



Council of the
European Union

Brussels, 1 September 2021
(OR. en)

11475/21
ADD 1

INF 244
API 138
OMBUDS 25
JUR 477
INST 300

COVER NOTE

From:	Ms Rosita Hickey, Director of Inquiries, European Ombudsman
date of receipt:	30 August 2021
To:	Ms Thérèse Blanchet, Director-General of the Legal Service, Council of the European Union

No. prev. doc.:	11475/21 INIT
Subject:	Complaint 1499/2021/TE to the European Ombudsman

Delegations will find in the Annex a copy of the complaint 1499/2021/TE sent to the European Ombudsman.

Personal data have been blanked out.

DELETED

From: DELETED
Sent: 25 August 2021 15:45
To: EORegistry
Subject: [EOWEB# 35713] New complaint from: DELETED
Attachments: - 3 -Letter of reply to CA -July-30th-21.pdf; 2-Confirmatory-Application-April, 26th-2021.pdf; 1-Letter-from-GSC-April-23rd-2021.docx

Your complaint has been submitted to the European Ombudsman. We will send you an acknowledgement of receipt within a few days.

NB - Please note that this e-mail was sent from a notification only e-mail address. If you wish to contact technical support, please use the link below:

[Contact technical support](#)

Sender

From: DELETED
Date: 25/08/2021 13:45:18

Complaint about maladministration**Part 1 - Contact information**

First name: DELETED
Surname: DELETED
Nationality: DELETED
Country: DELETED
Tel.: DELETED

Language preference: English

On behalf of (if applicable): DELETED
E-mail address: DELETED
Entity Name: DELETED
Country of registered office: DELETED

Part 2 - Against which European Union (EU) institution or body do you wish to complain?

Council of the European Union

Part 3 - What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

On April, 23rd, 2021, the General Secretariat of the Council (GSC) denied us access to many working documents produced for and presented in the council working party on competition regarding the negotiation of the draft law „Digital Markets Act“ (DMA, file 2020/0374 COD)

Part 4 - What do you consider that the EU institution or body has done wrong?

The denial of access to the listed documents and by this to the information needed for journalistic reporting about the ongoing legislative process violates the regulation (EC) No 1049/2001 and denies the citizens of the EU the right to participate in the democratic life of the union as it is guaranteed in article 10 (3) of the treaty on European Union.

Part 5 - What, in your view, should the institution or body do to put things right?

The Council of the EU should give us full access to all documents of the legislative process including those which contain information about the positions taken by the respective national governments, because otherwise the EU citizens have no chance to learn, what the government representatives turned lawmakers actually do.

Part 6 - Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify and submit copies of the relevant correspondence)

After our request for the access to the documents had been denied, we have filed a confirmatory application. This has also been denied.

Part 7 - If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Yes (please specify)

We have filed a confirmatory application. This has also been denied.

Part 8 - Has the object of your complaint already been settled by a court or is it pending before a court?

No

Part 9 - Please confirm that you have read the information below

You have read the information note on data processing and confidentiality

Part 10 - Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

No



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	

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

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).

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.

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

Contact: DELETED

Phone:

E-Mail:

Internet:

Date: April 26, 2021

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

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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,

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Council of the European Union
General Secretariat

Directorate-General Communication and Information - COMM
The Director-General

Brussels, 30 July 2021
SGS 21/002866

DELETED
Email: DELETED

Subject: Your Confirmatory Application 15/c/01/21

Dear DELETED,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 27 April 2021 which was registered by our service on the same day, as well as a link to the following documents to which the Council decided to grant full or partial access:

WK 1002/21
WK 2482/21
WK 3073/21
WK 3240/21
WK 3826/21
WK 1656/21 + REV1 + REV2
WK 2358/21
WK 2368/21
WK 2482/21 REV1
WK 3050/21
WK 3071/21
WK 3634/21
WK 4275/21

Yours sincerely,

Reijo KEMPPINEN

Link to the documents: <https://we.tl/t-faxzuJkZmQ>

Rue de la Loi/Wetstraat 175 - B-1048 Bruxelles/Brussel - Belgique/België
Tel./Tid +32 (0)2 281 58 25 - www.consilium.europa.eu

**REPLY ADOPTED BY THE COUNCIL ON 30 July 2021
TO CONFIRMATORY APPLICATION 15/c/01/21,
made by email on 27 April 2021,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents reflecting Member States'
preliminary questions and comments on the Digital Markets Act**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 9 March 2021 the applicant made an initial application for access to documents reflecting Member States positions on the proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act, DMA, file 2020/0374 COD).
2. On 23 April 2021, the General Secretariat of the Council (GSC) replied to this application by refusing access to all 26 working documents identified as relevant to the request. The GSC grounded its decision on the exception to the right of access relating to the protection of the institution's decision-making process (Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001).
3. On 27 April 2021, the applicant made a confirmatory application asking the Council to reconsider the GSC's decision. The applicant contests the refusal, considering that the GSC has not explained how and why the disclosure of the documents would seriously undermine the decision-making process of the Council. Moreover, he believes that there is an overriding public interest in the disclosure of all documents produced during the negotiations in the Council on this "important legislative proposal". Finally, the applicant contemplates that "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)".

4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in light of the applicant's comments, whether public access can be provided to the relevant documents. The Council has come to the conclusions set out below.

GENERAL CONTEXT OF THE COMMISSION'S PROPOSAL

5. The proposal for a Digital Markets Act (hereafter referred to as "DMA") was presented by the Commission on 15 December 2020.
6. The DMA aims at strengthening the single market for digital services by creating a safer digital space and a level playing field to foster innovation and competitiveness. It introduces rules that platforms identified as "gatekeepers" in the digital sector should abide by. "Gatekeepers" are large systemic online platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their customers, and which have a lasting, large user base in multiple countries in the EU. This can grant them the power to act as private rule-makers and to function as bottlenecks between businesses and consumers.
7. The DMA aims at preventing gatekeepers from imposing unfair conditions on businesses and consumers and at ensuring the openness of important digital services. It establishes objective criteria for qualifying a platform as a gatekeeper, obligations that gatekeepers will need to implement in their daily operations to ensure fair and open digital markets and remedies (fines, penalties) to be imposed on the gatekeepers in case of systematic infringements of the obligations arising from the Regulation.
8. At this stage, since the beginning of 2021 exchanges on the Commission's proposal took place within the Working Party on Competition, which gathers technical representatives of the Member States.

9. These discussions were organised around nine building blocks: designation of "gatekeepers", gatekeepers' obligations, implementation of obligations, future proofing, scope of Regulation and role of Member States, Commission's investigative and monitoring powers, compliance, procedural guarantees, implementing and delegated acts.
10. In that regard, even if no strong opposition among the technical representatives of the Member States within the working group can be observed at this early stage for the level of ambition of the proposal, its overall objectives and the need for swift approval, it must be pointed out that the positions of those technical representatives do not necessarily reflect the definitive positions of the Member States on the Commission proposal. This has been clearly indicated by different Member States, which reserved their positions pending the outcome of the ongoing discussions.
11. Thus, Member States are still analysing in-depth the content of the proposal, including in the light of the information collected by their technical representatives in the framework of the Working Party on Competition. Taking into account the complexity of the proposal, its impact on the single market and on contestable and fair markets in the digital sector, as well as its interrelation with other instruments of Union and national law, further work at technical level is required before the Council can reach a political agreement on the Commission proposal.

ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION 1049/2001

12. At the initial stage, the GSC identified 26 working documents as relevant to the request. The documents are listed and detailed below:

WK 1656/21 (dated 4/02/21) WK 1656/21REV1 (dated 5/02/21) WK 1656/21 REV2 (dated 15/03/2021)	Digital Markets Act proposal: MS comments on document ST 14172/20 - Articles 3, 4 and 15 (+ revised versions n°1 and n°2)
WK 2357/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Romania on bloc II of DMA
WK 2358/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Finland on bloc II of DMA
WK 2359/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Austria on bloc II of DMA

WK 2360/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Slovenia on bloc II of DMA
WK 2362/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by The Netherlands on bloc II of DMA
WK 2363/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Denmark on bloc II of DMA
WK 2366/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by France on bloc II of DMA
WK 2367/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Germany on bloc II of DMA
WK 2368/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Estonia on bloc II of DMA
WK 2369/21 (dated 18/02/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Sweden on bloc II of DMA
WK 2482/21 (dated 22/02/21)	Digital Markets Act proposal: Table for MS comments on document ST 14172/20 - Articles 5,6 12 and 13 (Explanations for submitting drafting suggestions and comments using the table)
WK 2482/21 REV1 (dated 15/03/21)	Digital Markets Act proposal: Table for MS comments on document ST 14172/20 - Articles 5,6 12 and 13 (MS comments)
WK 3009/21 (dated 4/03/21) WK 3009/21 REV1 (dated 15/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 7, 8, 9 and 11 - general comments sent by PL - SE - SI - SK -MT - FI - CZ - RO -DK - DE - ES - FR - HR on block III of the DMA (+ revised version n°1)
WK 3050/21 (dated 3/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 7, 8, 9 and 11 - general comments sent by Luxembourg on block III of the DMA
WK 3071/21 (dated 4/03/21)	Digital Markets Act proposal: preliminary comments and questions on articles 5 and 6 - general comments by Ireland on bloc II of DMA
WK 3073/21 (dated 5/03/21)	Digital Markets Act proposal: Table for MS comments on document ST 14172/20 - Articles 7, 8, 9 and 11 (Explanations for submitting drafting suggestions and comments using the table)
WK 3240/21 (dated 8/03/21)	Digital Markets Act: PPT Presentation by the European Commission on bloc IV (Articles 10, 14 and 17)
WK 3634/21 (dated 15/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 7, 8, 9 and 11 - final table with MS comments on block III of the DMA
WK 3790/21 (dated 17/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 10, 14 and 17 - general comments sent by PL - FI - MT - DK - SI - NL - FR - SK - SE - on block IV of DMA
WK 3791/21 (dated 17/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 1, 2, 32 and 33 - general comments sent by SI - NL - SK - FI - SE - DK - ES - FR - on block V of DMA

WK 3826/21 (dated 18/03/21)	Digital Markets Act proposal: Table for MS comments on document ST 14172/20 - Articles 1, 2, 10, 14, 17, 32 and 33 (Explanations for submitting drafting suggestions and comments using the table)
WK 4275/21 (dated 26/03/21)	Digital Markets Act : preliminary comments and questions on document ST 14172/20 - Articles 1, 2, 10, 14, 17, 32 and 33 - table with MS comments on block IV and V of the DMA

13. In its initial decision, the GSC considered that the exception related to the protection of the ongoing decision-making process justifying refusal to grant access applied to all documents identified as relevant to the request and therefore denied access to their full content.
14. Nonetheless, the Council fully acknowledges the principle of transparency, particularly in relation to decision-making processes of a legislative nature, since openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize the information which has formed the basis of a legislative act.
15. Taking into account the above considerations, the Council has now reassessed the request on the basis of the content of the documents assessed at the initial stage, the arguments put forward in the confirmatory application and the state of play of the examination of the file. In addition, it has identified two further relevant documents, WK 1002/21 (a table for MS comments on document ST 14172/20 - Articles 3, 4, 15 dated 19/02/21) and WK 2432/21 (preliminary comments and questions on articles 5 and 6 - general comments by Malta on bloc II of DMA dated 19/02/21). The Council has carefully scrutinized the content of all documents.

A. Documents to which full public access is granted

16. The Council has come to the conclusion that full public access can be granted to documents WK 1002/21, WK 2482/21, WK 3073/21, WK 3240/21, WK 3826/21.

B. Documents covered by the exception provided for in Article 4(3), first subparagraph, of the Regulation

17. Taking into account the content of the documents, the context of the discussions and the views expressed by the Member States on the matter, the Council has reached a different conclusion as regards documents WK 1656/21 + REV1, REV2, WK 2357/21, WK 2358/21, WK 2359/21, WK 2360/21, WK 2362/21, WK 2363/21, WK 2366/21, WK 2367/21, WK 2368/21, WK 2369/21, WK 2432/21, WK 2482/21 REV1, WK 3009/21 + REV1, WK 3050/21, WK 3071/21, WK 3634/21, WK 3790/21, WK 3791/21, WK 4275/21 (hereafter referred to as "remaining requested documents").
18. The Council considers that, in view of their content and the context in which they were drafted, the remaining requested documents fall within the remit of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 (protection of the Institution's decision-making process).
19. The Council ponders however that, in view of their content, partial access can be granted to documents WK 1656/21 + REV1 + REV2, WK 2358/21, WK 2368/21, WK 2482/21 REV1, WK 3050/21, WK 3071/21, WK 3634/21, WK 4275/21 pursuant to Article 4(6) of Regulation (EC) No 1049/2001.
20. Nonetheless, the Council contemplates that the entire content of documents WK 2357/21, WK 2359/21, WK 2360/21, WK 2362/21, WK 2363/21, WK 2366/21, WK 2367/21, WK 2369/21, WK 2432/21, WK 3009/21 + REV1, WK 3790/21, WK 3791/21 falls under the specific exception applying to the protection of the Institution's decision-making process (Article 4(3) first subparagraph, of Regulation (EC) 1049/2001) and therefore access to them must be refused.
21. As a preliminary point, in order to invoke this exception, it should be established that access to the requested documents is likely to undermine specifically and actually the protection of the institution's decision-making process, and that the likelihood of that interest being undermined is reasonably foreseeable and not purely hypothetical¹.

¹ Judgment of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 70 and the case-law cited.

22. According to the case-law, the decision-making process is "seriously" undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 where, inter alia, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question².
23. As underlined by the General Court³, that case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the institution's decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could reasonably be foreseen that the decision-making process would be undermined if the documents were disclosed⁴.
24. In that regard, the applicant argues that "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)". However, the Council contends that the right of access of the EU citizens to documents of the EU institutions, bodies, offices and agencies enshrined in Articles 1 and 10(3) of the Treaty on the functioning of the European Union ("TFEU") is subject to the principles and the conditions defined in accordance with Article 15(3) of the Treaty.
25. General principles, conditions and limits on grounds of public or private interest governing the right of access to documents are determined by the European Parliament and the Council, particularly in Regulation (EC) No 1049/2001. In recital 11 of the regulation, the legislator has admitted that, although in principle all documents of institutions should be accessible to the public, "certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks." This materialises in the exceptions set out in Article 4 of Regulation (EC) No 1049/2001, in particular in the provision

² Judgments of 18 December 2008, *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 75; of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 71, and of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 62.

³ Judgment of 22 March 2018, *De Capitani v Parliament*, T-540/15, EU:T:2018:167, paragraph 65.

⁴ Judgment of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraphs 78 and 79.

of paragraph 3, first subparagraph, thereof, which is also the legal basis for the present decision.

26. The Council notes that, in addition to the TFEU and Regulation (EC) No 1049/2001, the relevant case-law has not ruled out the possibility for the institutions to invoke the exception relating to the protection of the decision-making process in the context of a legislative procedure. Any other interpretation would deprive institutions of their discretion to refuse access to documents on the basis of this exception.
27. In the present case, the Council points out that the purpose of the Working Party on Competition is at this stage to enable a technical exchange of views on the matters at hand and further understanding of the Commission's proposal. This preparatory work is necessary to enable the representatives of the Member States, in the framework of the Coreper as foreseen in Article 240(1) TFEU and subsequently the Council of Ministers, to take a final position on the legislative proposal. Thus, the final position of the Council in relation to the proposal of the Commission on the DMA rules may depart substantially from the findings and preliminary exchanges of views that took place so far within the Working Group on Competition.
28. In that regard, "WK" documents listed at paragraph 17 are preparatory documents outlining the first preliminary comments of the delegates of Member States and their requests for clarification deemed at this stage necessary for allowing their respective authorities to understand the scope of the Commission's proposal and to form their positions on this important legislative file. These preliminary comments and questions seeking for clarification have been drawn up for internal use in the preliminary exchange of technical views within the Working Party on Competition. Against this background, Member States are still in the process of analysing the Digital Markets Act's provisions. The comments and questions summarized in the requested documents are neither exhaustive nor final and certainly do not reflect the final position the Member States may take at a later stage of the decision-making process (within Coreper and subsequently the Council). Moreover, they may not incorporate findings of national inter-ministerial and other public consultations that are still ongoing.
29. For an effective political decision-making, it is of particular importance to ensure workable discussions of the relevant Council preparatory bodies at each stage of the legislative procedure. In the present case, the elements set out in the remaining requested documents were not meant to become public at the respective stage of examination of the proposal and, if released at this stage, may give a wrong impression of the understanding of certain provisions of the proposed directive by the Member States. In addition, release of those documents

would seriously undermine the mutual trust and confidence that enable the Council preparatory body to perform effectively its tasks of technical nature. Therefore, due to the risk of misinterpretation by the broader public of comments raised and questions asked by the Member States' representatives in the framework of the discussions within the Working Group on Competition, the Council takes the view that disclosure of the remaining requested documents at this early stage is likely to put into question the final choices that the Member States will make at a later stage of the procedure and would create unnecessary uncertainty on their intentions.

30. Moreover, the negotiations phase with the European Parliament will begin soon and Member States are currently seeking to find the appropriate balance of the various interests involved. The DMA proposal is both technically complex and extremely sensitive. Members of the Council are fully aware of the risk that disclosure of the information contained in the documents could lead to an unprecedented lobbying on the side of systemic online platforms, including those from third countries. Indeed, as explained above, the DMA addresses anticompetitive practices by gatekeepers and would constrain their behaviour while forcing them to proactively open up to more competition. In addition, those of them in breach of the rules face penalties of up to 10% of their yearly turnover.
31. As a consequence, release to the public of the information contained in the remaining requested documents at this moment is likely to diminish the chances that the discussions take place in a sound and effective manner in the working party and subsequently in Coreper and the Council, and thus to severely affect the decision-making process and the future negotiating position of the Council. This would impede the ability of the institution to reach an agreement on the file. Should the information on Member States technical comments as regards some of the elements of the DMA proposal be disclosed at this early stage, pressure will increase on Member States to later concede at the political level on some of the elements before reaching the overall balance on the proposal.
32. The Council therefore considers that the above elements show to the necessary extent that the risk of disclosure seriously undermining the ongoing decision-making process is reasonably foreseeable and not purely hypothetical.
33. The Council therefore concludes that full disclosure of the remaining requested documents would seriously undermine the ongoing decision-making process.

C. Assessment of the public interest in disclosure

34. When applying the exception provided for in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001, the Council has to strike a balance between the need to protect its decision-making process and the legitimate interest in transparency, taking into account all relevant aspects and the context in which the documents were drafted. In this regard, the Council considers that the legitimate public interest in a public debate on this legislative proposal cannot automatically override the equally legitimate need to protect the effectiveness of its decision-making process.
35. The Council notes that the arguments put forward by the applicant in the confirmatory application are based on general considerations that cannot provide an appropriate basis for establishing that, at the present moment, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant full access to documents, as developed at paragraphs 19 to 32 above.
36. It is also important to underline that the refusal to fully disclose the documents at issue does not amount to denying citizens their democratic right to scrutinize how national governments deal with draft law for the DMA. Indeed, several documents relevant to this file are available in the public register of Council's documents. It should be added that the Council does not exclude to release further documents at a later stage of the legislative process.
37. Taking into account all relevant aspects, the Council concludes that, on account of the need to preserve the effectiveness of its decision-taking process in the specific case at hand, the public interest invoked by the applicant does not outweigh the interest protected under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

CONCLUSION

38. On the basis of the above considerations, the Council concludes that full public access can be granted to document **WK 1002/21, WK 2482/21, WK 3073/21, WK 3240/21, WK 3826/21.**
39. Partial access is granted to documents **WK 1656/21 + REV1 + REV2, WK 2358/21, WK 2368/21, WK 2482/21 REV1, WK 3050/21, WK 3071/21, WK 3634/21, WK 4275/21.**
40. Access to documents **WK 2357/21, WK 2359/21, WK 2360/21, WK 2362/21, WK 2363/21, WK 2366/21, WK 2367/21, WK 2369/21, WK 2432/21, WK 3009/21 + REV1, WK 3790/21, WK 3791/21,** is refused pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.
41. The present decision is based on the specific examination of the requested documents and it can under no circumstances be considered as a precedent for the future, since each application is assessed and judged on its own merit, pursuant to the established practice of the Council.
