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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	10265/21
Subject:	Public access to documents - Confirmatory application No 29/c/02/21

Delegations will find attached a draft reply to confirmatory application No 29/c/02/21
(see 10265/21).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 29/c/02/21,
made by email on 28 June 2021, and registered on the same day,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 8721/21**

The Council has considered the 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, 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 14 May 2021, the applicant requested access to **document 8721/21** (hereafter the "requested document"). This document contains an opinion of the Council Legal Service ("CLS") concerning the scope of the application of the Commission proposal for a Regulation amending the "Aarhus Regulation" (Regulation (EC) No 1367/2006)¹, and the advice of the Aarhus Convention Compliance Committee ("ACCC") on the proposal.
2. On 8 June 2021, the General Secretariat of the Council ("GSC") replied to this application granting partial access to **document 8721/21**. In particular, GSC granted access to paragraphs 1, 3-4 and 6-17 of the requested document pursuant to Article 4(6) of Regulation (EC) No. 1049/2001. Access was refused to other parts of the requested documents as the GSC took the view that their disclosure would undermine the decision-making process pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001, the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001, and the protection of international relations pursuant to Article 4(1) (a) third indent of Regulation (EC) No 1049/2001.

¹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Additionally, the GSC indicated in its reply that, 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 was also based on exemptions under Article 4(2), second indent, and Article 4(3) and for the sake of completeness, the GSC considered that, on balance, the principle of transparency underpinning this regulation would, in any case, not prevail over the above indicated interests so as to justify disclosure of the document.

3. On 28 June 2021, the applicant made a confirmatory application. She argues that the GSC has only provided “*a number of general and unsubstantiated arguments*” justifying the exception under Article 4(3) first subparagraph of Regulation (EC) No 1049/2001; that the GSC has not correctly assessed the exception under Article 4(2) second indent; that the risk that the public interest of protection of international relations is not in itself and in abstract a sufficient basis for denying access; and that there is an overriding interest in the disclosure of the document given the fact that “[the] *context, transparency and public particularly pressing*”.
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 and in light of the applicant's arguments, whether public access can be provided to the requested document.

I. Context of the requested documents

5. As mentioned above, **document 8721/21** contains an opinion of the CLS concerning the scope of the application of the Commission proposal for a Regulation amending the “Aarhus Regulation” (“Regulation (EC) No 1367/2006”) and the advice of the ACCC on that proposal.
6. On 25 June 1998, the European Community signed the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters (“Aarhus Convention”). The European Community concluded the Aarhus Convention on 17 February 2005.²

² Council Decision 2005/370/EC (OJ) L 124 17.5.2005, p.1.

7. Regulation (EC) No 1367/2006 entered into force on 28 September 2006 and into application on 28 June 2006. The objective of this regulation is to contribute to the implementation of the obligations arising under Aarhus Convention.³
8. On 17 March 2017, the ACCC adopted its findings and recommendations with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union with the Aarhus Convention.⁴
9. At the sixth session of the ACCC (11-13 September 2017), the meeting of the Parties to the Aarhus Convention 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. The report of the sixth session of the ACCC notes the following: "*The European Union recalled its willingness to continue exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review (...)* (the Budva Declaration). [T]he meeting of the Parties requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly".⁵
10. On 14 October 2020, the European Commission adopted a legislative proposal amending the Regulation (EC) No. 1367/2006 to address the findings and recommendations issued by the ACCC in 2017.⁶
11. On 17 December 2020, the Council adopted its General Approach on the Commission's proposal.⁷
12. On 12 February 2021, the ACCC issued its advice on the Commission's proposal.⁸

³ Article 1(1) of Regulation (EC) No 1367/2006.

⁴ ECE/MP.PP/C.1/2017/7.

⁵ Economic Commission for Europe - Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the sixth session of the Meeting of the Parties, paragraphs 62 and 63.

⁶ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, COM/2020/642 final.

⁷ See publicly available documents on these discussions: ST 11853/20 INIT, ST 13937/20 INIT, ST 14208/20 INIT and ST 14157/20 INIT.

13. As part of the legislative procedure, on 9 April 2021, the European Economic and Social Committee issued its opinion on the Commission's proposal.⁹
14. 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.¹⁰ 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 were provisionally concluded recently, but the text has not been yet formally adopted and discussions between the institutions on the text are still ongoing.

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

15. At the outset, it is recalled that Article 4(3) first subparagraph 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*".
16. It has been established by case-law that a higher standard of transparency applies when the institutions act in 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 Article 4(3) of Regulation (EC) No 1049/2001, given, in particular, that this exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of

⁸ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3.

⁹ Opinion of the European Economic and Social Committee on ‘Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies’, OJ C 123, 9.4.2021, p. 66–71.

¹⁰ Report on the proposal for a regulation of the European Parliament and of the Council Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (COM(2020)0642 – C9-0321/2020 – 2020/0289(COD)).

that provision, access to a specific document related to a legislative process or parts thereof in duly justified cases.¹¹

17. **Document 8721/21** has been drawn up by the CLS for the internal use of the Council in the sense of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001. This document 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 legislative proposal amending Regulation (EC) No 1367/2006 which the European Commission adopted on 14 October 2020. More particularly, **document 8721/21** analysed the scope of the Commission's proposal in light of the findings and the recommendations made by the ACCC in 2017 and the advice given by the ACCC on this proposal on 12 February 2021. This analysis is done in a frank and comprehensive manner.
18. Based on this, there is no doubt that the requested document relates to a matter where the decision has not been yet taken by the institution.
19. The purpose of **Document 8721/21**, which is intended for an internal audience within the Council, was to assist the Council and its preparatory bodies in the interinstitutional discussions, including informal trilogues discussions, on the Commission's proposal. This document provides legal advice on the Council's possible negotiating strategy and fall-back options during the ongoing legislative process. Its disclosure would therefore release details on the Council's possible negotiating position during informal trilogues or other (later) stages of the legislative procedure.¹² This would undermine the Council's own negotiating strategies and its position in the negotiations, and affect the possibility of successfully reaching agreement on the text.

¹¹ Judgment of the General Court of 22 March 2018, *Emilio De Capitani, v. European Parliament*, T-540/15, paragraph 67; judgement of 21 September 2010, *Sweden and Others v API and Commission*, C- 514/07 P, C- 528/07 P and C- 532/07 P, EU:C:2010:541, paragraph 76; and of 17 October 2013, *Council v Access Info Europe*, C- 280/11 P, EU:C:2013:671, paragraph 73.

¹² The Court has recognised that the use of trilogues has over the years proved effective and flexible in that it has contributed significantly to increasing the possibilities for agreements at the various stages in the legislative process (see Judgment of the General Court of 22 March 2018, *Emilio De Capitani, v. European Parliament*, T 540/15, paragraph 71).

20. It should also be highlighted that, although the Council has adopted a General Approach on the text, there are still diverging political positions among Council members regarding the Commission's proposal. Moreover, **document 8721/21** was issued after the Council adopted its General Approach on the Commission's proposal in December 2020. The requested document is at the heart of the discussions on the Commission's proposal and its disclosure would make it more difficult for members of the Council to accept compromise solutions or to pursue certain options. Any attempt to accept compromise solutions or to pursue certain options which do not reflect the views expressed by the CLS in the requested document would may be compromised.
21. Additionally, the requested document 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. It is also the first time that the Commission presents a proposal to improve the implementation of the Aarhus Convention and to address the concerns expressed by the ACCC.¹³ Consequently, CLS has never taken a position on these issues before, which are also not settled in the case-law.
22. Moreover, the issues discussed in the requested document are complex. This document contains an elaborate analysis, including questions relating to primary law, without the assistance of clear and settled case-law from the Court of Justice.

¹³ The objective of the Commission's proposals is "*to improve the implementation of the Aarhus Convention following the adoption of the Lisbon Treaty and to address the concerns expressed by the Aarhus Convention Compliance Committee) regarding the EU's compliance with its internal obligations under the Convention*" (explanatory memorandum).

23. Furthermore, another element adding complexity to the matter is the role played by Article 9(3) of the Aarhus Convention, which the ACCC states that the European Union fails to comply with.¹⁴ The Court has held that this article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals,¹⁵ and thus, lacks the clarity and precision required in order to be relied on before the EU judicature for assessing the legality of Union legal acts.¹⁶ However, even though such article, according to the case-law of the Court of Justice, cannot be used as a parameter for the judicial review of Union acts, the Union has been found to be in a situation of non-compliance by an international body. This situation is unusual to say the least.
24. Contrary to the applicant's arguments in the confirmatory application, these elements confirm that 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. These arguments are not "*general and unsubstantiated*", as the applicant claimed in the confirmatory application. To the contrary, they show that the disclosure of **document 8721/21** would specifically and concretely undermine the process initiated by the adoption of the Commission's legislative proposal amending Regulation (EC) No 1367/2006, and this risk is foreseeable and not purely hypothetical.¹⁷

¹⁴ See paragraph 123 of Findings and Recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union.

¹⁵ See judgement of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 45; and judgement of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C- 543/14, EU:C:2016:605, paragraph 50.

¹⁶ See judgment of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5, C-404/12 P and C-405/12 paragraphs 52-53; judgment of 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4, paragraphs 60 and 61; and judgment of 3 September 2020, *Mellifera v Commission*, C-784/18 P, EU:C:2020:630, paragraph 88.

¹⁷ Judgement of the General Court of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 29.

25. Additionally, if the analysis carried out by the CLS had to be fully disclosed, certain of the arguments developed therein would give rise to external interference. After the Commission presented its proposal amending Regulation (EC) No 1367/2006, several NGOs have actively run campaigns urging the institutions "*to amend EU access to justice law and comply with international law*"¹⁸ and "*to close the loopholes identified [in the Commission proposal] and ensure an internal review mechanism that is finally fit for purpose*".¹⁹ These NGOs consider that the ongoing revision of the Aarhus Regulation as proposed by the Commission last year is "*still not strong enough to ensure compliance with international law*".²⁰
26. The reality of this external pressure is therefore not purely hypothetical, if not to say certain, and the evidence set out in the previous paragraph shows that there is a reasonable risk that the decision to be taken would be substantially affected as a result of that pressure.²¹
27. For the above reasons, the Council maintains that the disclosure of the **document 8721/21** would undermine the decision-making process pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

III. The exception relating to the protection of legal advice

28. 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*".
29. The requested document falls within the scope of this provision.

¹⁸ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

¹⁹ ClientEarth, "The Aarhus Regulation Amendment: Cause for cautious celebration". Link: <https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-aarhus-regulation-amendment-cause-for-cautious-celebration/> . Also, EEB, ClientEarth and Justice and Environment, "Call to strengthen Commission proposal to amend Aarhus Regulation", link: <https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2020/12/Letter-to-Environmental-Ministers-regarding-the-Commission-s-Aarhus-proposal.pdf> .

²⁰ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

²¹ Judgment of the General Court of 22 march 2018, *Emilio De Capitani, v. European Parliament*, T 540/15, paragraph 99. Also judgment of the General Court of 18 December 2008 *Muñiz v Commission*, T-144/05, paragraph 86.

30. The Council recognises that, in the present case, the legal advice relates to a legislative procedure for which a particularly high standard of transparency applies as mentioned above. In that regard, it has been established in the case-law that an opinion of the Legal Service of a Union institution issued in the context of a legislative process should in principle be disclosed, unless it is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process in question.²²
31. In the Council's view, both conditions are met in the present case.
32. First, the issues analysed in **document 8721/21** are highly sensitive. As mentioned before, the requested document analysed the scope of the Commission's proposal to amend Regulation (EC) No 1367/2006 following the ACCC's findings and recommendations regarding the European Union's compliance with Article 9(3) and (4) of the Aarhus Convention.
33. The ACCC 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"*.²³ Following the adoption of those findings, the Meeting of the Parties decided to postpone the decision-making on the non-compliance of the European Union with the Aarhus Convention to the next ordinary session of the Meeting of the Parties to be held in 2021. As a result of these findings and recommendations, the Commission adopted a proposal to amend Regulation (EC) No. 1367/2006.
34. The sensitivity of these matters was clearly enunciated in the proposal's explanatory memorandum which stated that the objective of this proposal was *"to improve the implementation of the Aarhus Convention following the adoption of the Lisbon Treaty and to address the concerns expressed by the Aarhus Convention Compliance Committee) regarding the EU's compliance with its internal obligations under the Convention"*.

²² Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69.

²³ 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.

35. The CLS was therefore called to issue an opinion on sensitive matters in a sensitive context, i.e. after the ACCC addressed to the European Union findings and recommendations regarding its compliance with Article 9(3) and (4) of the Aarhus Convention and questioned the system of legal remedies provided for by European Union Treaties.
36. All these elements show that the matters analysed in **document 8721/21** are of a particularly sensitive nature.
37. Additionally, the content of the requested document is of a particularly wide scope that goes beyond the context of the Commission's proposal amending Regulation (EC) No. 1367/2006.
38. First, the fact that the ACCC's findings, discussed in the requested document, concern the EU's system of legal remedies, confers on the legal advice a wide scope going beyond the legislative file in question. In the current system of legal remedies, NGOs cannot challenge certain acts, as they do not have *locus standi* according to Article 263, fourth paragraph, TFEU, but can challenge the outcome of a review procedure under Regulation (EC) No. 1367/2006. Such procedure currently concerns only the review of administrative acts having individual scope. The Commission's proposal introduces the possibility to request review of administrative acts having general scope, broadening significantly the scope of application of the Aarhus Regulation. The requested document concerns the system of internal review as established under this regulation, as amended by the Commission proposal, and its relation with the system of legal remedies as provided for under the Treaty on the Functioning of the European Union ("TFEU"). Therefore, given that the Commission's proposal introduces a modification affecting all areas of policy making, the analysis of the CLS of the relation between the administrative review and the judicial remedies set out by the Union's Treaties has implications going beyond this specific legislative file.

39. Second, the requested document touches upon issues that may affect the choices that the Commission will make regarding future legislative proposals in the context of the European Green Deal currently in the making. As explained in the Commission Communication "*Improving access to justice in environmental matters in the EU and its Member States*",²⁴ the Commission has committed itself in the European Green Deal to revise Regulation (EC) No 1367/2006 and to work with the Member States to improve access to justice in environmental matters at national level. In connection to this, the Commission has identified as a priority area the inclusion of provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters.
40. In its confirmatory application, the applicant states that the GSC has incorrectly assessed whether disclosure of the document or the parts of the document covered by the exception would actually be undermined in a "*reasonably foreseeable and not purely hypothetical*" manner. In order to support those arguments, the applicant refers to two excerpts from the case T-395/13 *Miettinen v Council*.²⁵ Nevertheless, the Council considers that those excerpts do not show that the GSC has incorrectly made its assessment. The GSC granted a partial access to the document in spite of its sensitive nature, and the matter at hand does not concern the choice of the legal basis, but an issue which has been raised in a novel and unusual context, as explained above.

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on Improving access to justice in environmental matters in the EU and its Member States (COM(2020) 643 final).

²⁵ Judgement of the General Court of 18 September 2015, *Miettinen v Council*. The excerpts are the following: "[...] *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*" (paragraph 43), and "*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)*" (paragraphs 70-71).

41. Lastly, there is a significant risk that, should the legislative process result in the adoption of a legal act, the legality of the resulting text is challenged before the EU Courts. This is borne out by the fact that a large number of cases have been brought before the Court of Justice in which the compatibility of the current system with the Aarhus Convention has been questioned.²⁶ Also, as shown above, certain environmental NGOs which have challenged the current framework before EU Courts²⁷ have expressed their opposition to the Commission's proposal and urged the institutions "*to amend EU access to justice law and comply with international law*"²⁸ and "*to close the loopholes identified [in the Commission proposal] and ensure an internal review mechanism that is finally fit for purpose*".²⁹
42. On this basis, there is a high likelihood that the envisaged measure, once it has been adopted, will be contested before the EU Courts. In such a case, the legal issues covered by the requested document will be at the core of the court proceedings. There is therefore a concrete risk that the issues addressed in the requested documents will be subject to litigation.

²⁶ See, among others, order of 14 January 2021, *Sabo and Others v Parliament and Council*, C-297/20 P, EU:C:2021:24; judgement of 3 December 2020, *Région de Bruxelles-Capitale v Commission*, C-352/19 P, EU:C:2020:978; judgement of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7; judgement of 12 September 2019, *TestBioTech and Others v Commission*, C-82/17 P, EU:C:2019:719; judgment of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, C-404/12 P and C-405/12, ECLI:EU:C:2015:5; and judgement of 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4.

²⁷ Judgement of 27 January 2021, *ClientEarth v EIB*, T-9/19, EU:T:2021:42; judgement of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486; judgement of 13 September 2013, *ClientEarth v Commission*, T-111/11, EU:T:2013:482; order of 17 July 2015, *EEB v Commission*, T-685/14, EU:T:2015:560; order of 17 July 2015, *EEB v Commission*, T-565/14, EU:T:2015:559; order of 28 November 2005, *EEB and Others v Commission*, T-94/04, EU:T:2005:425.

²⁸ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

²⁹ ClientEarth, "The Aarhus Regulation Amendment: Cause for cautious celebration". Link: <https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-aarhus-regulation-amendment-cause-for-cautious-celebration/>. Also, EEB, ClientEarth and Justice and Environment, "Call to strengthen Commission proposal to amend Aarhus Regulation", link: <https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2020/12/Letter-to-Environmental-Ministers-regarding-the-Commission-s-Aarhus-proposal.pdf>.

43. The opinion of the CLS contained in the requested document is frank and comprehensive, as mentioned above, and the arguments and conclusions developed therein reveal which parts of the Commission's legislative proposal amending Regulation (EC) No 1367/2006 are most difficult and controversial from a legal perspective. Disclosure of legal advice concerning those aspects would negatively affect the ability of the CLS to effectively defend decisions taken by the Council before the Union courts on an equal footing with the legal representatives of the other parties to legal proceedings. In that regard, the Council also notes that the case-law has recognised the particularly sensitive nature of legal advice provided by the Legal Service of an institution and concerning issues that could be the subject of litigation.³⁰
44. In light of the above, in that particular case, full disclosure of the requested document would compromise the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice, and may lead the Council to display caution when requesting similar written opinions from its Legal Service. The possibility that the legal advice in question be disclosed to the public during the negotiations on the Commission's proposal may weaken the Council's position in those negotiations. Moreover, it could expose the CLS to external pressure, 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. Indeed, disclosure in such context would run counter the ability of the CLS to continue offering a honest and frank opinion, ultimately undermining the decision-making autonomy of the Council.

³⁰ See judgment of 15 September 2016, *Herbert Smith Freehills LLP v Council*, T-710/14, EU:T:2016:494, paragraphs 70 and 71. See judgment of 15 September 2016, *Philip Morris Ltd v Commission*, T-796/14, EU:T:2016:483, paragraphs 67-70. See also judgment of 9 June 2010, *Éditions Odile Jacob SAS v. Commission*, T-237/05, EU:T:2010:224, paragraph 160. In its judgment, the General Court found that the risk of undermining the protection of legal advice laid down in the second indent of Article 4(2) is reasonably foreseeable and not purely hypothetical when disclosure of the advice would put an institution (in that case, the Commission) in the difficult position where its Legal Service might find itself having to defend a position before the Court which was not as the position it argued for internally in its role as adviser. According to the General Court, "*the risk of such a conflict arising would be liable to have a considerable effect on both the freedom of the Legal Service to express its view and its ability effectively to defend before the judicature of the European Union, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position and the internal decision-making process of that institution. The Commission (...) must have the freedom to defend a legal position which differs from that initially adopted by its Legal Service*". The ruling of the General Court was subsequently upheld by the Court of Justice.

45. Under the circumstances, the Council concludes that full disclosure of the requested documents would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation (EC) No 1049/2001.

IV. The exception related to international relations

46. Based on their content, the Council also considers that the requested document comes within the remit of the exception of protection of the public interest as regards international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001).
47. At the outset, in accordance to the established case-law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a particular regime as compared to the other exceptions included in Article 4.
48. On the one hand, *"the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*.³¹
49. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*.³²

³¹ Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; judgement of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32; and judgement of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

³² Ibid and judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and judgement of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

50. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless.³³
51. In practice, in its answer to a confirmative application, the institution must provide the applicant with plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU's international relations and whether, in the institution's broad discretion in applying the exceptions in Article 4(1) of Regulation (EC) No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical. However, in the description of the document for the purpose of its answer, the institution cannot reveal its content in further detail as doing so may disregard the scope of the interest protected by that provision.³⁴
52. Having thoroughly examined the content of the requested document and taking into account the state of play on the matter, the Council considers that further access to document beyond the already disclosed sections would undermine the protection of international relations pursuant to Article 4(1) of Regulation (EC) No 1049/2001.
53. Indeed, as mentioned above, the Meeting of the Parties decided at the sixth session of the ACCC by consensus to postpone the decision-making on the compliance by the European Union with its international obligations under the Aarhus Convention "*to the next ordinary sessions of the Meeting of the Parties to be held in 2021*". It is expected that this meeting of the contracting parties to that Convention takes place in 2021. On that occasion, the Meeting of the Parties may decide whether the European Union has complied (or not) with its obligations under the Aarhus Convention. During this meeting, the Meeting of the Parties will take into account the amendment to Regulation (EC) No 1367/2006 proposed by the Commission, among other elements.

³³ Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.

³⁴ See, to that effect, judgement of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 106; of 7 February 2018, *Access Info Europe v Commission*, T-851/16, T:2018:69, paragraphs 54 and 122, and judgement of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 51 and 113-114.

54. **Document 8721/21** assesses both the Commission’s proposal amending Regulation (EC) No 1367/2006 and the advice given on 12 February 2021 2021 by ACCC on this proposal regarding the alleged non-compliance of the EU with the Aarhus Convention. Importantly, this document includes an assessment of the issues raised by the ACCC in its advice of February 2021 and possible legal arguments that could be put forward to the Meeting of the Parties, in which the findings and recommendations of the ACCC in 2017 and the 2021 ACCC Advice might be discussed. 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; and the possible legal response that the European Union gives on the matters raised by the ACCC.
55. As stated above, in this response, the Council cannot reveal the direction recommended by **document 8721/21**, as doing so disregards the exception covered by the third indent of Article 4(1) (a) third indent of Regulation (EC) No 1049/2001. However, it is clear that, if the assessment contained in this document confirms the legal feasibility of solutions that the European Union could implement to address the alleged non-compliance with the Aarhus Convention, further/full disclosure of the requested document would risk undermining the EU position in the context of the Meeting of the Parties that might take place in 2021. This would therefore affect the ability of the EU to defend its position within the international framework set up by that Convention. In that regard, the EU Court³⁵ has recognized that the release of documents may be refused when its disclosure might weaken the position of the EU within a dispute settlement mechanism like an arbitration but, also, more generally speaking, a review of compliance that may end up in a dispute settlement mechanism.³⁶

³⁵ See, by analogy, order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 135.

³⁶ Decision I/7 adopted at the first Meeting of the Parties to the Aarhus Convention in 2004 “for the review of compliance by the Parties with their obligations under the Convention.”. Section XII (namely paras. 37) sets out the possible “Consideration by the Meeting of the Parties”: “37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures: (a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention; (b) Make recommendations to the Party concerned; (c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; (d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public; (e) Issue declarations of non-

56. The Council therefore concludes that full disclosure of the requested document would undermine the protection of international relations pursuant to the third indent of Article 4 (1) (a) third indent of Regulation (EC) No 1049/2001.

V. Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001

57. In accordance with Article 4 (6) of Regulation (EC) No 1049/2001: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*".

58. In its initial decision, the GSC considered that disclosure of certain parts of the requested document did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to paragraph 1 and 3-4 of the requested document that contained the introduction, and paragraphs 6 to 17, which contain an overview of the relevant legal and factual framework.

59. The Council has now examined whether extended partial access could be granted to the document in question.

60. In light of its examination, the Council concludes that some parts of **document 8721/21** which have not been disclosed in its first reply, despite the fact that they provide legal advice, could now be released. These are paragraphs 18 to 28 of **document 8721/21**. In this assessment, the Council has specifically taken into consideration the developments of the debates of the Council's preparatory bodies on the proposal.

61. Therefore, the Council has concluded that additional partial access can be granted to paragraphs 18 to 28 of **document 8721/21**.

compliance; (f) Issue cautions; (g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; (h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.(emphasis added)"

VI. Assessment of the public interest in disclosure

62. As abovementioned, 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. On the contrary, once the Council has come to the conclusion that release would indeed undermine the public interests protected pursuant to the third and fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, this conclusion is not conditioned by any obligation – or even possibility – to take into account "*an overriding public interest in disclosure*" as is the case for Article 4(2) and (3) of the Regulation.
63. In that regard, as far as the refusal is also based on the exceptions laid down in Article 4(2), second indent (protection of legal advice), and Article 4(3), first and second subparagraphs (protection of decision-making process) of the Regulation (EC) No 1049/2001 and for the sake of completeness, the Council fully acknowledges the public interest in following the Council's discussions on legislative proposals and having access to documents related to a legislative procedure, as openness contributes to the strengthening of democracy by allowing citizens to scrutinise the choices of the legislators. It is with that in mind that it has decided to grant an extended partial access to the requested document.
64. However, the Council also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of the efficiency of the decision-making process and legal advice. 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 under the exceptions of Regulation (EC) No 1049/2001, including the interest of an institution to protect the autonomy of its decision-making, to seek advice from its legal counsellors and to preserve the equality of arms in view of a reasonably foreseeable litigation risk. In that regard, the Council also recalls the nature and purpose of the requested document, which is a technical legal assessment and does not contain positions of political decision-makers.

65. The Council also notes that the arguments put forward by the applicant in the confirmatory application are based on general considerations that do not provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant full access, as developed above.
66. This is particularly so as regards the applicant's argument that “*the context* [of the requested document] *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*”. This argument is of a very general nature and does not demonstrate how transparency would take precedence over the reasons invoked by the Council to refuse disclosure which pertain to the specific circumstances of the case at hand.
67. The same can be said about the applicant’s argument that the large number of cases brought before the Court of Justice on the compatibility with the Aarhus Convention “*demonstrate[s] that there is a need to conduct a broad and open debate about the EU’s compliance with its international obligations*”.
68. In fact, should such arguments be considered sufficient, it would amount to generally depriving the institutions of the possibility of refusing access to a document when it discusses important matters. This goes against the wording of the second indent of Article 4(2) (the protection of legal advice) and Article 4(3) first subparagraph (the protection of decision-making process) of Regulation (EC) No 1049/2001 and the way these provisions are interpreted in the case-law.

69. What is more, the Council considers that the refusal to fully disclose the particular opinion concerned by the requested document does not amount to denying citizens the possibility to obtain information about the legislative decision-making process in question. Indeed, a large number of documents containing information relevant to this file is available in the Council's register of public documents. It should also be stressed that the refusal to grant full access to the requested document has not prevented public debate on the Commission's legislative proposal, as is clearly shown by the abundant contributions and the lively public debate on the topic.
70. Finally, contrary to the applicant's argument, the GSC has not incorrectly interpreted the exceptions under Article 4(3) first subparagraph, Article 4(2) second indent and Article 4(1) (a) third indent of Regulation (EC) No 1049/2001 because the legal opinion contained in document 8721/21 does not constitute environmental information under Article 2(1)(d) of Regulation (EC) No 1367/2006.³⁷
71. As explained, **document 8721/21** is a legal opinion of the CLS on the scope of the Commission's proposal amending Regulation 1367/2006 in light of the findings and the recommendations made by the ACCC, and the advice given by the ACCC on this proposal on 12 February 2021. This legal opinion does not contain "environmental information" as defined under Article 2(1)(d) of Regulation (EC) No 1367/2006.
72. The objective of Regulation (EC) No 1367/2006 is to contribute to the implementation of the obligations of the Aarhus Convention, which in turn aims at guaranteeing the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Consequently, **document 8721/21** does not contain

³⁷ Article 2(1) (d) provides that "‘environmental information’ means any information in written, visual, aural, electronic or any other material form on: (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i); (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements; (iv) reports on the implementation of environmental legislation; (v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii); (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii)".

“environmental information” within the meaning of Article 2(1) (d) of Regulation (EC) No 1367/2006.

73. In that regard, the Council considers as well that, if the concept “environmental information” includes information containing any kind of link, even indirect, to the environment, the exceptions under Article 4 of Regulation (EC) No 1049/2001 would be to a large extent deprive of any meaning.
74. Moreover, even if the requested document contained environmental information, which is not the case, the Court has stated that it cannot be inferred from Article 6(1) of Regulation (EC) No 1367/2006 that there is always an overriding public interest in the disclosure of environmental information.³⁸
75. In light of the above, the Council concludes, on account of the particularly sensitive nature of the legal advice as well as of the need of preserving the effectiveness of the ongoing decision-making described above, that in the specific case at hand, the public interest invoked by the applicant does not outweigh the need to preserve the interests protected under Article 4(2), second indent and Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

VII. CONCLUSION

76. For the abovementioned reasons, the Council concludes that:
 - further to the paragraphs that have already been disclosed, public access is granted to paragraphs 18 to 28.
 - refusal to give public access to the remaining parts of **document 8721/21** is confirmed pursuant to the second indent of Article 4(2) (protection of legal advice), Article 4(3), first subparagraph (protection of the decision-making process) and Article 4(1) (a) third indent (protection of international relations) of Regulation (EC) No 1049/2001.

³⁸ Judgment of 14 July 2021, *Public.Resource.Org v Commission*, EU:T:2021:445, paragraph 16.