



Council of the  
European Union

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Eingelangt am 12/11/21

Brussels, 12 November 2021  
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#### NOTE

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 39/c/01/21

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Delegations will find attached the:

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

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 9 September 2021 - 14:47]

From: **DELETED**

Sent: Thursday, September 9, 2021 2:47 PM

To: TRANSPARENCY Access to documents (COMM) [Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)

Subject: Consilium - Electronic Request for Access to documents [FRENCH]

**DELETED**

Family name **DELETED**

First name **DELETED**

E-mail **DELETED**

Occupation **DELETED**

On behalf of **DELETED**

Full postal address **DELETED**

Telephone **DELETED**

Requested document(s):

Dear Sir/Madam,

I would like to obtain copies of documents related to the Legal Service of the Council, in particular:

- Opinions issued in the context of the reading and examination of the Digital Services Act in the Competitiveness - Internal Market working party
- Opinions issued in the context of the reading and examination of the Digital Markets Act in the Competitiveness - Competition working party
- Written exchanges between the Legal Service of the Council and the members of these two working parties concerning the Digital Services Act and the Digital Markets Act
- Written exchanges between the Legal Service of the Council and the Permanent Representations on these two files
- Written exchanges between the Legal Service of the Council and the European Commission on these two files

I can be contacted if you need further information on this application. Thank you

Yours sincerely,

**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, 27 October 2021

**DELETED**

Email: **DELETED**

Ref. 21/1493-em/nb

Request made on: 09.09.2021

Deadline extension: 30.09.2021 and 21.10.2021

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union<sup>1</sup>.

First, please note that the Legal Service of the Council did not issue written opinions in the context of the reading and examination of the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM (2020) 825 final), and 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) (COM (2020) 842 final) ('**DSA**' and '**DMA**' respectively).

As regards your request for access to written exchanges between the Legal Service of the Council and the preparatory bodies responsible for examining the two legislative files, the Permanent Representations and the European Commission, after internal consultation, the General Secretariat of the Council was able to identify 6 series of email exchanges concerning the DSA proposal and 9 series of emails concerning the DMA proposal.

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<sup>1</sup> 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).

As regards the content of these emails, these are mainly discussions of a legal and technical nature in relation to the two texts currently being adopted under the ordinary legislative procedure. Thus, they constitute 'legal advice' within the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/2001<sup>2</sup>, which has been sought and is necessary for the proper conduct of the legislative process, at least as regards the exercise by the Council of its prerogatives in this area. Consequently, granting access to those preliminary consultations intended for purely internal use would disregard the institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice within the meaning of that provision.

Furthermore, the texts of the two proposals for a Regulation concerned are at a preliminary stage of examination in the preparatory bodies of the Council, which has not yet adopted its position at first reading. Most of the discussions at this stage have taken place in the working parties. At this preliminary stage, therefore, granting access to the documents at issue would seriously undermine the decision-making process pursuant to Article 4(3), first subparagraph, of Regulation No 1049/2001. In particular, in order to avoid exposing these preparatory bodies and, more generally, the Council to undue external influences, it is essential that the content of discussions of a legal nature around the two proposals remains internal. This is all the more necessary in view of the sensitivity of the proposed texts, which aim to regulate intermediaries of service providers, including online platforms and illegal content, as well as providers of essential platform services that can be considered as gatekeepers. This is a sensitive area which will also affect third-country operators providing services in several EU Member States. It is therefore in the institution's interest that the nature and extent of the internal preparatory legal discussions which were the subject of the email exchanges identified are not disclosed, at least not at this stage of the ongoing legislative procedures.

In the light of these considerations and in the absence of an overriding public interest in disclosure of the requested documents, the General Secretariat of the Council regrets to inform you that it cannot grant you access to these documents.

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 your reasons<sup>3</sup>.

Yours sincerely,

Fernando FLORINDO

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<sup>2</sup> 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).

<sup>3</sup> Council documents on confirmatory applications are made available to the public. According 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](mailto:access@consilium.europa.eu) on 9 November 2021 - 12:13]

**From:** **DELETED**

**Sent:** Tuesday, November 9, 2021, 12:13

**To:** TRANSPARENCY Access to documents (COMM) [Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)

**Subject:** Re: Réf. 21/1493-em/nb

Dear Sir/Madam,

Thank you for your reply. Your refusal seems to me to be unjustified, and I am therefore appealing against your decision. Please find attached my letter to Mr Florindo explaining why you should send me these documents and exchanges.

Yours sincerely,

**DELETED**

**DELETED**

ATTN: Fernando Florindo  
Brussels, 9 November 2021

## **Appeal against the refusal to send me Legal Service documents**

Dear Mr Florindo,

Thank you for your reply. I wish to appeal your refusal, on 27 October 2021, to send me the Legal Service documents and exchanges requested on 9 September in request 21/1493-em/nb.

According to your letter, ‘at this preliminary stage, granting access to the documents at issue would seriously undermine the decision-making process’. You also cite ‘the absence of an overriding public interest in disclosure of the requested documents’. However, the case-law of the Court of Justice of the European Union (CJEU) argues for disclosure here.

In the same situation, the CJEU ruled against the European Commission in July 2011 when the latter refused access to the opinion of its Legal Service (judgment in Case C-506/08 P). The Commission, like you, relied on the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In particular: ‘Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying’.

Furthermore, in 2012, the CJEU perfectly explained the need to provide specific reasons for such refusal (judgment in Case C-477/10 P): ‘Within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents where the request for access to internal documents of the Commission relating to merger control proceedings was submitted when the Commission decision closing those proceedings had become definitive in the absence of an appeal against that decision, it is for the Commission to set out, in the decision to refuse access, the specific reasons, supported by detailed evidence, having regard to the actual content of the various documents sought, from which it may be concluded that the disclosure of those documents would seriously undermine that institution’s decision-making process’.

However, you simply cite ‘undue external influences’, without specifying what they actually are or the way in which disclosing the documents and exchanges would contribute to them. Therefore, the way in which disclosure would ‘seriously undermine’ the decision-making process is hypothetical. This is despite the fact that, as the CJEU also indicated in 2008 (judgment in Joint Cases C-39/05 P and C-52/05 P), ‘the risk of that interest [of the institution requesting the opinion of the Legal Service] being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical’.

The overriding interest lies in the crucial importance of these two texts, which are veritable keystones of digital regulation, the application of which will have many tangible impacts on the lives of Europeans. Disclosure ensures the legal solidity of the two draft Regulations, which are also being negotiated by the Parliament. The Digital Services Act revises the legal basis for the liability of internet intermediaries, a key component in the development of the digital public space and the internet economy. The Digital Markets Act – also an internal market tool, but dealing with competition – needs to address the effects of access to the digital markets being controlled by a few large companies. These two pieces of legislation are therefore fundamental to the regulation of the European public space and digital economy. The Council Legal Service’s expert contribution to this discussion is essential to guarantee this.

In addition, your refusal interferes with the exercise of my duties as a public watchdog in my capacity as a journalist. The European Court of Human Rights indicated as much in 2009 (judgment 37374/05) regarding, in particular, the refusal to disclose information over which an institution has a monopoly:

‘In view of the interest protected by Article 10 [of the European Convention on Human Rights], the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). The function of the press includes the creation of forums for public debate’.

I am therefore appealing your refusal and continue to request access to the documents and exchanges requested on 9 September.

Yours sincerely,

**DELETED**

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