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LIMITE

INF 60
API 30
OMBUDS 9
JUR 280
INST 146

NOTE POINT "I/A"

Origine:	Secrétariat général du Conseil
Destinataire:	Comité des représentants permanents/Conseil
N° doc. préc.:	8248/22
Objet:	Plainte 1499/2021/SF adressée à la médiatrice européenne – Approbation de la réponse à la recommandation de la médiatrice

1. Le 28 février 2022, le Conseil a reçu une lettre de la médiatrice européenne contenant une recommandation au Conseil relative à la plainte 1499/2021/SF. Dans cette lettre, la médiatrice recommandait que le Conseil accorde au public un accès complet à 23 documents législatifs produits dans le contexte du processus législatif relatif à la législation sur les marchés numériques.
2. Dans cette même lettre, la médiatrice européenne invitait le Conseil à présenter un avis circonstancié sur cette recommandation conformément à l'article 4, paragraphe 2 du statut du Médiateur.

3. Lors de la réunion du groupe «Information» du 28 avril 2022, les délégations ont examiné un projet de réponse du Conseil à la Médiatrice européenne figurant au document 8248/22. Toutes les délégations ont marqué leur accord sur le projet de réponse, l'Italie ayant annoncé son intention de voter contre.
4. Le Comité des représentants permanents est par conséquent invité à suggérer que le Conseil, lors d'une prochaine session:
- approuve, en point "A", la réponse figurant en annexe;
 - décide de rendre public le résultat du vote.
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DRAFT

Brussels, XXXXX

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

