



Council of the
European Union

Brussels, 7 January 2019
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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 29/c/02/18

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 30 October 2018 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 10 December 2018 (Annex 2);
- confirmatory application dated 20 December 2018 and registered on the same day (Annex 3).

From: Laurent Pech <ask+request-**DELETED**@asktheeu.org>
Sent: Tuesday, October 30, 2018 1:55 PM
To: SECRETARIAT DGF Access <Access@consilium.europa.eu>
Subject: access to documents request - CLS Opinion re proposed general rule of law deficiencies mechanism

Re: Opinion of the Legal Service of the Council of the EU regarding Commission proposal of 2 May 2018, COM(2018) 324 final, 2018/0136 (COD)

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting access to the document reported in this newspaper article:

https://www.politico.eu/pro/council-lawyers-raise-concerns-over-plan-to-link-eu-funds-to-rule-of-law-hungary-poland/?utm_source=POLITICO.EU&utm_campaign=ff70fe8ea3-EMAIL_CAMPAIGN_2018_10_29_12_09&utm_medium=email&utm_term=0_10959edeb5-ff70fe8ea3-190067569

It is my understanding the opinion of the Council Legal Service was adopted on 25 October 2018 and offers a comprehensive analysis of the compatibility with the EU Treaties of the Commission proposal for the establishment of a mechanism on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

Regards,

Professor Laurent Pech



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, 10 December 2018

Mr Laurent Pech

Email: ask+request-**DELETED**@asktheeu.org

Ref. 18/2087-em/mf

Request made on: 30.10.2018

Deadline extension: 22.11.2018

Dear Mr Pech,

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

Please find attached a partially accessible version of document **ST 13593/18**.² However, I regret to inform you that full access cannot be given for the reasons set out below.

Document ST 13593/18, dated 25th October 2018, comprises an opinion of the Council Legal Service, on the compatibility with the EU Treaties of the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. The requested opinion contains legal advice.

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 Article 4(6) of Regulation (EC) No 1049/2001.

The decision-making process in question is currently ongoing and the Council has just started debating the proposal. The issues analysed in the opinion are complex and form an important part of the on-going discussions. Moreover, the legal issues dealt with by the requested document are controversial and the different actors involved in this legislative procedure have expressed divergent positions. As a consequence, the ongoing discussions are very sensitive.

For these reasons, disclosure of the requested document would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would carry hence the real and genuine risk compromising the capacity of the institutions to reach an agreement on the dossier. In addition, should the opinion be released, third parties may attempt to influence or exert pressure on the policy choices to be made in the decision making process in question. Disclosure of the requested document would thus undermine the decision-making process. As a consequence, the General secretariat has to refuse full access to the document³.

Moreover, in view of its subject-matter, disclosure of the advice and the issues with which it deals would undermine the protection of the financial and economic policy of the Union⁴. In fact, the disclosure of the requested opinion would increase the difficulties in finding an agreement on an instrument aimed at strengthening the protection of the EU budget.

It is also to be noted that the legal advice covered by this opinion deals with issues which are critical elements in the negotiations, broad in scope and contentious. Since the measures introduced by the proposal would have a direct impact to the allocation of funds to the Member States, there is a reasonably foreseeable risk of litigation that will certainly concern the issues touched upon in the requested opinion. The legal advice is therefore particularly sensitive.

Under these circumstances, disclosure of the requested document would undermine the protection of legal advice. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts.

³ Article 4(3), first indent, of Regulation (EC) No. 1049/2001.

⁴ Article 4(1)(a), fourth indent, of Regulation (EC) No. 1049/2001.

Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences. Therefore, the General Secretariat of the Council has to refuse full disclosure of the document also for this reason.⁵

As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies Regulation (EC) No 1049/2001 would not, in the present case, prevail over the above indicated interests so as to justify full disclosure of the requested document.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have access to paragraphs 1 to 8, with the exception of the second sentence of paragraph 1.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁶

Yours sincerely,

Paulo VIDAL

Enclosure

⁵ Article 4(2), second indent, of Regulation (EC) No. 1049/2001.

⁶ Article 7(2) of Regulation (EC) No 1049/2001.

Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

From: Laurent Pech <ask+request-**DELETED**@asktheeu.org>

Sent: Thursday, December 20, 2018 10:45 AM

To: SECRETARIAT DGF Access <Access@consilium.europa.eu>

Subject: Internal review of access to documents request - CLS Opinion re proposed general rule of law deficiencies mechanism

London, 20 December 2018

Ref. 18/2087-em/mf

Dear Council of the EU,

Please pass this on to the person who reviews confirmatory applications.

I am filing the following confirmatory application with regards to my request for access to documents 'CLS Opinion re proposed general rule of law deficiencies mechanism'.

In your reply dated 10 December 2018, you informed me that full access could not be given – in practice, the third part of the Council Legal Service (hereinafter: CLS) opinion entitled ‘Legal Analysis’ – on multiple grounds which I regret to say I find unjustified and baseless for the reasons set out below:

Ground 1: “The requested opinion contains legal advice”

You do not evidence this claim nor do you specifically explain the nature of this alleged ‘legal advice’. I note that on the contrary, the undisclosed section of the CLS opinion is, as noted above, explicitly entitled ‘Legal Analysis’ and not ‘legal advice’.

On page 2 of the partially accessible version, the CLS opinion itself indicates that it does not provide any legal advice but on the contrary offers a purely abstract legal assessment of the “compatibility of the proposed mechanism with Article 7 of the TEU, the choice of Article 322(1)(a) TFEU as an appropriate legal basis and the legality of the procedure for the adoption of measures under the mechanism. This opinion responds to that request.”

An abstract examination of the compatibility of the Commission’s draft regulation with EU primary law cannot be reasonably construed as constituting legal advice.

Ground 2: “the ongoing discussions are very sensitive”

Only the content of a document may be lawfully described as ‘sensitive’ but your letter does not explain the extent to which the CLS opinion could be accurately described as ‘sensitive’ within the meaning of Article 9 of Regulation 1049/2001.

In other words, it is my submission that the Council cannot lawfully justify non-disclosure on the basis of an eminently subjective such as ‘sensitive discussion’ which, one must stress, Regulation 1049/2001 does not mention as a possible exception to justify non-disclosure.

Ground 3: “Disclosure of the requested document would thus undermine the decision-making process”

It is difficult to follow the logic of this ground. The CLS directly concerns a publicly available document adopted by the Commission. As reported in the press (https://www.politico.eu/pro/council-lawyers-raise-concerns-over-plan-to-link-eu-funds-to-rule-of-law-hungary-poland/?utm_source=POLITICO.EU&utm_campaign=ff70fe8ea3-EMAIL_CAMPAIGN_2018_10_29_12_09&utm_medium=email&utm_term=0_10959edeb5-ff70fe8ea3-1), the CLS opinion concludes that the draft regulation proposed by the Commission is not be compatible with EU primary law.

This means that we are in a situation where a confidential CLS opinion is being relied upon to undermine the adoption of a publicly available draft legislative document which is accompanied and justified by a publicly available explanatory memorandum.

It is therefore, on the contrary, the non-disclosure of the CLS opinion which ought to be more logically described as undermining the EU’s decision-making process, not its non-disclosure.

In this context, I would further submit that the non-disclosure of the CLS opinion is itself in breach of EU primary law. Indeed, as provided by Article 15 TEU, ‘The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures...’

As noted above, the CLS opinion directly and exclusively concerns a draft legislative act proposed by the Commission on 2 May 2018.

Ground 4: disclosure of the advice and the issues with which it deals would undermine the protection of the financial and economic policy of the Union

As way of reminder, it is important to first point out that the primary aim of the draft regulation proposed by the Commission is to protect the financial interests of the Union (see Article 3: measures (such as the suspension of payments) should to be taken, “where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union”)

To argue that the CLS opinion should not be disclosed because such a disclosure would undermine the financial policy of the EU is irrational considering that the CLS opinion, as reported in the newspaper article previously mentioned, argues that that the Commission had not demonstrated any link between compliance with the rule of law and an efficient implementation of the Union budget, preservation of the financial interests of the Union and compliance with principles of sound financial management.

In other words, according to the CLS, the Commission cannot introduce a regulation which aims to equip the Union to protect its budget when weaknesses in the rule of law impair – or threaten to impair – sound financial management or the financial interests of the Union.

It follows that it is the CLS opinion itself which arguably undermines the protection of the financial and economic policy of the Union, not its potential disclosure.

The disclosure of the CLS opinion could on the contrary enable a proper public debate on the Commission’s draft regulation and help improve its content in order to help the proposed regulation better achieve its primary aim: the enhanced protection of the EU’s financial interests.

Ground 5: “there is a reasonably foreseeable risk of litigation that will certainly concern the issues touched upon in the requested opinion”

To put it briefly, a “risk of litigation”, reasonably foreseeable or not, is simply not a lawful exception within the meaning of Regulation 1049/2001.

Ground 6: “disclosure of the requested document would undermine the protection of legal advice”

Firstly, as noted above, the CLS opinion does not actually offer any legal advice but offers on the contrary a purely abstract assessment of the compatibility with EU primary law of the Commission’s draft legislative act proposed last May.

Secondly, it is actually the non-disclosure of legal analyses such as the one in this CLS opinion which can be said to be more likely to undermine the quality of legal advice. Indeed, in the absence of external scrutiny, potentially inadequately reasoned legal analyses may influence the Council without the Council being able to rely on alternative legal analyses. Therefore, it is in the Council’s interest to disclose CLS opinions offering general Treaty compatibility assessments so as to make sure it is receiving the best possible and balanced legal advice.

Thirdly, and notwithstanding the above, your decision does not specifically explain how the full disclosure of the CLS opinion would in practice undermine the ability of the CLS to provide legal advice in the future. Non-disclosure cannot be justified on the basis on purely hypothetical risks without any specific and concrete reasoning directly connected to the actual content of the document whose disclosure is sought.

Lastly, your decision does not take into account at all the fact that the CLS opinion relates to a pending legislative procedure. There is no balancing of the particular interest to be protected by non-disclosure of the CLS opinion “against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, are of particular relevance where the Council is acting in its legislative capacity.” (Case C-350/12 P).

I should also recall that it is well established in the Court of Justice’s case law that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the CLS relating to a legislative process. Any refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, must be comprehensively reasoned and those reasons must detail precisely the extent to which the relevant CLS opinion is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process in question.

The Council's refusal in the present instance neither demonstrates that the CLS opinion whose disclosure is sought goes beyond the context of the legislative process in question nor does it justify the "particularly sensitive nature" of the CLS opinion, speaking instead of 'very sensitive' discussions (nothing to do with content therefore) before describing the CLS opinion as 'particularly sensitive' due to a 'reasonably foreseeable risk of litigation', which however is not one of the lawful exceptions laid down in Regulation 1049/2001.

Conclusion

To conclude, I respectfully submit that the refusal to fully disclose the CLS opinion is not only incompatible with Regulation 1049/2001, it furthermore breaches EU primary law and ignores the Court's case law regarding the non-disclosure of alleged "legal advice" in a context where the Council is acting in its legislative capacity.

In a context of where EU values are increasingly under attack by autocratic authorities, and an increasing number of official EU reports have evidenced the misuse of EU funds on an industrial scale in a number of countries, especially Hungary, and where the rule of law is under systemic threat, there is an overriding public interest in the disclosure of a "legal opinion" which, as reported in the press, is being used to prevent the adoption of measures which aim to better protect the EU's budget in case of in case of generalised deficiencies as regards the rule of law in the Member States.

Yours faithfully,

Laurent Pech

A full history of my request and all correspondence is available on the Internet at this address:

https://www.asktheeu.org/en/request/cls_opinion_re_proposed_general