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REV 1

LIMITE

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NOTE POINT "I/A"

Origine:	Secrétariat général du Conseil
Destinataire:	Comité des représentants permanents/Conseil
N° doc. préc.:	7363/19; 7365/19
Objet:	Accès du public aux documents - Demande confirmative n° 07/c/01/19

Les délégations trouveront en annexe un projet de réponse du Conseil à la demande confirmative n° 07/c/01/19, approuvé par le groupe "Information" dans le cadre d'une consultation écrite qui a pris fin le 4 avril 2019, les Pays-Bas, l'Autriche, la Slovaquie, l'Estonie, la Suède et la Finlande ayant voté contre.

Les déclarations ci- après ont été faites:

NL: *"Les Pays-Bas ne peuvent se rallier au projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire et de la jurisprudence constante de la Cour (i.e. arrêt De Capitani, point 99, et arrêt Suède et Turco, point 69), les Pays-Bas estiment qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document porterait concrètement et effectivement atteinte au processus décisionnel en cours et à la protection des avis juridiques, ni en quoi ce risque est raisonnablement prévisible et non purement hypothétique."*

AT: *"L'Autriche ne peut se rallier au projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire et de la jurisprudence constante de la Cour (i.e. arrêt De Capitani, point 99, et arrêt Suède et Turco, point 69), l'Autriche estime qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document porterait concrètement et effectivement atteinte au processus décisionnel en cours et à la protection des avis juridiques, ni en quoi ce risque est raisonnablement prévisible et non purement hypothétique."*

SK: *"La République slovaque est en fait favorable à ce que le document en question soit accessible dans son intégralité et n'est donc pas d'accord avec le projet de réponse."*

EE: *"Nous ne sommes pas d'accord avec le projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire nous estimons qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document porterait concrètement et effectivement atteinte au processus décisionnel en cours et à la protection des avis juridiques, ni en quoi ce risque est raisonnablement prévisible et non purement hypothétique."*

SE: *"La Suède ne peut se rallier au projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire et de la jurisprudence constante de la Cour (i.e. arrêt De Capitani, point 99, et arrêt Suède et Turco, point 69), la Suède estime qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document porterait concrètement et effectivement atteinte au processus décisionnel en cours et à la protection des avis juridiques, ni en quoi ce risque est raisonnablement prévisible et non purement hypothétique."*

FI: *"La Finlande ne peut se rallier au projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire et de la jurisprudence constante de la Cour (i.e. arrêt De Capitani, point 99, et arrêt Suède et Turco, point 69), la Finlande estime qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document porterait concrètement et effectivement atteinte au processus décisionnel en cours et à la protection des avis juridiques, ni en quoi ce risque est raisonnablement prévisible et non purement hypothétique."*

Les délégations ont marqué leur accord pour que le résultat du vote soit rendu public.

Le Comité des représentants permanents est donc invité à suggérer que, lors de sa prochaine session, le Conseil:

- approuve, en point "A", le projet de réponse figurant à l'annexe du présent document;
- décide de rendre public le résultat du vote.

L'annexe n'est disponible qu'en anglais.

DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx

TO CONFIRMATORY APPLICATION 07/c/01/19,

made by email on 6 March 2019,

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

for public access to documents ST 14639 2013 INIT, ST 14639 2013 COR 1

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 "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 26 January 2019 the applicant introduced an initial application (registered on 28 January 2019) for access to documents **ST 14639 2013 INIT** and **ST 14639 2013 COR 1**.
2. On 22 February 2019, the General Secretariat of the Council (GSC) replied to this application granting partial access to document ST 14639 2013 INIT. Full disclosure has been refused pursuant to the exceptions laid down in art. 4(3), first subparagraph (protection of the decision-making process) and Article 4(2), second indent (protection of legal advice) of Regulation (EC) No 1049/2001.
3. On 6 March 2019, the applicant introduced a confirmatory application requesting the Council to reconsider the decision of the GSC to grant only partial access to the requested opinion. The applicant contended that *"on this occasion the public interest in the legal assessments in this documents prevails, since they refer to the relevant grounds for the legislative consultations, which have still not been concluded after nearly six years, concerning the European Commission's proposal for a Regulation of the European Parliament and of the Council on the provision and quality of statistics for the macroeconomic imbalances procedure."*

4. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001, whether full public access can be granted.

I. The requested documents

5. Document ST 14639 2013 INIT is an opinion of the Council Legal Service (CLS) of 9 October 2013 on the proposal for a Regulation of the European Parliament and of the Council on the provision and quality of statistics for the macroeconomic imbalances procedure.
6. At the request of the Council's preparatory body examining this proposal, the CLS opinion provides legal analysis on the compatibility with the legal basis of the proposal, namely Article 338 (1) TFUE, of its provisions related to sanctions and missions of Member States, as well as on the respect of the principle of proportionality.
7. Document ST 14639 2013 COR 1 of 31st October 2013 is a corrigendum which only contains minor corrections of typing mistakes without reflecting the content of the CLS opinion.
8. The draft legislative act, proposed by the Commission on 7 June 2013, has not been adopted to date by the co-legislators.

II. The exception relating to the institution's decision-making process

9. At the outset, it shall be recalled that Article 4(3) first indent of Regulation (EC) No 1049/2001 provides that : "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

10. It is established that a higher standard of transparency applies when the institutions act on their legislative capacity. This cannot, however, result in denying the institutions the possibility of justifying a refusal to grant access to documents related to a legislative file on the basis of the exception set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001, given, in particular, that that exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of that provision, to grant access to certain documents related to a legislative process in duly justified cases¹.
11. The requested document is drawn up by the Council's Legal Service for the internal use of the Council in the sense of Article 4(3), first subparagraph, of Regulation 1049/2001 and relates to a matter on which the decision-making process has not been finalised to date and is therefore still ongoing.
12. The issues analysed in the requested opinion – notably the analysis on the provisions on the possibility to impose sanctions and to carry out missions to Member States – are complex and form an important part of the basis for future discussions concerning the Commission's proposal. Those issues have been controversial and are among the most sensitive ones in the context of the discussions on that file for which no political agreement has been reached among the Council Members.
13. Moreover, even if the Council managed to reach an agreement internally, the envisaged proposal would then need to be negotiated with the European Parliament and the Commission. The analysis of the Legal Service, which is intended to an internal audience and is not binding, is frank and straightforward and clearly points certain legal issues that arise from the envisaged measures. Given also the fact that the involved institutions have expressed divergent approaches on the matters covered by the opinion, its full disclosure at this stage would limit the Council's margin of manoeuvre and its capacity to defend its positions in an effective way in the context of the inter-institutional discussions.

¹ Judgment of the General court of 22 march 2018 in Case T-540/15, Emilio De Capitani, v. European Parliament, obs. 112

14. The Council also considers that, if the analysis carried out by the CLS had to be fully disclosed, this could give rise to interference by external stakeholders in the decision-making process. In a file in which it is very difficult to reach an agreement at both internal and interinstitutional level, such pressure would make it even more difficult for co-legislators to accept compromise solutions or to pursue certain options and therefore would affect the possibility of concluding this file.
15. Therefore, there is a reasonably foreseeable risk that full disclosure of the requested document could have a negative impact on the decision-making process.
16. The Council therefore concludes that full disclosure of the requested document would seriously undermine the on-going decision-making process under Article 4(3), first subparagraph, of Regulation 1049/2001.

III. The exception relating to the protection of legal advice

17. Under article 4(2) second indent of Regulation (EC) No 1049/2001 : "*The institutions shall refuse access to a document where disclosure would undermine the protection of (...) legal advice*".
18. The Council recognises that, in that specific case, the legal advice relates to a legislative procedure for which a particularly high exigence of transparency applies as above-mentioned.
19. However, the requested legal advice addresses complex legal issues.
20. As it has been pointed out above, those issues are delicate and controversial within the Council and are very likely to be among the main points in the future negotiations with the European Parliament and the Commission. In addition, the considerations developed in the requested opinion by the Legal Service of the Council are not shared by its institutional interlocutors. Thus, the legal advice concerns matters that are critical for the negotiations and its full disclosure would further impede the possibility to reach an agreement on the file. In so far as the co-legislators have not yet adopted the proposed Regulation, the issues touched upon by the opinion remain particularly sensitive.

21. Moreover, the legal advice contained in the requested opinion touches upon issues that are of a broad scope that goes beyond the context of the legislative file in question. This is particularly true as regards the analysis of the possibility to introduce in a legislative act based on Article 338(1) TFUE a specific procedure for sanctions against Member States or provisions allowing the conduct of missions to Member States so as to investigate in depth the statistics' quality. Those are indeed questions that have a systemic nature.
22. Under these circumstances, in that particular case, full disclosure of the requested opinion would compromise the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover it could expose to external pressure the Legal Service, which in turn, could affect the way in which legal advice is drafted and hence prejudice the possibility to express views free from external influences.
23. Under the circumstances, the Council concludes that full disclosure of the requested document would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation No 1049/2001.

IV. Partial access pursuant to Article 4(6) of Regulation 1049/2001

24. In its initial decision, the GSC considered that disclosure of certain parts of the requested legal opinion did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to document ST 14639 2013 INIT and notably to paragraphs 1 to 3.
25. The Council has now examined whether extended public access could be granted.
26. In light of its examination, the Council considers that some parts of the requested document which have not been disclosed in the initial reply – including several paragraphs that contain legal advice which is, however, of a more general nature – are less sensitive and can therefore be disclosed at this stage.

27. Therefore, the Council has concluded that additional partial access can be granted to paragraphs 4 to 6 and 17 to 19 of document ST 14639 2013 INIT and that document ST 14639 2013 COR 1 can be fully disclosed.

V. Assessment of the public interest in disclosure

28. The Council has thoroughly examined whether there is an overriding public interest in disclosure, taking into account the arguments provided by the applicant and the need to ensure transparency and public participation in the legislative process.
29. In that regard, the Council fully recognises the public interest in following the Council's discussions on legislative proposals. It is in that view that it has decided to grant a wider public access to the requested documents as mentioned above.
30. The Council however also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of legal advice and of the decision making process in all case. Rather, the Council is called upon to carefully balance the public interest in having access to the requested document against the need to protect the interests invoked.
31. In light of its examination, the Council concludes, on account of the particularly sensitive nature and wide scope of some parts of the legal advice as well as of the need of preserving the effectiveness of its decision-making, that in the specific case at hand, the public interest invoked by the applicant does not outweigh the need of protection of the aforementioned interests under Article 4(2), second indent and 4(3) first subparagraph of Regulation No 1049/2001.

VI. Conclusion

1. For the abovementioned reasons, the Council concludes that:
 - a) Public access to document ST 14639 2013 INIT, with the exception of paragraphs from 1 to 6 and 17 to 19, has to be refused pursuant to the second indent of Article 4(2) (protection of legal advice) and Article 4(3), first subparagraph (protection of the decision making process) of Regulation No 1049/2001.
 - b) Full public access is granted to document ST 14639 2013 COR 1.
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