Reply to Comments of the Commission on a request for information from the European Ombudsman –complaint ref. 2132/2022/OAM

1. [redacted] I also have repeatedly tried to convince the Commission to publish more information – as is appropriate before issuing a complaint.

2. I appreciate that the Commission acknowledges at least for a part of the documents that they should be made available in accordance with the respective transparency rules, that the current practice does not sufficiently conform to these rules and that it should be revisited accordingly, a procedure that is ongoing since my first requests at the end of 2022.

3. I do not agree with the Commission's interpretation of possible exceptions to the publication of documents as described in Art 26(2) of Commission Decision C(2016) 3301 with reference to Article 4 of Regulation No 1049/2001.

   The Commission makes a blanket argument that the publication of all documents intended to be endorsed by the MDCG that have not yet been endorsed in general fall under the exception from publication, because their disclosure could in some abstract way undermine the protection of the decision-making process. For these documents the exception would be the default without the need to justify each exception with respect to its specific circumstances.

   The arguments provided for the application of this exceptional rule are in my opinion not convincing:
   "[…]which, if disclosed could create confusion, prolong decision making or otherwise undermine the decision-making process"
   This passage does not specifically explain how these consequences would be achieved by the publication of draft documents to the public. It can be assumed that the clear statement that it is a draft and not an actually endorsed version should be sufficient to avoid confusion and I think it is also clear to the public that decision making processes are not necessarily simple and require discussions that might change the outcome. However, exactly the transparency with respect to these decision-making processes is what makes the publication valuable. In a recent decision with respect to the exceptions provided by Article 4 of Regulation No 1049/2001 the Court of Justice of the European Union (CJEU) states: "Similarly, according to the case-law, a proposal is, by its nature, intended to be discussed and is not liable to remain unchanged following such discussion. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently." (T-163/21, ECLI:EU:T:2023:15, paragraph 79). And although the topic here is rather the disclosure of legislative proposals, I think the general opinion that the publication of proposals and drafts does not generally confuse the public is clear.

   "Such documents, in this case documents which have not been formally endorsed by the MDCG and have not yet gone through the appropriate consultation processes, contain preliminary views, which are often subject to amendments after the consultation process. Disclosure of those

versions at a premature stage could indeed undermine the protection of the decision-making process, as it would reveal preliminary views and policy options, which are at a given stage under consideration."
Again it remains unclear, how the disclosure of draft documents should undermine the protection of the decision-making process. How does revealing preliminary views and policy options under consideration have a negative impact on the decision-making? Members of the public with an interest in these documents will be aware of the fact, that the topics under discussion are complicated and an exchange of views is required to come to a satisfying conclusion. But again in my opinion this disclosure and transparency rather strengthens the confidence in the decision-making process than disturb it.

"The participants in those expert groups (including Commission services and experts) should be encouraged to engage in constructive discussions and be free to explore all possible options in preparation of the group's output (such as opinions/recommendations/reports) free from external pressure"
It remains unclear to me how the publication of the drafts to the public could put the experts under pressure. The draft documents are not signed or attributable to a single expert (or if they are, then personal information could easily be removed). So it seems unlikely that individual experts would be subject to directed public scrutiny or intervention. It might be possible that some preliminary documents get negative public feedback or discussion in general, but these are seasoned experts in their field with sufficient experience and standing. It seems unlikely that they are no longer capable of voicing their opinion because someone disagrees with them.

"In addition, the work carried out by expert groups is a collective one, which very often leads to conclusions being reached by consensus, in a spirit of mutual trust. Experts should be able to contribute freely to the work of expert groups and to express their views in a flexible way, in light of specific circumstances."
Like with the last argument it is unclear to me how a publication of anonymous drafts to the public should hinder the experts to freely contribute and express their views or undermine a "spirit of mutual trust". This is in my view no concrete argument that supports a serious and exceptional limitation of the required transparency in these matters.

"This interest would be significantly compromised should all versions of preliminary drafts be made accessible to the public by default and without ad hoc assessment and this would ultimately be detrimental to the decision-making process of this expert group."
It is unclear to me how this follows from the previous arguments. From my point of view, it is clear (and also clear to the public) that these are complex topics that need discussion and development of ideas. That the initial drafts might not be perfect or explore new interpretations is part of the process that is of interest to the public and should give additional legitimation to the procedures of the expert group. I do not think that it is necessary to hide these discussions until a "perfect" consensus is reached so that the reputation of the expert group remains intact. And the possibility to make use of the exception from publication in specific cases, with concrete and plausible arguments why this would undermine the decision-making process would still be available – but is should not become the default. In my opinion this again shows that the interpretation of the Commission has it backwards: The making available of the documents is the default required by the transparency rules and the possibility to have exceptions from this default according to Article 4 of Regulation No 1049/2001 must be well-founded and is not meant to become the new default.

In consequence from my point of view there is no concrete argument made by the Commission, how the publication of these drafts should undermine the decision-making process, but just the generic statement that it in any case would, without evaluation of the exact circumstances. And this in my view is not sufficient to rely on the possible exceptions from publication in accordance with Article 4 of Regulation No 1049/2001.

To again cite the current judgment by the Court of Justice of the European Union on these exceptions:
"To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access that is as wide as possible" (T-163/21, ECLI:EU:T:2023:15, paragraph 66)
"Since such exceptions derogate from the principle that the public should have the widest possible access to the documents, they must be interpreted and applied strictly" (T-163/21, ECLI:EU:T:2023:15, paragraph 68)
"Where an EU institution, body, office or agency to which a request for access to a document has been made decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of that undermining must be reasonably foreseeable and not purely hypothetical" (T-163/21, ECLI:EU:T:2023:15, paragraph 69)

In my opinion, the proposed procedure by the Commission is not in line with these general principles. It does not give an access that is as wide as possible, the exceptions are not interpreted and applied strictly and the refusal does not give a specific explanation of a possible undermining of the decision-making, but a purely hypothetical.

I would therefore appreciate it if the Ombudsman would intervene with the Commission and ensure the proper publication of all documents of interest.