



Council of the
European Union

Brussels, 30 June 2021
(OR. en)

10265/21

INF 203
API 108

NOTE

From: General Secretariat of the Council
To: Working Party on Information

Subject: Public access to documents
- Confirmatory application No 29/c/02/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 14 May 2021 and registered on 17 May 2021 (Annex 1);
- the reply from the General Secretariat of the Council dated 8 June 2021 (Annex 2);
- the confirmatory application dated 28 June 2021 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 14 May 2021 - 12:24 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone: **DELETED**

Mobile:

Fax:

Requested document(s): Council Legal Service opinion relating to COM(2020) 642 final

1st preferred linguistic version: EN - English

2nd preferred linguistic version:



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 8 June 2021

DELETED

Email: **DELETED**

Ref. 21/1042-mj/mf

Request made on: 14.05.2021

Registered on: 17.05.2021

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Document **8721/21** is an opinion of the Council Legal Service ("CLS") on the Commission proposal for a Regulation amending the "Aarhus Regulation" (Regulation (EC) No 1367/2006) – Scope of application of the proposal, and 2021 Advice of the Aarhus Convention Compliance Committee ("ACCC")² on the proposal.

The opinion was issued in response to a request of the members of the Working Party on Environment, which sought the written opinion of the CLS on the proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1367/2006 ("the Proposal"), which was adopted by the European Commission on 14 October 2020.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

² Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3 (ACCC 2021 Advice).

The General Secretariat of the Council is of the view that the requested document falls within the remit of the exceptions relating to the protection of the decision-making process (Article 4(3), first subparagraph of Regulation (EC) No 1049/2001) and legal advice (Article 4(2), second indent of Regulation (EC) No 1049/2001).

The requested document is very recent and pertains to a highly complex and politically sensitive decision-making process, that is currently ongoing.

On 14 October 2020, the European Commission adopted a legislative proposal amending the Regulation (EC) No 1367/2006 to address the findings and recommendation issued by the ACCC in 2017³. On 17 December 2020, the Council adopted its General Approach on the Commission's proposal.

As part of the legislative procedure, on 9 April 2021, the European Economic and Social Committee issued its opinion on the Commission's proposal. On 4 May 2021, the Committee on the Environment, Public Health and Food Safety (ENVI Committee) adopted a report on the Commission's proposals proposing several amendments. A few days later, on 20 May 2021, the Plenary of the European Parliament adopted the report prepared by the ENVI Committee.

Informal trilogues on the Commission's proposal will start soon.

In such context, full disclosure of the requested document at this stage of the legislative procedure entails a serious risk of undermining the position of the Council in the informal trilogues, and would limit the necessary margin of manoeuvre in these discussions. Disclosure of the requested document would also undermine the mutual trust and confidence that enable the European Parliament, the Council and the Commission to reach an agreement at this stage of the legislative process.

Also, even if the Council has adopted a General Approach on the text, there are still diverging political positions among its members. The pressure that would ensue from the disclosure of the requested document, which is critical to this ongoing legislative procedure, would make it more difficult for members of the Council to accept compromise solutions or to pursue certain options and therefore would affect the possibility of reaching a final agreement on the position at the stage of informal trilogues.

³ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3.

Moreover, the analysis of the CLS, which is intended for an internal audience within the Council, is frank and discusses in detail various legal issues. Full disclosure of the legal advice would make known to the institutional interlocutors involved in the legislative procedure the Council's internal reflections and concerns and would therefore limit its options during interinstitutional exchanges. Therefore, there is a concrete and serious risk that full disclosure of the requested document would have a concrete and substantial negative impact on the Council's decision-making process.

Finally, if this opinion is disclosed, certain arguments developed therein could give rise to external interference, as the Proposal happens to be the object of criticism by NGOs and academia.

Additionally, the Commission proposal examines, among other, the obligations under the Aarhus Convention, and was adopted to address the mentioned findings by the ACCC, which concluded that the European Union “fails to comply with Article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Convention, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs”.⁴ Thus, the issues analysed in the requested document are not only highly controversial but also sensitive.

The requested document also addresses an issue which has been raised in a novel and unusual context. It is the first time that the ACCC addressed to the European Union findings and recommendations regarding its compliance with Article 9(3) and (4) of the Aarhus Convention and questions the system of legal remedies provided for by European Union Treaties and that the Commission, as a result of those findings, presents a proposal “to improve the implementation of the Aarhus Convention”.⁵

Consequently, it is the first time that the CLS takes a position on the issues discussed in the requested document, which are similarly not settled in the case-law. Those issues, which concern EU's system of legal remedies, are of a systemic and transversal nature and confers on the legal advice a wide scope going beyond the legislative file in question.

Finally, the legal advice covered by this opinion deals with issues which are likely to be subject to litigation before the courts. This is borne out by the fact that a large number of cases have been brought before the CJEU in which the compatibility of the current system with the Aarhus Convention has been questioned.

On this basis, the disclosure of the requested document would undermine the decision-making process pursuant to Article 4(3), first subparagraph, and the protection of legal advice pursuant to Article 4(2) second indent of Regulation (EC) No 1049/2001.

⁴ Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, paragraph 122.

⁵ The Proposal, page 1.

Last, the requested document is also relevant to the preparation of the next session of the Meeting of the Parties under the Aarhus Convention. At the sixth session of the ACCC, the Meeting of the Parties decided by consensus to postpone the decision-making on the compliance by the European Union with its obligations under the Aarhus Convention “to the next ordinary session of the Meeting of the Parties to be held in 2021”.⁶ It is expected that this meeting of the contracting parties to that Convention takes place in October 2021.

On that occasion, the Meeting of the Parties may decide to declare that the European Union has complied (or not) with its obligations under the Aarhus Convention. To that purpose, the Meeting of the Parties will take into account the amendment to Regulation (EC) No 1367/2006 proposed by Commission, among other elements.

The disclosure of the requested document would therefore reveal an assessment of the CLS confirming or refuting the existence of legally feasible ways for the European Union to address the alleged non-compliance with the Aarhus Convention. This could therefore affect the ability of the European Union to defend its position within the international framework set up by the Aarhus Convention.

On this basis, the disclosure of the requested document could undermine the protection of international relations pursuant to the third indent of Article 4(1) (a) of Regulation (EC) No 1049/2001.

Although Article 4(1) of Regulation (EC) No 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public’s interest in disclosure, as far as the refusal is also based on the exemptions laid down in Article 4(2), second indent (protection of legal advice), and Article 4(3), first subparagraph (protection of decision-making process) of Regulation (EC) No 1049/2001 and for the sake of completeness, the General Secretariat of the Council considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the document.

In the view of the foregoing, the General Secretariat of the Council considers that access to the greatest part of document 8721/21 should be refused.

⁶ ACCC/M/2017/3.

However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, public access may be granted to paragraphs 1 and 3-4 of the requested document that contain an introduction, and paragraphs 6 to 17, which contain an overview of the relevant legal and factual framework.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁷

Yours sincerely,

Fernando FLORINDO

Enclosure

⁷ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to access@consilium.europa.eu on 28 June 2021 - 16:41]

Dear Transparency Unit,

Please find my confirmatory application attached.

Would you please confirm that it has been received?

With best wishes from sunny **DELETED**

DELETED

*Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency*

Subject: Request for an opinion of the Council Legal Service (Document 8721/21) on the Commission proposal for a Regulation amending the ‘Aarhus Regulation’ (Regulation (EC) No 1367/2006) - Ref. 21/1042-mj/mf

1. Subject of dispute

I have requested access to an opinion of the Council Legal Service (Document 8721/21) concerning the Commission’s proposal for a Regulation amending the ‘Aarhus Regulation’ (Regulation (EC) No 1367/2006). According to Article 1 of the Regulation,

1. The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as ‘the Aarhus Convention’, by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

(a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;

(b) ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted;

(c) providing for public participation concerning plans and programmes relating to the environment;

(d) granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.

2. In applying the provisions of this Regulation, the Community institutions and bodies shall endeavour to assist and provide guidance to the public with regard to access to information, participation in decision-making and access to justice in environmental matters.

In its letter of 8 June 2021, the General Secretariat provided partial access to the requested document, limiting the scope of access primarily to the findings of the Aarhus Compliance Committee (ACCC), which were already in the public domain. It explains that access is granted to paragraphs 1 and 3-4 of the requested document that contain an introduction, and paragraphs 6 to 17, which contain an overview of the relevant legal and factual framework.

The General Secretariat of the Council justifies its refusal to grant full access with the exceptions relating to the protection of the decision-making process (Article 4(3), first subparagraph of Regulation (EC) No 1049/2001) and legal advice (Article 4(2), second indent of Regulation (EC) No 1049/2001).

The Secretariat discusses the two first exceptions together. In its view, the ‘requested document is very recent and pertains to a highly complex and politically sensitive decision-making process, that is currently ongoing’. The Secretariat argues that

‘full disclosure of the requested document at this stage of the legislative procedure entails a serious risk of undermining the position of the Council in the informal trilogues, and would limit the necessary margin of manoeuvre in these discussions. Disclosure of the requested document would also undermine the mutual trust and confidence that enable the European Parliament, the Council and the Commission to reach an agreement at this stage of the legislative process.

Also, even if the Council has adopted a General Approach on the text, there are still diverging political positions among its members. The pressure that would ensue from the disclosure of the requested document, which is critical to this ongoing legislative procedure, would make it more difficult for members of the Council to accept compromise solutions or to pursue certain options and therefore would affect the possibility of reaching a final agreement on the position at the stage of informal trilogues.’

The Secretariat argues that the analysis of the CLS is ‘intended for an internal audience within the Council’ and is for this reason ‘frank and discusses in detail various legal issues’. In the opinion of the Council Secretariat,

‘full disclosure of the legal advice would make known to the institutional interlocutors involved in the legislative procedure the Council's internal reflections and concerns and would therefore limit its options during interinstitutional exchanges. Therefore, there is a concrete and serious risk that full disclosure of the requested document would have a concrete and substantial negative impact on the Council's decision-making process.

Finally, if this opinion is disclosed, certain arguments developed therein could give rise to external interference, as the Proposal happens to be the object of criticism by NGOs and academia.

Additionally, the Commission proposal examines, among other, the obligations under the Aarhus Convention, and was adopted to address the critical findings by the ACCC, which makes the issues analysed in the requested document ‘not only highly controversial but also sensitive’. In the Secretariat’s view, the examined issues are also raised in a novel and unusual context, which are ‘not settled in the case-law. Those issues, which concern EU’s system of legal remedies, are of a systemic and transversal nature and confers on the legal advice a wide scope going beyond the legislative file in question’. Moreover, the issues covered by the legal opinion ‘are likely to be subject to litigation before the courts. This is borne out by the fact that a large number of cases have been brought before the CJEU in which the compatibility of the current system with the Aarhus Convention has been questioned’.

As regards international relations, the Secretariat argues that the disclosure of the requested document could undermine the protection of international relations pursuant to the third indent of Article 4(1) (a) of Regulation (EC) No 1049/2001, since it is relevant to the preparation of the next session of the Meeting of the Parties under the Aarhus Convention where the Parties may decide to declare that the European Union has complied (or not) with its obligations under the Aarhus Convention where the proposed amendment will be assessed. For the Secretariat,

the disclosure of the requested document would therefore reveal an assessment of the CLS confirming or refuting the existence of legally feasible ways for the European Union to address the alleged non-compliance with the Aarhus Convention. This could therefore affect the ability of the European Union to defend its position within the international framework set up by the Aarhus Convention.

Finally, as regards the balancing of the harm to the protected interest against the public’s interest in disclosure required by the exemptions laid down in Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of decision-making process) the General Secretariat of the Council considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the document. It does not provide any further justification for this argument.

2. Application of Regulation (EC) No 1049/2001

The document relates to a legislative file. According to Regulation 1049/2001, all institutional documents are subject to the principle of ‘widest possible access’, however legislative documents are supposed to be afforded even wider and, where possible, direct access.⁸ Pursuant to Regulation 1049/2001 and the consistent jurisprudence of the CJEU, institutional transparency with respect to legislative documents is of paramount importance in the democratic present of the European Union. As the Council certainly knows, in the case of *Turco*, the European Court of Justice (‘ECJ’) expressed that, ‘[o]penness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.’⁹ And, more recently, in *ClientEarth*, the ECJ built upon this idea by providing that, ‘the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the

⁸ Regulation 1049/2001, recital 6 and Article 12(2).

⁹ Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 46.

choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices.’¹⁰ Because of the importance of the openness of legislative documents within the democratic European Union, any application of exceptions to documents of that nature must be interpreted ‘all the more strictly’.¹¹

According to the actual wording of Article 4(3), it is not enough that the interest would be merely ‘undermined’ but rather that the interest would be ‘seriously undermined’ by release of the document. More specifically, the institution must show that there is a, ‘specific, actual and reasonably foreseeable risk that access to the documents at issue would seriously undermine’ the relevant decision-making processes.¹² The Council has simply provided a number of general and unsubstantiated arguments. Arguments precisely of this nature were firmly rejected by the ECJ in *ClientEarth*, as being insufficient. Dismissal by the Court of similar arguments by the Council can also be found in, for example, *Miettinen*.¹³

For these reasons, Article 4(3) has been misapplied and full access to the Document should be granted.

As regards the exception relating to Article 4(2), second indent, the General Secretariat’s line of argumentation is familiar from a number of Court cases, which the Council has lost, such as *Turco* and *Miettinen* quoted above.

First, the same considerations relating to the legislative nature detailed above with respect to Article 4(3) is also of relevance to the application of Article 4(2). For these reasons, Article 4(2) must be interpreted particularly strictly.

Secondly, the ECJ has held that with respect to application of Article 4(2), a three-stage test must be applied by the institutions. According to this test, the institutions must: first, be satisfied that the document, or parts of that document, actually relate legal advice¹⁴; secondly, assess whether disclosure of the document or the parts of the document covered by the exception would actually undermine, in a ‘reasonably foreseeable and not purely hypothetical’ manner, the institutions ‘interest in seeking legal advice and receiving frank, objective and comprehensive advice’¹⁵; and, finally, ‘ascertain whether there is any overriding public interest justifying disclosure’ regardless of whether they have determined that the interest protected by the exception would be undermined.¹⁶

¹⁰ Case C-57/16 P *ClientEarth v Commission* EU:C:2018:660, para 84.

¹¹ *Ibid.*, para 101.

¹² *Ibid.*, para 121.

¹³ Case T-395/13 *Miettinen v Council* EU:T:2015:648.

¹⁴ *Turco*, paras 38-39.

¹⁵ *Ibid.*, paras 40-43.

¹⁶ *Ibid.*, para 44.

Presuming that the first stage of this test has been carried out correctly the Council in this case, the second stage has clearly been misapplied. The Court has specifically established that:

*conferring particularly sensitive character on all legal advice concerning a novel question would result in impeding in practice the disclosure of a large proportion of that advice. It is precisely when they are dealing with novel questions that the institutions request advice from their legal service.*¹⁷

Moreover,

*as regards the risk invoked by the Council that disclosure of the requested document would impede its negotiating capacities and the chances of reaching an agreement with the Parliament, [...] a proposal is designed to be debated, in particular as regards the choice of legal basis. Moreover, as the applicant states, in the light of the importance of the choice of legal basis of a legislative act, the transparency of the choice does not weaken the decision-making process, but strengthens it. In that regard, as the Court of Justice has held, it is precisely openness concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (judgments in Sweden and Turco v Council, cited in paragraph 20 above, EU:C:2008:374, paragraph 59, and Sweden v MyTravel and Commission, cited in paragraph 31 above, EU:C:2011:496, paragraph 113).*¹⁸

Finally, as regards the application of the exception relating to international relations, it is not sufficient that the document in question merely relates to international relations. The risk that the public interest of protection of international relations is undermined is not, in itself and in abstract, a sufficient basis for denying access. The analysis of the document needs to take into consideration the content and the context of the document and the specific circumstances involved.¹⁹ In this case, the context is that of the Aarhus Regulation, which implements the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in the European Union. In this context, transparency and public participation are particularly pressing.

As regards the balancing of the harm to the protected interest against the public's interest in disclosure required by the exemptions laid down in Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of decision-making process) the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the document. It does not provide any further justification for this conclusion.

¹⁷ Case T-395/13, *Miettinen v. Council*, para. 43.

¹⁸ Case T-395/13, *Miettinen v. Council*, EU:T:2015:648, paras 70-71

¹⁹ Cases T-211/10, *Kuijjer v. Council*, paras 60-61 and C-360/12 P *Council v In 't Veld*, para 51.

Contrary to the Secretariat's conclusion, it appears clear that an overriding public interest in disclosure does apply to the Document in this instance. In *Turco*, a case involving a document directly analogous to the Document (a legal opinion by the CLS given in the legislative context), the Court held that an overriding public interest in disclosure was 'constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.' In this instance, an overriding public interest is constituted by the very same reasons and justifies its existence. In addition, the legislative document in question concerns the application of publicity to environmental information and access to justice, which as a topic is of a particularly high relevance for the general public and is based on international obligations binding on the European Union. Many of the arguments provided by the Secretariat in its reply in fact support exactly this conclusion: the matter is of an interest to civil society and the academia. Moreover, the Secretariat explains that a large number of cases have been brought before the CJEU in which the compatibility of the current system with the Aarhus Convention has been questioned. This is a consequence of the negative assessments by the Aarhus Compliance body, which are also broadly and publicly known. All of these demonstrate that there is a need to conduct a broad and open debate about the EU's compliance with its international obligations. Granting access to the analysis of the CLS is a part of enabling such broad debate. The EU institutions should welcome this debate, not try to hinder it.

Therefore, regardless of the inapplicability of Articles 4(2) and (3) to the Document outlined above, the document should in any case be released due to the existence of an overriding public interest in disclosure.

Regulation No 1049/2001 as applied by the European Court of Justice has therefore been misapplied in this instance and full access should be granted to the Document.

3. Requested action

For the above reasons, I request that the Council disclose the full Document at its earliest possible convenience, taking into account the subject matter of the Aarhus Convention and its obligations on the Union. Overall, it does not enhance the Council's legitimacy that it seeks to recycle argumentation that has been expressly rejected by the Court over and over again in relation to similar types of documents.

DELETED