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#### INFORMATION NOTE

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From: Legal Service

To: Information Working Party

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Subject: **Handling of requests for public access to certain categories of documents held by the Secretariat General of the Council**

- Documents held by the GSC in relation to the performance of tasks of support to bodies or entities other than the Council
  - Interpretation of Article 3(a) of Regulation 1049/2001
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1. In a number of instances the General Secretariat of the Council (GSC) has been entrusted with the task of supporting the activities of bodies or entities other than the Council. Examples of these instances are:
  - a. the administrative support to the work of intergovernmental conferences;<sup>1</sup>
  - b. the administrative support to the work of the Eurogroup;<sup>2</sup>
  - c. the administrative support to the work of the Board of Governors of the ESM and of the Task Force on Coordinated action;<sup>3</sup>

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<sup>1</sup> The GSC has provided administrative support to the intergovernmental conferences aimed at revising the Treaties or to the recent intergovernmental conferences in the area of economic governance (e.g. Fiscal Compact Treaty, ESM Treaty)

<sup>2</sup> See Eurogroup working methods according to which "*secretariat tasks for the Eurogroup are shared between the Secretariat General of the Council (for logistics and procedural assistance to the President) and the EFC secretariat (for substance)*".

<sup>3</sup> Article 5 of the ESM Treaty.

- d. the administrative support to the Athena mechanism for EU operations having military or defence implications;<sup>4</sup>
  - e. the administrative support to the functioning of the Panel established pursuant Article 255 TFUE to provide advice on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court.<sup>5</sup>
2. In the performance of tasks of support to bodies and entities like the ones listed above, GSC normally holds documents which concern matters falling outside the Council's authority as defined in the Treaties. GSC regularly receives requests for public access to these documents under Regulation 1049/2001. A recent assessment of GSC practice in relation to the handling of such requests has highlighted the need to clarify the position of the Secretariat. After having carefully considered the matter, the Legal Service of the Council considers useful to provide the following indications.
  3. Requests for access concerning documents held by GSC in relation to the performance of tasks of support to bodies or entities other than the Council fall within the scope of application of Regulation 1049/2001. To begin with, Regulation 1049/2001 applies to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession (Article 2(3) Regulation 1049/2001), regardless of their authorship. Secondly, the documents at stake fall also within the definition provided by Article 3(a) of Regulation 1049/2001, according to which document shall mean "*any content whatever its medium ... concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*". The Court of Justice has not yet had occasion to interpret Article 3(a) of Regulation 1049/2001. However the analysis based on purpose and context makes it necessary to interpret the "*institution's sphere of responsibility*" following the criterion of material activity rather than that of legal competence and in particular of including in it the performance of administrative tasks which have been formally entrusted to GSC to support the work of bodies or entities which deal with matters which do not fall directly inside the Council's authority as defined in the Treaties.

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<sup>4</sup> Article 5 of Council Decision (CFSP) of 27 March 2015 No. 2015/528, establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP, OJ L 84, 28.3.2015, p. 39–63.

<sup>5</sup> Points 4 of Annex to the Council Decision of 25 February 2010 No. 2010/124/EU, OJ L 50, 27.2.2010, p. 18.

4. As a consequence, requests for public access to documents held by GSC in relation to the performance of tasks of support to bodies or entities other than the Council are to be processed by GSC in line with the substantive and procedural legal framework set out in Regulation 1049/2001. In particular GSC needs to assess whether the disclosure of the requested document could affect one of the interests protected by Article 4 of Regulation 1049/2001 and, if required, to appreciate the existence of an overriding public interest in disclosure. The possibility of a partial disclosure should also be appreciated, in line with Article 4(6) of Regulation 1049/2001.
  
5. In carrying out this assessment, GSC normally has to consult the body or entity other than the Council who is the author of the requested document unless it is clear that the document shall or shall not be disclosed, as required by Article 4(4) and Article 4(5) of Regulation 1049/2001. In particular, in the case of documents originating from inter-governmental conferences or inter-governmental fora in relation to which the GSC has officially been entrusted with tasks of administrative support, the consultation is to be carried out with the Member State or Member States who are the author or the joint authors of the document. In such a case, and in line with Article 4(5) of Regulation 1049/2001, GSC will be allowed to proceed to disclosure only with the prior assent of the involved Member States on the fact that none of the grounds of exception provided by the Regulation is present (Article 4(5)).

6. Applicants could decide to address their requests for public access directly to the bodies which are administratively assisted by GSC (e.g. the Panel established pursuant Article 255 TFUE or the Athena mechanism and its organs)<sup>6</sup>. This kind of requests would fall outside the scope of application of Regulation 1049/2001, which only applies to the three main EU Institutions (Article 1(a) and Article 2(3) of Regulation 1049/2001). However, following the entry into force of the Lisbon Treaty, Article 15(3) third indent TFUE provides that each EU institution, body, office or agency shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.<sup>7</sup> As a consequence, the bodies concerned are required to adopt rules in order to implement their Treaty obligations in the domain of transparency. Those rules should reflect those laid down in Regulation 1049/2001, pending a revision of that Regulation. They should also include procedural arrangements for the handling of the requests for access. It is advisable that those arrangements include a delegation of powers to GSC for the handling of the requests for access and of possible litigation.
  
7. Documents held by GSC in relation to the performance of tasks of support to bodies or entities other than the Council are not in principle published on the Council's public register of documents, either directly or following a disclosure decision, unless such documents have been submitted to the Council, to one of its preparatory bodies or circulated to delegations to serve as a basis for the Council work. The relevant provisions of the Council's Rules of Procedure<sup>8</sup> apply.
  
8. GSC has already started implementing the policy described above as of July 2015.

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<sup>6</sup> In case of fora or conferences of Member States, and unless specific standing organs can be identified (e.g. Eurogroup president), such requests should be considered as addressed to the Member States themselves.

<sup>7</sup> Article 15(3) third indent provides that "*each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph*".

<sup>8</sup> Article 11 of Annex II to the Rules of Procedure of the Council