



Council of the European Union
General Secretariat

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CM 1454/21

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API
PROCED

COMMUNICATION

WRITTEN PROCEDURE

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Subject: PUBLIC ACCESS TO DOCUMENTS
– Confirmatory application No 01/c/01/21
– Outcome of the written procedure initiated by CM 1452/21

Delegations are informed that the written procedure opened by CM 1452/21 of 10 February 2021 was completed on 15 February 2021 and that a majority of the members agreed to the approval of the Council's reply to the above-mentioned confirmatory application, as set out in document 5122/21.

The statements by The Czech Republic, Hungary, The Netherlands, Poland and Sweden are reproduced in the Annex to this CM.

The above statements will be included in the summary of acts adopted by the written procedure as statement to be entered in the Council minutes, in accordance with the third subparagraph of Article 12(1) of the Council's Rules of Procedure.

Statement by The Czech Republic

While fully acknowledging the importance of transparency in the legislative procedure, we are of the view that before taking the decision about disclosure of internal preparatory documents indicating flexibilities and fallback options in the preparation for trilogue meetings the following should be duly taken into consideration:

In particular, the effectivity of the legislative procedure, which requires that the Council preparatory bodies should be able to formulate their positions and negotiating strategies in mutual trust and confidence, free from external pressure.

Furthermore, for the sake of inter-institutional balance and principle of loyal cooperation during the legislative procedure, situations of information asymmetry regarding the respective positions of negotiators should be avoided.

In our view, these considerations apply also to the parts of the preparatory documents where a „preliminary compromise“ has been achieved, especially regarding the sensitivity of the file and the difficulties that arose during the negotiations. It should be stressed that nothing is agreed until everything is agreed.

For this, the Czech Republic thinks that even partial disclosure of the documents requested would seriously undermine the decision making process.

Statement by The Netherlands and Sweden

The Netherlands and Sweden cannot concur with the draft reply to confirmatory application No 01/c/01/21 that disclosure of the requested documents would seriously undermine the ongoing decision-making process. Considering the restrictive interpretation of this exception by the Court regarding documents that relate to legislative procedures (De Capitani case, T-540/15), The Netherlands and Sweden believe that it is not sufficiently motivated that there is an actual and concrete risk that full disclosure would seriously undermine the institution's ongoing decision-making process and this risk is reasonably foreseeable and not only hypothetical. Furthermore, The Netherlands and Sweden believe there is an overriding public interest in disclosure considering in light of the subject-matter of the documents involved and the criticism which the Council has received on this matter in the past.

Statement by Hungary and Poland

We are of the view that since the legislative process regarding the Regulation 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) has not been finalized, there is a risk that the Council's decision-making process in the meaning of Article 4(3) of Regulation 1049/2001 might be seriously undermined by the disclosure of these documents.

The General Court confirmed in the De Capitani case that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process. In Hungary and Poland's view, such a risk exists in the case at hand.

Parts of the document still include information regarding the compromise proposals and draw attention to some specific issues that are still the subject of the discussions between the co-legislators.

The fact that the issue of emissions, including conformity factors attracts a lot of public attention, also from producers side (the leak of the compromise proposal to the press) and considering ongoing procedures before the CJEU, only reinforces this conclusion