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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Complaint No. 360-2021-TE - Approval of Council's draft additional observations

1. On 19 February 2021 a complaint to the European Ombudsman has been lodged following the Council's reply to confirmatory application 01/c/01/21 (document **5122/21**) confirming a refusal to grant full public access to certain documents related to trilogue negotiations on the proposal for a Regulation on type approval of motor vehicles emissions (interinstitutional file 2019/0101 COD).
2. For recall, by its decision of 16 February 2021, the Council replied to the confirmatory application of the complainant by granting full access to document **WK 10915/20** and partial access to documents **WK 11807/20**, 12384/2020, 12384/2020 REV1, **WK 13001/20**, **13041/20** and **WK 14199/20** pursuant to Articles 4(3), first subparagraph, and 4(6) of Regulation (EC) No **1049/2001**.
3. In their letter of 26 February 2021, the Ombudsman's services informed the General Secretariat of the Council of the complaint concerning the Council's decision of 16 February 2021 and of the Ombudsman's decision to open an inquiry of the matter, for the purpose of which they requested an inspection of the concerned documents. They also invited the Council to provide additional views in relation to the inquiry, should it deemed it necessary.

4. Delegations were informed of the complaint and the Ombudsman letter requesting an inspection of the relevant documents on 3 March 2021 (documents **6672/21** + **ADD1**).
 5. Coreper was informed of the matter and approved the letter to the Ombudsman authorising the inspection of documents held by the Council in relation to complaint 360/2021/TE on 10 March 2021 (document **6707/21**).
 6. Delegations will find in the Annex to this note a draft reply to the Ombudsman services' invitation to provide additional observations on the matter subject to the inquiry. Further to the views expressed by delegations, the draft reply will be submitted to Coreper for approval.
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DRAFT REPLY**TO THE REQUEST FOR ADDITIONAL OBSERVATIONS OF THE COUNCIL AS
REGARDS THE INQUIRY OF THE EUROPEAN OMBUDSMAN INTO
COMPLAINT 360/2021/TE****I. THE INQUIRY**

1. By letter of 26 February 2021, the European Ombudsman opened an inquiry into complaint 360/2021/TE concerning the Council's refusal to grant public access in full to documents WK 11807/20, ST 12384/2020, ST 12384/2020 REV1, WK 13001/20, ST 13041/20 and WK 14199/20, pertaining 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.
2. By that letter, the European Ombudsman requested, in accordance with Article 3(2) of its Statute, the inspection of the non-redacted versions of the abovementioned documents. Those documents were transmitted to the competent services of the European Ombudsman on 11 March 2021.
3. The European Ombudsman also invited the Council to submit any additional observations to be taken into account in the context of this inquiry.
4. At the outset, the Council recalls that, by its decision of 16 February 2021¹, it has granted public access to the greatest part of documents WK 11807/20, ST 12384/2020, ST 12384/2020 REV1, WK 13001/20, ST 13041/20 and WK 14199/20.

¹ Council's decision of 16 February 2021 replying to confirmatory application under ref. 01/c/01/21.

5. The reasons why the Council considered that disclosure of some remaining limited parts thereof would run counter to the protection of the decision-making process, and has therefore refused access to those parts pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001, are described in detail in the confirmatory decision of the Council.
6. The Council will therefore hereby underline only some key elements that deserve particular attention as well as reply to some points put forward, for the first time, in the complaint to the European Ombudsman.

II. ADDITIONAL OBSERVATIONS OF THE COUNCIL

7. First, the Council is of the view that 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 with the Parliament and the Commission should not be treated in the same way as documents used as a basis for a trilogue meeting and reflecting the provisional compromises reached by the co-legislators.
8. Indeed, contrary to the latter, the former are not documents discussed during trilogues.
9. Second, the Council fully recognises that, as submitted in the complaint, in its judgment of 22 March 2018, *De Capitani v Parliament* (T-540/15, EU:T:2018:167) the General Court has clarified that trilogues form a part of the legislative procedure for which a very high standard of transparency applies.

10. However, the Council also notes that :

- The reasoning in the De Capitani judgment of the General Court clearly concerned documents (i) drawn up in the framework of ongoing trilogues and (ii) which were shared between the legislators. Even for such documents, the General Court has expressly rejected the applicant’s position according to which there was no margin left for institutions to refuse access to documents relating to a legislative procedure on the basis of Article 4(3) of Regulation 1049/2001. The Court underlined that such an approach would have manifestly gone against the letter of Regulation 1049/2001, which in no way excludes documents relating to legislative procedures from the scope of application of its set of exceptions (paragraph 112 of the judgment) ;
- The General Court has 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*” and “*that the possibility of a free exchange of views is not called into question*”. The General Court has also clarified that its judgment should not be understood as creating a right of direct access to the work of trilogues (paragraph 106 of the judgment).

11. What the General Court has underlined in paragraphs 106 and 112 of its judgement apply all the more to documents which, unlike in the De Capitani case, are not shared with the European Parliament.

12. Thus, the Council is of the view that in the present case the very few points of the requested documents that, at the time of the reply to the confirmatory application, have not been released to the complainant are precisely parts revealing discussions during internal meetings for the preparation of an upcoming trilogue, whose disclosure would seriously compromise the possibility of a free exchange of views necessary for determining beforehand the Council’s negotiation position to be presented in the subsequent trilogue meeting.

13. Third, the Council considers that it is important to clarify in that respect that it has not refused access to the whole content of the requested documents solely because they were not shared as such with its co-legislator counterpart, namely the European Parliament. On the contrary, as expressly stated in its confirmatory reply, 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 as well as to parts revealing previous negotiation positions and the evolution of the Council's approach on those points.
14. Indeed, the only parts that have not been disclosed in the context of this confirmatory application were those that constitute the most critical points for the position of the Council as a negotiator, that is to say parts for which not even provisional agreement was reached and which are reflected in its internal preparatory documentation and reveal the strategy to be followed by the Council in the negotiations, while also identifying the areas of flexibility and the concessions that could be made during the tripartite negotiations. If the formal compromises reached by the co-legislators within the framework of the legislative procedure ought to be released to the public according to the De Capitani judgement, this case-law has however not denied the Council the possibility of maintaining its own sphere of reflection, necessary to build up a negotiation position beforehand, that falls within the exception related to its internal decision-making process and whose content shall not be released at an early stage of the legislative procedure either to the European Parliament or to the public.

15. In that regard, the Council stresses, on the one hand, that in order to allow for effective political decision-making, it is of particular importance to ensure workable conditions for the discussions of the relevant Council preparatory bodies at each stage of the decision-making process. Several elements set out in the undisclosed parts of the documents in question are the result of difficult deliberations between the Member States, taking also into account the flexibility the European Parliament might or might not show during the negotiations. They give details of progress made and thereby reflect the difficulties that still need to be addressed. Full release of such content would seriously undermine the mutual trust and confidence that enable the Council preparatory instances to perform their tasks effectively. It also entails the risk that Member States become more entrenched in their positions to the detriment of the possibility of finding possible negotiation lines that would enable further compromise solutions to be negotiated with the European Parliament.
16. On the other hand, it should be underlined that the ongoing interinstitutional discussions on this file are complex and require the conciliation of divergent approaches of the negotiators. Should the information on Council's flexibilities as regards some of the elements of the package be disclosed, pressure could increase for the Council to concede on some of its elements before reaching the overall balance on the whole package. Releasing the preliminary negotiation positions of the Council and revealing the way those are formed would be detrimental for its position in the context of the subsequent discussions between the co-legislators. In that respect, suffices it to say that the European Parliament does not share such information with the Council. Thus, if only its internal views were disclosed, the Council would face an asymmetric situation where its position and negotiation strategy would be prematurely released to its counterparts, thus limiting the leeway of the Council in the upcoming interinstitutional discussions. Similarly, revealing Council's margins of manoeuvre in the negotiation process could trigger pressure from the other negotiator on the Council, thus putting it at a disadvantage in further negotiations or leading to the entrenching of negotiators' positions. This would be particularly harmful to the prospect of a successful outcome on the file and the smooth running of the legislative procedure.

17. The Council stresses once more the particular nature of the requested documents (internal to the Council and not shared with the European Parliament) and of the specific passages that have not been disclosed (pertaining to the determination of a position of the Council on matters for which a provisional agreement was to be found) and notes that it is expressly recognised in the complaint that the Council regularly makes public, following requests received by citizens, documents discussed during trilogues, albeit in less sensitive context.
18. Fourth, the Council notes that the complainant regrets that the extensive partial access was only granted by the Council at confirmatory stage. In that regard, the Council recalls that Regulation (EC) 1049/2001 provides for a two-stage administrative procedure for the handling of requests for public access to documents. For documents in the possession of the Council, replies at initial stage are given by the General Secretariat of the Council and replies at confirmatory stage are adopted by the Council. This allows for a thorough assessment following extensive consultations at both stages of this procedure, which may sometimes lead the Council to reconsider its final position. The Council is of the view that this is very much to the interest of citizens in transparency and wider access to documents. In any event, the Council recalls that Article 8 of Regulation (EC) No 1049/2001 opens the possibility of instituting court proceedings against the institution and/or making a complaint to the Ombudsman only as regards replies of an institution at confirmatory stage.
19. Lastly, as regards the complainant's suggestion that the requested documents be made public by default and uploaded to the Council documents database even if no access to documents request has been filed, the Council notes that Regulation 1049/2001 provides that wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, but that at the same time the effectiveness of the institutions' decision-making process should be preserved. In accordance with Article 12 of this Regulation, the institutions shall make documents, in particular of a legislative nature, directly accessible to the public through a register: a) as far as possible; b) without prejudice to the exceptions provided by Article 4 of Regulation (EC) 1049/2001 (including but not limited to the protection of the institution's decision-making process); and c) in accordance with the rules of the institution concerned.

20. In the present case, disclosure of the documents, would, for the reasons set out in the confirmatory reply and hereby succinctly reiterated, run counter to the protection of the decision-making process and was therefore covered by the exception laid down in Article 4 (3) of Regulation (EC) No 1049/2001. Thus, those documents could not have been proactively released in accordance with the relevant provisions of the Council's Rules of Procedure, especially Article 11(6) of Annex II thereof.
21. In that regard, the Council also recalls the considerations that it has already set out in point 10 above as regards the De Capitani judgment and its specific passage which touches upon the issue of direct access and the publicity of debates relating to trilogues. The European Ombudsman, in a previous decision², has similarly stressed the need to balance the interest in having a transparent process with the legitimate need to ensure a privileged negotiating space as regards trilogues and has proposed that the institutions make proactively available four-column documents, including the final agreed text, as soon as possible *after* the negotiations have been concluded.

III. FINAL REMARKS

22. The Council considers that its refusal of 16 February 2021 to grant full public access to WK 11807/20, ST 12384/2020, ST 12384/2020 REV1, WK 13001/20, ST 13041/20 and WK 14199/20 was fully justified on the ground of the exception provided for in Article 4 (3) of Regulation (EC) No 1049/2001 (protection of the decision-making process) and that no instance of maladministration can be found.

² Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues