



Council of the
European Union

Brussels, 2 July 2021
(OR. en)

10386/21

INF 209
API 113

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 30/c/01/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 20 May 2021 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 8 June 2021 (Annex 2);
- confirmatory application dated 29 June 2021 and registered on 30 June 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 20 May 2021 - 12:54]

From: **DELETED**

Sent: Thursday, May 20, 2021 12:54 PM

To: TRANSPARENCY Access to documents (COMM) Access@consilium.europa.eu

Subject: ClientEarth Request for access to documents - Opinion of the Council's Legal Service

Dear Sir/Madam,

On behalf of ClientEarth, please find attached a request for access to documents containing the Opinion of the Council's Legal Service on the Commission proposal for a Regulation amending the Regulation 1367/2007.

Many thanks in advance for processing this request and be assured that we remain available to answer any questions you may have.

Kind regards,

DELETED

20 May 2021

To: **General Secretariat of the Council of the European Union**
DG COMM – Transparency
Rue de la Loi/Wetstraat 175
B-1048 Bruxelles/Brussel

Sent by e-mail to: access@consilium.europa.eu

Dear Sir/Madam,

Request for access to documents containing the Opinion of the Legal Service of the Council on the Commission proposal for a Regulation amending the Regulation 1367/2007

In accordance with Article 6(1) of Regulation 1049/2001, Article 3 of Regulation 1367/2006, and Article 42 of the Charter of Fundamental Rights, ClientEarth AISBL requests access to the following document:

- ST 8721 2021 INIT containing the Opinion of the Legal Service of the Council concerning 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 on the proposal*, registered on 11 May 2021 in the Council's Register.

In deciding whether to provide access, we urge you to consider carefully **the General Court's decision in T-252/19 case¹**, in which a previous Council decision to not disclose a legal opinion of its Legal Service was annulled. Failure to take due account of this judgment at the initial stage of the procedure could lead to wasted resources, both for the Council and the applicant.

In this regard, we note that the legal opinion we are requesting is similar to the document that was at issue in case T-252/19. Both are legal opinions elaborated by the Council's Legal Services in relation to a regulation proposal and are therefore legislative documents within the meaning of Regulation 1049/2001. Additionally, in the present situation, the present legal opinion contains also environmental information in the sense of Regulation 1367/2007, which makes the application of the exception from disclosure even stricter than in the above-mentioned case.

We also request a response within the normal time limit of 15 working days from registration and without recourse to the deadline extension in Article 7(3), which should be reserved for exceptional cases only, involving, for example, a very long document or a very large number of documents. These circumstances do not apply in this case. In addition, the Council should strive to ensure timely access to legislative documents, at a time when they can be used by citizens to participate in the decision-making procedure, in accordance with case C-57/16 *ClientEarth v Commission*, paragraph 84.

¹ T-252/19, *L. Pech v. Council of the European Union*, ECLI:EU:T:2021:203.



Brussels
60 Rue du Trône (3ème étage)
Box 11, Ixelles, 1050 Bruxelles
Belgique

Beijing
1950 Sunflower Tower
No. 37 Maizidianjie
Chaoyang District
Beijing 100026
China

Berlin
Albrechtstraße 22
10117 Berlin
Germany

London
Fieldworks
274 Richmond Road
Martello St. Entrance
E8 3QW
United Kingdom

Warsaw
ul. Mokotowska 33/35
00-560 Warszawa
Polska

Madrid
García de Paredes
76 duplicado
1º Dcha
28010 Madrid
Spain

ClientEarth

Finally, we request that the document/information falling within the scope of this request to be made publicly available on the Council's documents register, in accordance with Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.

Kind regards,

DELETED



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. 21/1087-mj/mf

Request made on: 20.05.2021

Dear **DELETED**,

Thank you for your request for access to the "*document containing the Opinion of the Council's Legal Service on the Commission proposal for a Regulation amending the Regulation 1367/2007*".¹

Document **8721/21** was identified as corresponding to your request.

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.

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.

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

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 Regulation, 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.

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.

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.

⁶ ACCC/M/2017/3.

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.

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 29 June 2021 - 19:39]

From: **DELETED**

Sent: Tuesday, June 29, 2021 7:39 PM

To: TRANSPARENCY Access to documents (COMM) Access@consilium.europa.eu

Subject: RE: Ref. 21/1087-mj/mf

Dear Sir/Madam,

On behalf of ClientEarth AISBL, please find attached a confirmatory application in relation to the Council's response to our request for access to documents.

We remain available for any information.

Kind regards,

DELETED

29 June 2021

To: General Secretariat of the Council of the European Union
DG COMM – Transparency
Rue de la Loi/Wetstraat 175
B-1048 Bruxelles/Brussel

Sent by e-mail to: access@consilium.europa.eu

Dear Sir/Madam

Confirmatory application in respect of the Council's refusal to provide full access to the document concerning the Opinion of the Council's Legal Service on the Commission proposal for a Regulation amending the Regulation 1367/2007 – Ref. 21/1087-mj/mf

In conformity with Article 7(2) of Regulation 1049/2001, ClientEarth AISBL "**Applicant**") hereby submit a confirmatory application regarding the Council's decision of 8 June 2021 (the "**Decision**") to refuse full access to the document identified as Document 8721/21, representing the *Opinion of the Council's Legal Service on the Commission proposal for a Regulation amending the Regulation 1367/2007* (hereinafter under the "**Requested Document**"). The Council provided access only to some general parts of the Requested Document and redacted the relevant parts representing the essential sections of it.¹

The Decision refused full access to the Requested Document on the basis of the following provisions of Regulation 1049/2001:

- (i) Article 4(3) first subparagraph, claiming that these relate to a decision that has not been yet taken by the Council and its disclosure would undermine the decision-making process,
- (ii) Article 4(2) second indent, claiming that the disclosure of the Requested Document could undermine the protection of legal advice,
- (iii) Article 4(1) (a) third indent, claiming that the disclosure of the Requested Document could undermine the protection of international relations.

We hereby request a reconsideration of the Decision for the following reasons:

¹ According to the transmitted document identified with number 8721/21, the Applicant received access only to the "Introduction" and the "Factual and legal framework" sections of the Requested Document.

I. Background note

It is particularly remarkable that the Council refused full access to the Requested Document on the basis of such a general and hypothetical explanation, invoking the application of Regulation 1049/2001 exceptions, since the General Court recently² annulled a Council decision which was rejecting access to another legal opinion of the Council in relation to a regulation proposal on the basis of similar reasoning.

In this case T-252/19, the General Court reiterated that generally full access to such documents as the Requested Document, must be provided by the Council, unless the risk of undermining the protected interest is reasonably foreseeable and not purely hypothetical, and the Council is able to explain how access to that document could specifically and actually undermine the interest protected by that exception. The same was previously concluded also by the Court of Justice of the European Union in in Joined Cases C-39/05 P and C-52/05 P³.

Denying full access to the Requested Document is in non-compliance with these two prior judgments, which were specifically addressed to the Council of the European Union.

II. Preliminary remarks on the nature of the Requested Document

1. The Requested Document is a legislative document

The Requested Document constitutes a legislative document within the meaning of Regulation 1049/2001. This is such as it was produced in the context of a legislative initiative regarding the amendment of Regulation 1367/2006. Article 12(2) of Regulation 1049/2001 provides a clear definition of "legislative documents", that is "*documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States*".

The Council's legal opinion contains its position regarding the ongoing legislative procedure in relation to the revision of Regulation 1367/2006. Therefore, the Requested Document is a legislative document within the sense of Regulation 1049/2001.

The fact that the legal opinion of the Council elaborated in respect of regulation proposals represents a legislative document is also supported by both cases, T-252/19 and Joined Cases C-39/05 P and C-52/05 P, in which the General Court and respectively the CJEU based their judgment on this intrinsic characteristic of those legal opinions.⁴

2. The Requested Document contains environmental information

The Requested Document also contain environmental information within the meaning of Article 2(1)(d) of Regulation 1367/2006.

Essentially, the Requested Document contains the Council's legal assessment in relation to the amendment of Regulation 1367/2006, which implements the Aarhus Convention in EU law. The object and purpose of the Aarhus Convention, which lays down legal obligations at international level, is the protection,

² T-252/19, Pech v. Council of the European Union.

³ Joined Cases C-39/05 P and C-52/05 P, Turco v. Council of the European Union.

⁴ Joined Cases C-39/05 P and C-52/05 P, Turco v. Council of the European Union, paras. 46-47; T-252/19, Pech v. Council of the European Union para. 52.

preservation and improvement of the elements of the environment. Considering that the Regulation 1367/2007 implements into EU legislation these legal obligations designed to protect the elements of the environment, information on the amendment to this regulation constitutes environmental information.

As such, the information included in the Requested Document falls within the definition the “environmental information” laid down in Article 2(1)(d)(iii) of Regulation 1367/2006, as they contain information on measures such as policies and legislation affecting or likely to affect the elements and factors of the environment, as well as measures designed to protect these elements.

In addition, the information included in the Requested Document falls also within the category of the definition the “environmental information” laid down in Article 2(1)(d)(iv) of Regulation 1367/2006 considering the fact that the main scope of the current revision of Regulation 1367/2007 is to correct the flaws found by the ACCC in 2017 in relation to the transposition of the Aarhus Convention into EU law. As such, the Requested Document also contains information on the implementation of the international environmental agreement into EU legislation.

As will be shown below, the status of the Requested Document as a legislative document containing environmental information is of significance with regard to the application of the exception in Article 4(3) first paragraph, Article 4(2) second indent and Article 4(1)(a) of Regulation 1049/2001.

III. Error in law and misapplication of the exceptions in Article 4 of Regulation 1049/2001 and failure to state reasons

1. Error in law and misapplication of the exceptions in Article 4 of Regulation 1049/2001

According to the Decision, the Requested Document cannot be fully disclosed as such would undermine the protection of three different interests of the Council, pursuant to Article 4 of Regulation 1049/2001. The Decision is based on very general and hypothetical justifications, which cannot support the application of the exceptions from disclosure provided under Article 4 of Regulation 1049/2001 as they fall far short of the legal test established by the case law of the Court of Justice, Article 296 TFEU and Article 4 of Regulation 1049/2001 itself.

Firstly, the Decision states that the disclosure would undermine the protection of the ongoing decision making process in respect of the amendment of Regulation 1367/2007 pursuant to Article 4(3) first subparagraph:

“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. [...]”

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.

Second, it is stated that disclosure is prevented by the protection of the legal advice provided by the Council's legal service pursuant to Article 4(2) second indent:

"the issues analysed in the requested document are not only highly controversial but also sensitive.[...] 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."

Moreover, [...] [f]ull 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."

Lastly, the Decision mentions that the Requested Document is withheld in the interest of the international relations protection pursuant to Article 4(1)(a):

"the requested document is also relevant to the preparation of the next session of the Meeting of the Parties under the Aarhus Convention. [...] 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."

It is the settled case law of the CJEU that the exceptions in Article 4 of Regulation 1049/2001 "*must be interpreted and applied strictly*" because they "*depart from the principle of the widest possible public access to documents.*"⁵ Thus, "the mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception".⁶

According to the Court, "*if an EU institution hearing a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical.*"⁷

This bar is even higher when the request relates to legislative documents containing environmental information.⁸ The CJEU previously concluded "*the public right of access to documents of the institutions is related to the democratic nature of those institutions.*"⁹ This is enshrined in primary EU law.

According to Article 1 second paragraph of TEU we currently live in a legal order characterised as an "*ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*". Moreover, Article 15(1) TFEU provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible. Other very important sources of law that oblige EU institutions to respect this principle of openness are Article 10(3) TEU, Article 298(1) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union¹⁰.

Analysing the wording of the Decision, it is beyond doubt that the justifications on which the Council relied to protect the Requested Document are purely hypothetical. The CJEU and the General Court have already

⁵ See inter alia, C-64/05 P Sweden v Commission, para. 66, C-506/08 P Sweden v MyTravel and Commission, para. 75 and C-60/15 P Saint-Gobain Glass v Commission, para. 63.

⁶ Case T-51/15 PAN Europe v Commission, para. 22.

⁷ C 280/11 P Council v Access Info Europe, paras 30 and 31 and the case-law cited.

⁸ C-57/16 Para. 101.

⁹ C 280/11 P Council v Access Info Europe, para. 27 and the case law cited.

¹⁰ C 213/15 P Commission v Breyer, para. 52.

rejected the same type of justifications in relation to the protection from disclosure of other legal opinions of the Council. In this context, it results that no specific reason (let alone evidence of such) is provided in relation to what is the actual or foreseeable risk that the protected interests invoked would be undermined by the disclosure of the whole Requested Document.

The Applicant submits that the Decision represents a misinterpretation and misapplication of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and of the case-law of the EU Courts by not taking account of provisions of primary EU law and the principle that EU legislative documents are subject to the principle of the widest possible access.

As the CJEU previously ruled and the General Court also reiterated:

"it is precisely transparency 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 that 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"¹¹.

Furthermore, regarding the external pressure that could be triggered by the disclosure of the Requested Document, the General Court concluded that:

"as regards the Council's argument that disclosure could lead to the exposure of individual members of its Legal Service to external pressure, it must be recalled that, while the risk of external pressure may constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure"¹².

It is clear that the Council's argument is not substantiated and there is no tangible evidence to establish the reality of such external pressure. In light of the above, the non-disclosure of the Requested Document in full cannot rely on the application on Article 4(3) of Regulation 1049/2001.

Similarly, the Decision represents a misapplication and a misinterpretation of Article 4(2) second indent of Regulation 1049/2001. To start with, the fact that the Requested Document contains the opinion of the Council's Legal Service given for the first time in relation to a specific matter that has lately lead to controversies is not a valid argument to sustain the application of this exception from disclosure. As the General Court concluded recently:

"As regards the question whether the opinion is particularly sensitive, it must be observed that it is the content of the opinion itself which must be particularly sensitive. Therefore, the question whether the legislative process may in itself be regarded as sensitive, as the Council contends, is irrelevant. The fact that the legal issues raised in the context of such a process may be controversial and are the subject of disagreements or that the Legal Service has dealt with those issues does not in any way alter this."¹³

Moreover, the Applicant submits that the issues connected to the legislative proposal subject to the Council's Legal Opinion do not go beyond the legislative file in question, but are intrinsically part of it. The issues are not of a sensitive nature.

In addition, the risk of litigation cannot constitute an argument such as to make the requested document sensitive in nature. This is supported also by the General Court's conclusions:

¹¹ C-39/05 P and C-52/05 P, *Turco v Council*, paragraph 59 and T-252/19, *Pech v. Council of the European Union*, para. 55.

¹² *Pech v. Council of the European Union*, para. 92 and the case-law cited.

¹³ T-252/19, *Pech v. Council of the European Union*, para. 85.

"[a]s regards the existence of a risk that the Council's ability to defend its position in court proceedings might be undermined, it should be noted that, as the Court of Justice has stated, such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001"¹⁴

Finally, with regard to the international relations exception, the applicant submits that the even if the topics assessed in the Requested Document are indirectly connected with the international forum, namely with the future discussion of the Meeting of the Parties under Aarhus Convention, the Decision misapplies the exception from disclosure provided for by Article 4(1)(a). This is such as the Council simply states that the document is relevant for the preparation of the future meeting, but does not show specifically and actually how the disclosure of the document in full might undermine strategic objectives pursued by the EU in specific international negotiations.

Moreover, the Requested Document is directly linked with the legislative process regarding the amendment of Regulation 1367/2006, which represents the main scope of the document. The fact that the same topic is approached at a Meeting of the Parties under Aarhus Convention is not a valid reason to apply the exception from disclosure aimed at the protection of the international relations in order to withhold the Requested Document in full.

2. Failure to state reasons and to validly justify the protection of the Requested Document

In the specific context of a request for access to documents, the duty to state reasons in Article 296 TFEU entails that if an institution decides to refuse access to a document which it has been asked to disclose, it must provide a statement of reasons *"from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine."*¹⁵

As described above, the Decision does not provide adequate reasons that would allow the Applicant to ascertain whether the Requested Document falls under the sphere of the exceptions and, most importantly, whether the need for protection is genuine.

According to the Court, *"if an EU institution hearing a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical."*¹⁶ This bar is even higher when an access request relates to legislative documents containing environmental information. Indeed, the Court held in case C-57/16: *"It follows from the considerations set out [...] above that the documents at issue in the present case are documents which are part of a legislative process and which, moreover, contain environmental information and that, consequently, the first subparagraph of Article 4(3) of Regulation No 1049/2001 must be interpreted and applied all the more strictly."*¹⁷ This applies to all the exceptions from disclosure applicable in relation to legislative documents containing environmental information.

Furthermore, based on the second sentence of Article 6(1) of Regulation 1367/2006, read in light of recital 15 thereof, the exceptions in Article 4 of Regulation 1049/2001 are accordingly:

¹⁴ T-252/19, Pech v. Council of the European Union, para 89 and the case law cited.

¹⁵ Case T-796/14, Philip Morris Ltd v Commission, para. 31 and the case law cited.

¹⁶ C 280/11 P Council v Access Info Europe, paras 30 and 31 and the case-law cited.

¹⁷ C-57/Para. 101.

*"to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information."*¹⁸

According to the Court of Justice, the requirement to restrictively interpret this exception *"is all the more compelling where the documents communication of which is requested contain environmental information."*¹⁹ Accordingly, the justification for non-disclosure provided by the Council should have equally been more compelling.

It should also be noted that the Council does not appear to have even considered that the Requested Document contains environmental information. This amounts to a failure to state reasons.

IV. There is an overriding public interest in full disclosure of the Requested Document

Without prejudice to the foregoing, the information would also need to be disclosed based on an overriding public interest in disclosure. The Decision states that there is no overriding public interest. On the contrary, as shown below, an overriding public interest in disclosure exists.

It follows from the case law of the European Court of Justice that the overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie the Regulation 1049/2001.²⁰ The Court of Justice has confirmed the General Court's approach in the case *Sweden v API and Commission*, according to which the invocation of the principle of transparency *"may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question"*.²¹ In addition, the Court of Justice has also held that the specific circumstances justifying the disclosure of documents must be set out, and that purely general considerations are not an appropriate basis for establishing that an overriding public interest prevails.²²

The Applicants submit that the specific circumstances of this case are such that the need for the public to have access to the Requested Document at the current moment is so pressing as to justify their disclosure.

From the outset, the Requested Document has been drawn up in relation to the amendment of Regulation 1367/2006, following the findings of the ACCC in 2017 regarding the EU's non-compliance with the Aarhus Convention. Considering the importance that the transposition of the Aarhus Convention represents to environmental protection and human health in the EU, it is imperative that citizens, NGOs and the whole of civil society have the opportunity to scrutinize and participate in the ongoing legislative process

The future amendment of Regulation 1367/2006 represents a significant legal instrument of environmental protection at EU level and shall have a profound effect on the lives of Union citizens and the environment they live in. The current legislative process aims to improve the current version of Regulation 1367/2006 by bringing it into compliance with the Aarhus Convention. The current legislative amendment will decide if citizens shall be able to exercise their rights in relation to environmental matters at EU level. Therefore, the legislative process leading to the adoption of the amendment of Regulation 1367/2006 should be open to public scrutiny and participation.

¹⁸ C-57/16 P *ClientEarth v Commission*, para. 100.

¹⁹ C-60/15 P *Saint-Gobain Glass v Commission*, para. 78.

²⁰ Joined cases C-514/11 and C-605/11, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, paragraph 92 ; Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, ECLI:EU:C:2008:374, paragraphs 74-75.

²¹ Joined cases C-514/07 P, *Sweden and others v API and Commission*, ECLI:EU:C:2010:541, paragraphs 152-153.

²² Joined cases C-514/11 and C-605/11, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, paragraphs 93 and 94.

V. Active Dissemination of the Requested Documents

Finally, we request that the Requested Document be made publicly available on the Council's documents register, in accordance with Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001. We also take this opportunity to point out that the Council could save valuable resources by actively disseminating all future documents that are similar to the Requested Document, in the sense that they constitute legal opinions on behalf of the Council in relation to legislative initiatives.

Yours sincerely,

DELETED
