



Council of the  
European Union

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**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information

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No. prev. doc.: 5121/21

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Subject: Public access to documents  
- Confirmatory application No 01/c/01/21

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Delegations will find attached a draft reply to confirmatory application No 01/c/01/21  
(see 5121/21).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...**

**TO CONFIRMATORY APPLICATION 01/c/01/21,**

**made by email on 6 January 2021**

**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**

**for public access to trilogue documents related to the proposal for a 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) and on access to vehicle repair and maintenance information**

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 23 November 2020 the applicant introduced an initial application for access to documents "related 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. These should include at least: ST 12384 2020 INIT (30-10-2020), ST 12384 2020 REV 1 (03-11-2020)".
2. On 6 January 2021, the General Secretariat of the Council (GSC) replied to this application by refusing access to documents ST 12384/20 and ST 12384/20 REV1 grounding 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 the same date, the applicant submitted a confirmatory application against the decision of the GSC to refuse access to the documents in question and not to provide access to other documents related to the trilogue negotiations. The applicant contests the refusal of access to the two documents, referring to the judgement of the Court of Justice of the EU in case T- 540/15, known as the case "De Capitani v European Parliament". In substance, the applicant states that trilogue documents are part of the legislative process, that citizens have a right to access them and that this access, far from undermining the decision-making process, allows citizens to follow the process in detail and the divergences between various points of view to be known and openly debated, thus ensuring the legitimacy of the whole process.
4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the applicant's comments, whether public access can be provided to the relevant trilogue documents. The Council has come to the conclusions set out below.

#### **GENERAL CONTEXT OF THE PROPOSAL**

5. Commission Regulation (EU) 2016/646 ("RDE 2 Regulation") set out conformity factors used to assess the compliance of light passenger and commercial vehicles with the emission limits laid down in Regulation (EC) No 715/2007, while performing a real driving emission (RDE) test. Conformity factors were initially adopted by the Commission in the framework of comitology and intended to progressively reduce the discrepancy between NOx emissions measured in real driving and those measured in a laboratory.
6. 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 (hereafter referred to as "*the Proposal*") was presented by the Commission on 14 June 2019 following the judgment of 13 December 2018 of the General Court delivered in the direct actions T-339/16 (*Ville de Paris/Commission*), T-352/16 (*Ville de Bruxelles/Commission*) and T-391/16 (*Ayuntamiento de Madrid/Commission*) submitted against Commission Regulation (EU) 2016/646.

7. The General Court ruled in its judgement that the Commission had acted outside of its powers in setting the conformity factors for nitrogen oxides (NOx) emissions via comitology procedure instead of ordinary legislative procedure. The General Court annulled those provisions in Commission Regulation (EU) 2016/646.
8. The Proposal includes the same conformity factors for NOx as in the partially annulled Commission Regulation (EU) 2016/646. It provides for a two-step procedure, namely temporary conformity factors during a first step, and the final conformity factors during a second step. In addition, the Proposal empowers the Commission to further review the conformity factors and to adapt them to technical progress.
9. Within the Council, after extensive discussions in the Council's Working Party on Technical Harmonisation (Motor Vehicles), the Permanent Representatives Committee agreed on a mandate for informal negotiations with the European Parliament on 11 December 2019<sup>1</sup>. The first informal trilogue with representatives of the European Parliament and the European Commission took place on 9 October 2020. On 4 November 2020, the Presidency received a revised Coreper mandate for the second informal trilogue on 10 November 2020. A third trilogue took place on 2 December 2020, where Council's compromise proposals and flexibilities on the main unsettled political issues, such as provisions on a lower value of the "error margin" for NOx, on yearly reviews of the error margin, on the possible use of delegated acts in connection with downwards revisions of the error margin, were not sufficient to reach an agreement with the European Parliament. Moreover, currently both co-legislators remain apart on phase-out of conformity factors and have not agreed on implementing vs. delegated acts in relation to specific procedures, tests and requirements for type approval in Art. 5 (3) of Regulation (EC) No 715/2007.

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<sup>1</sup> The mandate agreed by Coreper is reflected in public document ST 15042/19.

## **ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION**

### **1049/2001**

10. 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 documents **12384/2020, 12384/2020 REV1** in their entirety and therefore fully denied access to their content.
11. 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.
12. Taking into account the above considerations, the Council has now reassessed the request on the basis of the reasons stated in the confirmatory application and the content of the documents assessed at the initial stage. In addition, it has identified other documents relevant for the trilogues phase of the legislative procedure and carefully scrutinized their content. In doing so, the Council has particularly taken into consideration that all requested documents relate to an ongoing legislative procedure.

#### **A. Documents to which full public access is granted**

13. The Council has come to the conclusion that full public access can be granted to document **WK 10915/20** dated 13 October 2020, which is a working document prepared by the Presidency for the Council's Working Party on Technical Harmonisation (Motor vehicles) containing the first 4-column document setting out the negotiating positions of the three institutions at the beginning of trilogue negotiations.

**B. Documents to which partial access is granted pursuant to Article 4(6) of Regulation (EC) No 1049/2001**

14. The Council has furthermore considered that, in view of their content, parts of documents **WK 11807/20, 12384/2020, 12384/2020 REV1, WK 13001/20, 13041/20, WK 14199/20** fall under the specific exception applying to the protection of the decision-making process of the institution (Article 4(3) first subparagraph, of Regulation (EC) 1049/2001) and that only partial access can be granted to them.
15. Document **WK 11807/20** dated 27 October 2020 is a note from the Presidency for the Working Party on Technical Harmonisation (Motor vehicles) containing German Presidency's compromise proposals in view of a revised mandate and the second trilogue.
16. Document **ST 12384/2020** dated 27 October 2020 is a note from the GSC for the Coreper in preparation for the next trilogue. It contains a Presidency's compromise text set out in the 4th column of the table in the Annex to the note.
17. Document **ST 12384/2020 REV 1** dated 3 November 2020 is a revised version of document 12384/20.
18. Document **WK 13001/20** dated 17 November 2020 is a working document prepared by the Presidency and containing compromise proposals to be discussed at the Working Party meeting on 18 November 2020 in preparation of the third trilogue.
19. Document **ST 13041/20** dated 23 November 2020 is a note by the GSC to the delegations in preparation for the third informal trilogue. The document outlines the political issues remaining open after the second trilogue and puts forward compromise proposals for various provisions in a 4-column table.
20. Document **WK 14199/20** dated 4 December 2020 is a working document prepared by the Presidency for the Working Party on Technical Harmonisation (Motor vehicles) containing a 4-column document following the third trilogue on 2 December 2020.

21. The "WK" documents listed above are internal preparatory documents outlining certain issues to be considered in the political discussion in the Working Party on Technical Harmonisation (Motor vehicles). They indicate possible Council's flexibilities and fall-back options to allow the Presidency some room for manoeuvre during the respective trilogue meetings with the European Parliament, options that are contingent to the overall balance of a package deal.
22. The documents listed above set out the progress achieved and the political importance of some central issues in the proposal. They are intended to transmit a compromise text to Coreper for a revised mandate or to receive guidance from it for the subsequent trilogues. They also contain 4-column tables with Presidency's compromise proposals, comments and suggestions in the 4th column.
23. While the Council underlines the principle according to which, in the course of legislative negotiations, "nothing is agreed until everything is agreed", it recognises that, to some extent, the requested documents cover points for which progress has been made in the trilogue negotiations, which allowed for provisional compromises to be reached. The Council is of the view that, in order to enhance openness and public participation to the legislative process, those parts of the requested documents as well as parts which reveal the evolution of the Council's positions on those points should be disclosed. This is in line with the *De Capitani* judgment<sup>2</sup>, that the applicant invokes in the confirmatory application. However, the Council also notes that this judgment has not ruled out the possibility for the institutions to apply the exception related to the protection of the decision-making process, provided for in Article 4(3) of Regulation (EC) No 1049/2001, as regards documents drawn up in the framework of ongoing trilogues. Any different interpretation would amount to denying the institutions any discretion to refuse to grant access to such documents on that ground, which is an interpretation that has been expressly rejected in paragraph 112 of the court's judgement.

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<sup>2</sup> Judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15,

24. In that regard, the Council points out that, far from being limited to compromise proposals that have been negotiated and provisional agreements that have been reached in the interinstitutional discussions, the requested documents reflect positions that have been drawn up for internal use in the preliminary discussions within the Council's preparatory instances with the purpose of forming the Council's negotiation strategy and defining the Council's positions in the negotiations. In order to allow 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. Many of the elements set out in the documents in question are the result of difficult negotiations 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, assuming that they were not meant to become public at the respective stage of the negotiations. Full release of the documents would seriously undermine the mutual trust and confidence that enable the Council preparatory body to perform their task effectively. It also entails the risk that Member States become more entrenched in their positions to the detriment of the possibility of finding possible compromise solutions.
25. Moreover, as set out in paragraph 9 above, the ongoing interinstitutional discussions on the Proposal are complex and require the conciliation of divergent approaches of the negotiators. The assessments contained in the requested documents are an essential part of the process and their disclosure could lead to the entrenching of negotiators' positions. This would be particularly harmful to the prospect of a successful outcome on the file. Should the information on Council's flexibilities as regards some of the elements of the package be disclosed, pressure will 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 exposed, 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(s) on the Council, thus putting it at a disadvantage in further negotiations to the detriment of the overall balance of the agreement to be reached.



26. Release to the public of the information contained in documents **WK 11807/20, 12384/2020, 12384/2020 REV1, WK 13001/20, 13041/20, WK 14199/20** at a moment when the institutions are seeking to find an appropriate balance of the various interests involved would severely affect the negotiating process and diminish the chances of the Council reaching an agreement with the European Parliament. The Council therefore concludes that full disclosure of the requested documents would seriously undermine the ongoing decision-making process under Article 4(3), first subparagraph, of Regulation 1049/2001.

**C. Assessment of the public interest in disclosure**

27. When applying the exception provided for in Article 4(3), first subparagraph, of Regulation 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, as explained in paragraphs 5-9 above. In this regard, the Council considers that the legitimate public interest in the release of information does not outweigh the equally legitimate need to protect its decision-making process.

28. As stated above, the Council fully acknowledges the importance of transparency as a basic democratic principle. It is in that view that it has decided to grant access to the greatest parts of the documents concerned by this confirmatory application. However, the Council also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of the effectiveness of the decision-making process in all cases.

29. 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, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant full access, as developed in paragraphs 23 to 26 above.

30. In addition, it does not seem to the Council that public confidence in the EU in general, and in the Council in particular, would in any substantial way be affected by the decision to postpone release of limited parts of the documents in question.

31. Taking into account all relevant aspects, the Council concludes, on account of the need to preserve the effectiveness of its decision-taking, that 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 No 1049/2001.

## CONCLUSION

32. On the basis of the above considerations, the Council concludes that full public access can be granted to document **WK 10915/20**.
33. Partial access is granted to documents **WK 11807/20, 12384/2020, 12384/2020 REV1, WK 13001/20, 13041/20, WK 14199/20** pursuant to Article 4(3), first subparagraph and Article 4(6) of Regulation (EC) No 1049/2001.
34. The Council notes that its decision is based on the specific examination of the requested documents and that 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.

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