



Council of the
European Union

Brussels, 27 April 2021
(OR. en)

8226/21

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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 15/c/01/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 9 March 2021 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 23 April 2021 (Annex 2);
- the confirmatory application dated 27 April 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 9 March 2021 - 12:21]

Dear Mr Florindo,

many thanks for the useful documents. But there seem to be some documents missing. For both meetings the agenda has the point "exchange of views" about the commissions proposal for the Digital Markets Act (DMA). But none of the documents you have sent contains any information about what has actually been said by the member states representatives. I am sure that there was someone of the council staff taking minutes from the meetings including the "views" of different participants. Could you send me also these documents which describe the views of the participants in the meeting?

Kind regards,

DELETED



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 23 April 2021

DELETED

Email: **DELETED**

Ref. 21/0643-em/mf

Request made on: 09.03.2021

Deadline extension: 30.03.2021

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

By your email of 9 March 2021, you requested access to documents reflecting Member States positions on the Digital Markets Act (interinstitutional file number 2020/0374 COD).

We have identified the following documents as corresponding to your request:

WK 1656/21	WK 2362/21	WK 2482/21 REV1	WK 3634/21
WK 1656/21 REV1	WK 2363/21	WK 3009/21	WK 3790/21
WK 1656/21 REV2	WK 2366/21	WK 3009/21 REV1	WK 3791/21
WK 2357/21	WK 2367/21	WK 3050/21	WK 3826/21
WK 2358/21	WK 2368/21	WK 3071/21	WK 4275/21
WK 2359/21	WK 2369/21	WK 3073/21	
WK 2360/21	WK 2482/21	WK 3240/21	

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

I regret to inform you that access to these documents cannot be given for the reasons set out below.

These documents contain tables with preliminary and consolidated written comments of Member States related to the examination of different blocks of articles of the legislative proposal in question in the first three months after the Commission tabled its proposal.

Member States and the Presidency have been consulted on the possible disclosure of these documents. They consider that releasing these comments at this stage would be detrimental to the ongoing negotiations. Many of these written comments haven't even been discussed in the Working Party on Competition yet, while others do not reflect exactly the national positions, which are for most of the Member States just preliminary comments and requests for clarification to the Commission.

The documents in question concern indeed a legislative proposal which is still at the beginning of its examination within the competent preparatory body of the Council. There is still a long way to go before the Council can reach a political agreement on the file. Release to the public of the information contained in the documents would affect the negotiating process and diminish the chances of the Council reaching an agreement. Disclosure of the documents at this stage would therefore seriously undermine the decision making-process of the Council.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance, the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure. As a consequence, the General Secretariat has to refuse access to the documents at this stage.²

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.³

Yours sincerely,

Fernando FLORINDO

² Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

³ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to access@consilium.europa.eu on 27 April 2021 - 12:27]

Please find attached the confirmatory application regarding your decision,

Kind regards,

DELETED

Ref. 21/0643-em/mf, Confirmatory Application

Dear Mr. Florindo,

thanks for your reply to my request for access to the documents reflecting Member States positions on the Digital Markets Act (interinstitutional file number 2020/0374 COD).

I do not accept the decision to refuse the access to the listed docs. I hereby send a confirmatory application and ask the Council to review the decision for the following reasons:

1. You claim the release to the public of the information in the documents „would affect the negotiating process and diminish the chances of the Council reaching an agreement.”

It is a basic task of journalists in a democratic society to report about ongoing legislative processes and to present the audience and the citizens the arguments brought forward by the different legislative actors. But I cannot fulfill this duty without access to the appropriate information about the process and the respective documents. Yes, the reporting about the information in the documents might lead to public discussions about certain positions taken by this or that government and might influence or even „affect” the negotiation process. But citizens taking influence on the legislation is the basic idea of democracy.

This clearly creates an overriding public interest in the disclosure of all WK documents produced during the negotiations in the council on this important law proposal. By refusing access to the information contained in the listed WK documents the Council denies the EU citizens their democratic right to scrutinise how the national governments deal with draft law for the Digital Markets Act and by this violates the articles 1 and 10(3) of the Treaty on the European Union (TEU).

2. You claim „disclosure of the documents at this stage would therefore seriously undermine the decision making-process of the Council.”
But you do not explain how and why this might happen. Thus the claim is purely hypothetical and not a reasonable foreseeable consequence as it is demanded by the case law of the ECJ.

That means the decision is legally not correct. So I repeat the request for access to all documents reflecting Member States positions on the Digital Markets Act (interinstitutional file number 2020/0374 COD).

Yours sincerely,

DELETED
