Rat der
Europäischen Union

Brüssel, den 6. Mai 2022
(OR. fr, en)

8612/22

LIMITE

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API 30
OMBUDS 9
JUR 280
INST 146

PUBLIC

I/A-PUNKT-VERMERK

Absender:	Generalsekretariat des Rates
Empfänger:	Ausschuss der Ständigen Vertreter/Rat
Nr. Vordok.:	8248/22
Betr.:	Beschwerde 1499/2021/SF bei der Europäischen Bürgerbeauftragten – Billigung der Antwort auf die Empfehlung der Bürgerbeauftragten

1. Der Rat hat am 28. Februar 2022 ein Schreiben der Europäischen Bürgerbeauftragten mit einer Empfehlung an den Rat im Zusammenhang mit der Beschwerde 1499/2021/SF erhalten. In diesem Schreiben empfiehlt die Europäische Bürgerbeauftragte dem Rat, der Öffentlichkeit vollständigen Zugang zu 23 legislativen Dokumenten zu gewähren, die im Rahmen des Gesetzgebungsverfahrens im Zusammenhang mit Vorschriften über die digitalen Märkte erstellt wurden.

2. In demselben Schreiben ersucht die Europäische Bürgerbeauftragte den Rat um eine ausführliche Stellungnahme zu dieser Empfehlung gemäß Artikel 4 Absatz 2 des Statuts des Europäischen Bürgerbeauftragten.

3. In der Sitzung der Gruppe „Information“ vom 28. April 2022 haben die Delegationen den Entwurf eines Antwortschreibens des Rates an die Europäische Bürgerbeauftragte (siehe Dokument 8248/22) geprüft. Alle Delegationen haben dem Entwurf eines Antwortschreibens zugestimmt; Italien hat seine Absicht bekundet, dagegen zu stimmen.

4. Der Ausschuss der Ständigen Vertreter wird daher ersucht, dem Rat zu empfehlen, dass er auf seiner nächsten Tagung

   – das beigefügte Antwortschreiben als A-Punkt billigt;

   – beschließt, das Abstimmungsergebnis zu veröffentlichen.

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Brussels, XXXXX

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Ms Emily O'Reilly
European Ombudsman
1, Avenue du Président Robert Schuman
B.P. 403
F-67001 Strasbourg Cedex

Subject: Your letter of 28 February 2022 concerning the complaint 1499/2021/SF – Recommendation

Dear Ms O'Reilly,

Thank you for the letter from your services dated 28 February 2022 regarding case 1499/2021/SF pertaining to the Council of the European Union's ("Council") refusal to give full public access to 23 documents related to negotiations on the draft 'Digital Markets Act' ("DMA"). In this letter, you recommended that the Council should grant full public access to 23 legislative documents issued in the context of the legislative process of the DMA.

The Council refused total or partial access to these documents in its response to the confirmatory application submitted by the complainant based on the protection of the ongoing legislative process pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001[1].

As explained in the response to the confirmatory application, at the time of its adoption the legislative work on the DMA was at a very early stage.

[1] In the response to the confirmatory application (No 15/c/01/21), the Council identified 28 documents falling within the scope of the request (2 additional more than in the response to the initial application). Then, the Council granted access to documents WK 1002/21, WK 2482/21, WK 3073/21, WK 3240/21, WK 3826/21, granted partial access 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; and refused access to the following 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.

The Working Party on Competition's explanatory exchanges were of technical nature, without reflecting the national positions yet, and their purpose was to further understand the Commission's proposal in order to carry out the preparatory work necessary for the representatives of the Member States, in the framework of the Coreper, and subsequently the Council to take a final position on the legislative proposal[2]. The nature of the documents to which the Council refused to grant access or full access in the response to the confirmatory application reflected that.

Nevertheless, since the adoption of the response to the confirmatory application, the legislative process on the DMA has significantly advanced. This has enabled the disclosure of other legislative documents concerning the DMA. After the presentation of a second compromise text by the Slovenian Presidency on 16 September 2021, the Council granted full access to 28 additional documents from the same legislative procedure to the complainant on 29 October and 22 November 2021 (following the reception of a new request for access).

Then, following complex and sensitive negotiations within the Working Party on Competition, a consensus emerged and enabled the Competitiveness Council of 25 November 2021 to agree unanimously on a general approach on the proposal for the DMA. As a result of these changes of circumstances, the General Secretariat of the Council disclosed the 23 legislative documents subject of this complaint to two other applicants following the submission of two different initial requests in January 2022. Indeed, given the status of the legislative process, the arguments put forward in the response to the complainant's confirmatory application no longer justified a partial or full refusal of the disclosure of the abovementioned legislative documents.

This illustrates the Council's willingness to strike a fair and balanced approach between the principle of transparency and the necessary protection of its decision-making process by reassessing the status of a legislative procedure and disclosing legislative documents when there is a change of circumstances justifying so. This approach is not only in line with Regulation (EC) No 1049/2001, but it also ensures a high level of transparency enabling citizens' participation in legislative procedures without undermining the interests that the exceptions of Article 4 of that regulation intend to protect, such as the protection of an ongoing decision-making process.

[2] See paragraph 27 of the response to the confirmatory application.

To conclude, in accordance with your recommendation and in light of the above-mentioned considerations, the **Council has decided to grant full access to the requested documents to the complainant**.

Yours sincerely,

For the Council,

The President

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