Council of the EU dealt with a request for public access to documents concerning its deliberations on the application of the 'rule of law procedure' in Hungary (case 444/2024/PVV)

The complainant asked the Council of the EU to grant public access to documents relating to its deliberations on the application of the conditionality mechanism for protecting the EU budget against breaches of the rule of law in Hungary. The Council identified 39 documents as falling within the scope of the request. It granted access to most of them but refused to disclose parts of three documents. In doing so, it invoked an exception under the EU legislation on public access to documents, arguing that disclosure could undermine court proceedings.

The Ombudsman inquiry team met with representatives of the General Secretariat of the Council and received additional confidential explanations as regards the potential risk to a fair trial. In light of these additional explanations and the content of the documents, the Ombudsman took the view that it was reasonable for the Council to invoke the exception for the protection of court proceedings. In view of this and in light of the wide access granted by the Council, the Ombudsman considered that no further inquiries were justified. Considering that the rule of law is one of the founding values of the EU, the Ombudsman however pointed out that the Council could have set out to the complainant, in more detail, how it balanced the protection of the court proceedings with the principle of transparency.

Background to the complaint

1. The rule of law is one of the founding values of the EU.¹ In 2021, the Conditionality Regulation² or 'conditionality regime' was adopted as a tool to ensure respect for the rule of law in the EU Member States.³ The conditionality regime allows the Council of the EU, upon a proposal of the European Commission, to adopt measures intended to protect the EU's financial interests against breaches of the rule of law principles.

¹ Article 2 of the Treaty on European Union.

² Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv:OJ.LJ.2020.433.01.0001.01.ENG&toc=OJ.LJ.2020.433:TOC>.

³ For more information, see: https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en.

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2. In December 2022, the Council adopted for the first time an Implementing Decision⁴ under the Conditionality Regulation addressed to Hungary (hereafter 'the Council Implementing Decision'). Concretely, the Council decided to suspend about €6.3 billion in EU funds attributed to Hungary for the protection of the EU budget in light of breaches of the principles of the rule of law regarding public procurement and anti-corruption investigations and prosecution.⁵ In December 2023 and again in December 2024, the Commission decided not to propose to the Council to lift these measures.⁶

3. One of the measures⁷ taken to protect the EU's financial interests is the suspension of EU funding for Hungarian public interest trusts or any entity maintained by such a public interest trust. The Commission and the Council are concerned about the lack of transparency in the management of EU funds by these trusts and about the fact that public procurement and conflict of interest rules do not apply to them.⁸ In March 2023, six universities/higher education institutions maintained by Hungarian public interest trusts brought an action for annulment⁹ to the Court of Justice of the EU (CJEU) against the relevant provision of the Council Implementing Decision.

4. Against this background, in November 2023, the complainant submitted a request to the Council for public access to documents¹⁰. More specifically, the complainant requested access to documents that contain information about the deliberations in the preparatory bodies of the Council on the Commission's proposal to adopt measures under the

⁴ Council Implementing Decision 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D2506>. Upon the Commission proposal of 18 September 2022 for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0485>.

⁵ For more information, see: <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

⁶ Commission Decision of 13.12.2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, available at: https://commission.europa.eu/document/83f08b3a-bf4a-4462-a361-88d446924526_en; Commission Decision of 16.12.2024 pursuant to Article 7(2) of Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, concerning a written notification from Hungary with regard to Article 2(2) of Council Implementing Decision (EU) 2022/2506 of 15 December 2022, available at: https://commission.europa.eu/document/8003e1ad-8e79-4238-bf76-af1fcd2b5efe_en. As long as Hungary has not addressed all rule of law concerns under the conditionality regime, it cannot claim disbursements under the Recovery and Resilience Facility either.

⁷ Article 2(2) of Council Implementing Decision 2022/2506.

⁸ Consideration (11) to Council Implementing Decision 2022/2506.

⁹ Case T-115/23, application available at

<https://curia.europa.eu/juris/document/document.jsf?docid=273772&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=13176582>; Case T-132/23, application available at <https://curia.europa.eu/juris/document/document.jsf?docid=275186&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=13176615>; Case T-133/23, application available at <https://curia.europa.eu/juris/document/document.jsf?sessionId=2A7D5D1EB8D80B6CC4A89430F3E259FA?text=&docid=275159&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=268780>; Case T-138/23, application available at

<https://curia.europa.eu/juris/document/document.jsf?docid=274830&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=13176662>; Case T-139/23, application available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=275197&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=13461926>; Case T-140/23, application available at <https://curia.europa.eu/juris/document/document.jsf?docid=275179&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=13176698>.

¹⁰ 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>.

Conditionality Regulation in relation to the rule of law situation in Hungary (between September and December 2022).

5. In January 2024, the Council sent its reply. It identified 39 documents as falling within the scope of the request and granted full or very wide partial access to 35 of them. In addition, the Council gave partial access to an opinion of the Council Legal Service on the Commission's proposal and it refused access to three working documents in their entirety. These working documents (WK12831/2022, WK12831/2022 ADD1 and WK15657/2022) contain replies of the Commission to questions of Member State representatives in the Council's Budget Committee. In these replies, the Commission clarified a number of important procedural aspects relating to the handling of the proposal in the Council and its preparatory bodies.

6. The complainant asked the Council to reconsider its refusal to grant (full) access to the opinion of the Council Legal Service and to the three working documents (by making a 'confirmatory application').

7. In February 2024, the Council adopted a decision on the complainant's confirmatory application. The Council gave full access to the opinion of the Legal Service and partial access to the three working documents. In redacting some parts of the working documents, the Council invoked an exception under the EU legislation on public access to documents, arguing that disclosing the documents in their entirety could undermine the protection of court proceedings¹¹.

8. Dissatisfied with the Council's confirmatory decision on their access request, the complainant turned to the Ombudsman.

The inquiry

9. The Ombudsman opened an inquiry into the Council's decision to grant only partial access to the three working documents ('documents at issue') under Regulation 1049/2001.

10. In the course of the inquiry, the Ombudsman inquiry team inspected the documents at issue. The Ombudsman also invited the Council to provide additional views on the complaint.

11. The Council did not provide additional views but the Ombudsman inquiry team met with representatives of the General Secretariat of the Council to obtain further clarifications on the redactions in the working documents.

12. The Ombudsman then shared the report on the meeting¹² with the complainant who provided comments.

¹¹ Article 4(2), second indent of Regulation 1049/2001. An additional redaction of personal data is not contested by the complainant and does therefore not fall within the scope of the Ombudsman's inquiry.

¹² Available at: <https://www.ombudsman.europa.eu/doc/inspection-report/199784>.

Arguments presented

By the Council

13. Taking into account the consultation of the Commission on disclosure of the documents at issue, the Council argued that the redacted elements are “at the heart” of the cases brought before the CJEU by six universities/higher education institutions maintained by Hungarian public interest trusts. Although the documents at issue were not drawn up for the purpose of these specific court proceedings, the principle of equality of arms would be undermined if they were fully disclosed.¹³

14. Indeed, the working documents include comments of the Commission referring to public interest trusts as well as to other remedial measures. In the Council’s view, these redacted comments of the Commission were “preliminary exchanges at technical level” without political endorsement. They do not necessarily represent an official or final position of the Commission but rather “reveal a preliminary and internal position of the institution concerned on contentious issues which are at the core of the legal dispute in ongoing court proceedings”.

15. During the meeting with the Ombudsman inquiry team, the representatives of the General Secretariat of the Council added that the European Parliament had in the meantime also brought an action for annulment to the CJEU¹⁴ against the Commission’s Decision of December 2023¹⁵ to make around €10.2 billion in funds available to Hungary under the Common Provisions Regulation¹⁶. According to the representatives of the General Secretariat of the Council, “although the latter case before the CJEU does not concern the Council’s Implementing Decision, certain elements contained in the documents are relevant and their release could negatively impact the position of the defendant in those proceedings and the author of the [requested] documents, the Commission”.

16. The representatives of the General Secretariat of the Council provided the Ombudsman inquiry team with further confidential explanations regarding the scope of the relevant court proceedings and how these proceedings could be undermined if the requested documents were to be disclosed in their entirety.

¹³ In this regard, the Council referred to Judgment of 15 September 2016, *Philip Morris v Commission*, T-18/15, paragraph 64: <https://curia.europa.eu/juris/liste.jsf?language=en&num=T-18/15> and Judgment of 28 September 2022, *Leino-Sandberg v Parliament*, T-421/17 RENV, paragraph 40: <https://curia.europa.eu/juris/liste.jsf?language=en&id=ALL&num=T-421/17%20RENV>.

¹⁴ Action brought on 25 March 2024 – *Parliament v Commission*, Case C-225/24, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?url=CELEX:62024CN0225>.

¹⁵ Commission Decision on the approval and signature of the Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition ‘3. Effective application and implementation of the Charter of Fundamental Rights’ with regard to the deficiencies in judicial independence in Hungary of 13 December 2023, C(2023)9014, available to request at: [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2023\)9014&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)9014&lang=en).

¹⁶ Regulation 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, available at: <https://eur-lex.europa.eu/ellreg/2021/1060/oj>.

17. In its confirmatory decision, the Council considered that there was no overriding public interest in disclosure of the redacted elements. During the meeting, the representatives of the General Secretariat of the Council clarified that there would not be any additional value for the public debate in disclosing the redacted information. Indeed, *"the very specific and preliminary considerations related to the public interest trusts are at the core of the ongoing court proceedings and not at the core of the public debate regarding the rule of law in Hungary"*.

By the complainant

18. The complainant argued that the Council was manifestly wrong in applying the exception for the protection of court proceedings. More specifically, the complainant said that documents that were not drawn up solely for the purpose of court proceedings could only undermine court proceedings if their disclosure would reveal internal positions and would oblige the institution to defend itself against those positions.¹⁷ In the complainant's view, the requested documents do not concern such internal positions, since the Commission communicated them to a separate entity - the Council. In addition, they considered that *"these positions were given by the Commission upon official request from the Council, and while they may not be 'final' [...], they constitute the official position of the Commission at the time"*.

19. The complainant further argued that even if the requested documents fell under the exception, the Council had not sufficiently substantiated the risk to the court proceedings at issue. Although the Council claimed that the redacted information concerns contentious issues at the core of the ongoing court proceedings, it did not specify those issues, nor did it claim that the redacted information contradicts the Council Implementing Decision challenged before the Court.

20. In addition, some of the redactions appeared arbitrary to the complainant. Firstly, although the Council stated that the redacted elements are *"comments of the Commission"*, some Member States' questions had been redacted, too. Secondly, the complainant indicated that one of the redactions did not seem to be related to public interest trusts since the redaction concerned part of a reply to a question about judicial independence in Hungary. In their comments on the meeting report, they added that by referring to the CJEU case brought by Parliament, the Council implicitly acknowledged that some redactions relate to the question of judicial independence and that the Council should have mentioned this in its confirmatory decision.

21. Lastly, the complainant found that there is an overriding public interest in disclosure. Since the documents concern the first ever procedure under the Conditionality Regulation, the public has the right to know the details of the deliberations preceding the Council's decision. Moreover, the stakes are high in the court cases as the prohibition to enter into legal commitments with public interest trusts excludes a large number of Hungarian universities from the Erasmus and Horizon programmes while the case brought by Parliament concerns €10.2 billion in cohesion funds. Therefore, the complainant considered that *"any information that contributes to the understanding of those cases and their context is undoubtedly valuable for the public debate"* and that *"it cannot be true that this information would not have any additional value for the public debate"* if it is so central to these court cases.

¹⁷ Referring to *Leino-Sandberg v Parliament*, paragraphs 52-54.

The Ombudsman's assessment

22. For the court proceedings exception under Regulation 1049/2001 to apply, the documents at issue must either be drawn up for the purpose of specific court proceedings or have a relevant link¹⁸ to such proceedings.¹⁹ EU case-law also requires that an EU institution demonstrate that these court proceedings would be undermined by disclosure of the requested documents. More specifically, the exception is intended to protect the principle according to which there should be a fair balance between the opportunities afforded to the parties involved in litigation (principle of equality of arms²⁰) on the one hand and the sound administration of justice and the integrity of court proceedings on the other.²¹

23. The documents at issue contain replies of the Commission to questions of Member States, in the context of the Council's consideration of the Commission's proposal under the Conditionality Regulation. It is clear that these documents were not drawn up for the purpose of specific court proceedings.

24. In view of this, the Council is required to demonstrate an actual or specific risk to court proceedings arising from the documents' disclosure that is reasonably foreseeable and not purely hypothetical. For documents that are not drawn up for the purpose of specific court proceedings, the CJEU has stated that this risk could occur "if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending [...] proceedings"²².

25. According to the Council, disclosing the redacted information would reveal a preliminary and internal position of the Commission on the issues at stake in court proceedings brought by Hungarian universities/higher education institutions maintained by Hungarian public interest trusts against the Council Implementing Decision. In addition, as mentioned during the meeting of the Ombudsman inquiry team with the representatives of the General Secretariat of the Council, the Council considers that some of the elements contained in the documents are also relevant for the court proceedings brought by Parliament in relation to the Commission Implementing Decision under the Common Provisions Regulation.

26. During that meeting, the Ombudsman inquiry team obtained additional confidential explanations. The Council had not been able to share these explanations with the complainant, as this would have undermined the very interest the Council is aiming to protect by withholding the information.

¹⁸ See, for instance, Judgment of 24 January 2024, *Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) v Commission*, T-602/22, paragraph 58: <https://curia.europa.eu/juris/liste.jsf?num=T-602/22&language=EN>.
¹⁹ The proceedings in question can be pending or can cover instances where there is potential for litigation but in that case the proceedings must be imminent (*Veritas*, paragraph 58).

²⁰ A concept that has been created by the European Court of Human Rights in the context of the right to a fair trial (Article 6). Equality of arms requires that there be a fair balance between the opportunities afforded the parties involved in litigation.

²¹ Judgment of 6 February 2020, *Compañía de Tranvías de la Coruña, SA v Commission*, T-485/18, paragraph 38: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018TJ0485_RES. See also: *Philip Morris v Commission*, T-18/15, paragraph 56; *Leino-Sandberg v Parliament*, paragraph 38.

²² *Veritas v Commission*, paragraph 58. See also: *Compañía de Tranvías de la Coruña, SA v Commission*, paragraph 42.

27. The Ombudsman recognises the complainant's argument that the documents at issue could not constitute, strictly speaking, 'internal positions' from the Commission, as the documents were exchanged with the Council. The Ombudsman notes, in this regard, that the documents constitute replies from the relevant Commission staff to questions from Member State representatives in a Council preparatory body, the Budget Committee, when considering the Commission's proposal for the Council Implementing Decision. However, in light of their content, the replies reflect the underlying internal technical analysis of the relevant Commission staff at the time. The Ombudsman therefore takes the view that it was reasonable for the Council to consider that the redacted elements in the three documents reveal a preliminary and internal position, closely connected to litigation pending regarding the Council Implementing Decision. In addition, some elements of these technical exchanges may be relevant in the ongoing court proceedings brought by Parliament.

28. Furthermore, the Ombudsman's review has confirmed that disclosure of the redacted elements in the documents at issue would afford privileged access for the applicants in the above-mentioned court proceedings to information relevant to the legal issues at stake. In light of the Council's confidential explanations as regards the potential risk to the equality of arms, and in light of the content of the documents, the Ombudsman considers that it was reasonable for the Council to rely on the court proceedings exception for the redactions.

29. Having said that, the Ombudsman finds that the Council should have elaborated its reasoning as regards the application of the court proceedings exception and the possible existence of an overriding public interest in disclosure in its confirmatory decision. Considering that the rule of law is one of the founding values of the EU, it can be expected from the Council that it sets out, in more detail, how it balanced the protection of the court proceedings with the principle of transparency.

30. The Ombudsman acknowledges, as put forward by the complainant, that there is an important public interest attached to the Council's decision-making under the Conditionality Regulation and the related court cases. Therefore, she welcomes the fact that the Council granted wide access to a large number of documents giving insight into the deliberations on its Implementing Decision. However, considering the nature and the content of the documents at issue, the Ombudsman does not find that the public interest in transparency outweighs the public interest in ensuring the equality of arms in the court proceedings concerned.

31. In view of the above, the Ombudsman considers that no further inquiries are justified.

Conclusion

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

No further inquiries are justified.

The complainant and the Council of the EU will be informed of this decision.



Emily O'Reilly
European Ombudsman

Strasbourg, 18/02/2025