

## Letter from the European Ombudsman to the Council of the EU on its refusal to give full public access to documents related to the discussions on the 'Digital Markets Act' proposal

Correspondence - 30/08/2021

**Case** 1499/2021/SF - **Opened on** 30/08/2021 - **Recommendation on** 28/02/2022 - **Decision on** 27/06/2022 - **Institution concerned** Council of the European Union ( Maladministration found ) |

Director-General of the Legal Service

Council of the European Union

Dear Ms Y,

The Ombudsman has received a complaint from Mr X, on behalf of Investigate Europe, against the Council of the EU. She has asked me to deal with the case on her behalf.

The complainant asked the Council for public access to documents reflecting Member State positions on the Digital Markets Act.

In its confirmatory decision of 30 July 2021, the Council identified 28 documents as falling within the scope of the complainant's request. It granted full access to five documents, partial access to ten documents and it refused access to the entire contents of the remaining 13 documents.

The Council noted that the identified documents contain “ *first preliminary comments of the delegates of Member States and their requests for clarification* ”, drawn up for internal use in the context of a preliminary exchange of technical views in the Working Party on Competition. The Council said that these preliminary comments do not reflect the final position of Member States and that their release was therefore likely to put into question the final choices that the Member States will make at a later stage. The Council further said that the Digital Markets Act proposal is a technically complex and extremely sensitive file and that full disclosure of the documents could lead to “ *an unprecedented lobbying on the side of systemic online platforms, including those from third countries* ”.



In view of the above, the Council concluded that full disclosure of the identified documents was likely to seriously undermine the ongoing decision-making process. The Council considered that there was no overriding public interest in disclosure.

We have decided to open an inquiry into this complaint against the Council's decision to refuse full access under Regulation 1049/2001.

Regulation 1049/2001 states that applications for access should be handled promptly. It is in line with this principle that the Ombudsman also seeks to deal with cases such as this as quickly as possible.

As a first step, we consider it necessary to review the documents at issue in the complainant's request. We would therefore be grateful if the Council could provide us with copies of unredacted versions of the ten documents to which it granted partial access and to copies of the remaining 13 documents, which the Council refused to disclose in their entirety, preferably in electronic format (through encrypted e-mail [1] ).

The documents subject to the public access request will be treated confidentially, along with any other material the Council chooses to share with us that it marks confidential. Documents of this kind will be handled and stored in line with this confidential status and will be deleted from the European Ombudsman's files shortly after the inquiry has ended.

The Council's position has been set out in its confirmatory reply of 30 July 2021. However, should the Council wish to provide additional views, to be taken into account by the European Ombudsman during this inquiry, we would be grateful if they could be provided to us.

We would be grateful if the Council could let us know by when it can respond to this inquiry request. The inquiries officer responsible for this inquiry is Ms Tanja Ehnert.

Yours sincerely,

Rosita Hickey Director of Inquiries

Strasbourg, 30/08/2021

[1] Encrypted emails can be sent to our dedicated mailbox.