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NOTE

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

No. prev. doc.: 15097/18

Subject: Public access to documents
- Confirmatory application No 29/c/02/18

Delegations will find attached a draft reply to confirmatory application No 29/c/02/18
(see 15097/18).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION 29/c/02/18,
made by email on 20 December 2018,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document ST 13593/18**

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

1. On 30 October 2018 the applicant introduced an initial application for access to document **ST 13593 2018 INIT** dated 25th October 2018. The requested document is an opinion of the Council Legal Service on 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.
2. On 10 December 2018, the General Secretariat of the Council replied to this application granting partial access to paragraphs 1 to 8, with the exception of the second sentence of paragraph 1, of the requested document.

Full access has been refused pursuant to the exceptions laid down in art. 4(3), first subparagraph (protection of the decision-making process), Article 4(1)(a), fourth indent (protection of public interest as regards the financial, monetary or economic policy of the Union), and Article 4(2), second indent (protection of legal advice) of Regulation (EC) No 1049/2001.

3. On 20 December 2018, the applicant introduced a confirmatory application, claiming that the refusal to fully disclose the CLS opinion was incompatible with Regulation (EC) No 1049/2001, breached EU primary law and ignored the Court's case law regarding the non-disclosure of legal advice in a context where the Council is acting in its legislative capacity.
4. The applicant notably alleged that the undisclosed part of the document did not contain legal advice but "*legal analysis*". He then stated that the Council could not lawfully justify the non-disclosure on the basis of the sensitivity of the ongoing discussions, which is not an exception foreseen by Regulation (EC) No 1049/2001. Furthermore, the applicant stated that the non-disclosure of the CLS opinion on a publicly available draft legislation, itself in breach of EU primary law especially article 15 TFEU, undermined the EU's decision-making process rather than its disclosure. The applicant underscored that CLS opinion indeed concerned directly and exclusively a draft legislative act proposed by the Commission and that under art. 15 TFEU the European Parliament and the Council should ensure publication of the documents relating to legislative procedures.
5. Moreover, the applicant contested the ground for refusal of access based on the protection of the financial and economic policy of the Union claiming that, on the contrary, the disclosure of the CLS opinion would "*enable a proper debate on the Commission's draft regulation in order to help the proposed regulation better achieve its primary aim: the enhanced protection of the EU's financial interests*".
6. The applicant also contested the ground for refusal of access based on the protection of legal advice. He especially emphasised that it was actually the non-disclosure of legal analyses that was "*likely to undermine the quality of legal advice*" as, "*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*".

7. Lastly, the applicant regretted the fact that the decision to refuse full access to the opinion did not take into account the need of balancing of the particular interest to be protected by non-disclosure of the CLS opinion against the public interest in the document being made accessible as such increased openness would, according to recital 2 of the Regulation (EC) No 1049/2001, "*enable citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy is more effective and more accountable to the citizens in a democratic system*".
8. 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. THE REQUESTED DOCUMENT

9. Document **ST 13593 2018 INIT** comprises an opinion of the Council Legal Service which analyses 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.
10. The said proposal, adopted by the Commission on 2 May 2018 as a part of the Multiannual Financial Framework 2021-2027, aims at establishing a legal framework for the protection of the financial interests of the Union in accordance with the principles of sound financial management from generalized deficiencies in the Member States as regards the rule of law affecting in particular the proper functioning of public authorities.

II. THE EXCEPTION RELATING TO THE INSTITUTION'S DECISION-MAKING PROCESS

11. At the outset, it shall be recalled that Article 4(3) first indent 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*".
12. It has been established by case law that a higher standard of transparency applies when the institutions act on 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 the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, given, in particular, that that exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of that provision, to grant access to certain documents related to a legislative process in duly justified cases.¹
13. The requested document is drawn up by the Council's Legal Service for the internal use of the Council in the sense of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and relates to a matter on which the decision-making process is currently ongoing.
14. In particular, the Council has just started debating the proposal and discussions are complex, as it has been made obvious in the General Affairs Council of 11 December 2018 where the Member States have publicly expressed very divergent preliminary positions on the proposal.

¹ Judgment of the General court of 22 march 2018 in Case T 540/15, Emilio De Capitani, v. European Parliament, obs. 112

15. The legal issues examined in the requested opinion – notably the compatibility of the envisaged conditionality mechanism with the Treaties and the legal feasibility of the procedure for the adoption of measures under the mechanism– are relevant for the analysis and forthcoming discussions concerning the Commission’s proposal. Even more important, they are highly controversial, the Council members having expressed very different positions and sensibilities on that very issues covered by the opinion.
16. Given the strongly divided visions on that file, the ongoing discussions in the Council are delicate. What is more, in the current legal and political context, the debate on the envisaged measures, aiming at the adoption of a mechanism that links the EU financing with the respect of rule of law, is particularly sensitive.
17. Thus, if the analysis carried out by the Legal Service had to be fully disclosed, certain of the arguments developed therein could give rise to external interference. The ensuing pressure would make it more difficult for Council members to accept compromise solutions or to pursue certain options and therefore would affect the possibility of reaching a final agreement on the proposal.
18. Moreover, even if the Council managed to reach an agreement internally, the envisaged proposal would then need to be negotiated with the European Parliament and the Commission. The analysis of the Legal Service, which is intended to an internal audience and is not binding, is frank and straightforward and clearly points certain legal difficulties that arise from the envisaged measures. Under these circumstances, the disclosure of the legal opinion would make known to the institutional interlocutors the Council's internal reflections and concerns and could therefore limit its options during the upcoming inter-institutional negotiations.

19. Therefore, there is a reasonably foreseeable risk that full disclosure of the requested document could have a substantial negative impact on the decision-making process.
20. It is to be noted that this does not seem to be completely denied by the applicant, who states in the confirmatory application that the arguments developed by the Legal Service in the requested opinion could "*be relied upon to undermine the adoption (...) of a draft legislative document*".
21. The Council therefore concludes that full disclosure of the requested document would seriously undermine the on-going decision-making process under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

III. THE EXCEPTION RELATING TO THE PROTECTION OF LEGAL ADVICE

22. 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*".
23. In view of its content, the requested document falls within the scope of this provision. It contains an opinion of the Council Legal Service that provides detailed analysis on legal issues and in particular on the appropriateness of the legal basis of the Commission's proposal, its compatibility with the EU Treaties and the legal feasibility of the procedure for the adoption of measures under the envisaged mechanism. In addition, the opinion has been elaborated following a request for legal advice from a Council's preparatory body that sought clarifications on the legal questions that arose during the work and discussions on the draft legislative act.
24. Thus, contrary to what is contended by the applicant, the requested document and in particular its parts that have not been yet disclosed following the initial request do contain legal advice.

25. The Council recognises that, in that specific case, the legal advice relates to a legislative procedure for which a particularly high exigence of transparency applies as above-mentioned.
26. However, the legal advice contained in the requested opinion touches upon issues (such as, for instance, the analysis of the legal basis of the proposal or the recourse to the voting system proposed for the Council's implementing acts) that have a systemic nature and are of a broad scope, that goes beyond the context of the legislative process in question.
27. Moreover, several issues analysed in the requested opinion are both highly contentious and critical for the negotiations on the draft legislative act.
28. It has already been mentioned that the members of the Council are currently divided on the Commission's proposal and that the legal issues examined in the requested opinion are particularly controversial. As demonstrated above, the full disclosure of this document would further impede the possibility to reach an agreement on the file. The legal advice is therefore sensitive in the context of the ongoing discussions.
29. In addition, as the proposed instrument, if adopted, shall have a direct impact on the allocation of funds, a high risk of litigation can be expected in this domain. In such a case, the legal issues covered by the opinion would be at the core of the court proceedings. There is therefore a concrete and not purely hypothetical risk that the issues addressed in the Legal Service's opinion will be subject to litigation. Disclosure of legal advice concerning those aspects would negatively affect the ability of the Legal Service 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.

30. In light of the above, in that particular case, full disclosure of the requested opinion would compromise the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice. 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 it could expose to external pressure the Legal Service, 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.
31. Under the circumstances, the Council concludes that full disclosure of the requested document would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation (EC) No 1049/2001.

IV. PARTIAL ACCESS PURSUANT TO ARTICLE 4(6) OF REGULATION (EC) NO 1049/2001

32. In its initial decision, the Council considered that disclosure of certain parts of the requested legal opinion did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to document ST 13593 2018 INIT and notably to paragraphs 1 to 8, with the exception of the second sentence of paragraph 1, which contain an introduction as well as an account of the legal and factual background of the Legal Service's opinion.
33. The Council has now examined whether extended partial access could be granted to the document in question.
34. In light of its examination, the Council concludes that all the parts of the requested document which have not been disclosed in its first reply are covered by the invoked exceptions in their entirety and that no additional partial access can be granted.

V. ASSESSMENT OF THE PUBLIC INTEREST IN DISCLOSURE

35. The Council has thoroughly examined whether there is an overriding public interest in disclosure, taking into account the arguments provided by the applicant and the need to ensure transparency and public participation in the legislative process.
36. In that regard, the Council fully recognises the public interest in following the Council's discussions on legislative proposals. It is in that view that it has decided to grant partial access to the requested document already at the initial stage. The Council is also aware that some parts of the requested opinion have been leaked to the press and that some of the comments on the legal analysis have not been accurate, something that could be prevented if the opinion was fully released.
37. The Council however also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of legal advice and of the decision making process in all case. Rather, 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 invoked.
38. In light of its examination, the Council concludes, on account of the particularly sensitive nature and wide scope of the legal advice as well as of the need of preserving the effectiveness of its decision-making, 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 4(3) first subparagraph of Regulation (EC) No 1049/2001.

VI. CONCLUSION

39. For the abovementioned reasons, the Council concludes that public access to document ST 13593 2018 INIT, with the exception of paragraphs from 1 to 8 not including the second sentence of paragraph 1, which were made public at the initial stage, has to be refused pursuant to the second indent of Article 4(2) (protection of the public interest as regards legal advice) and Article 4(3), first subparagraph (protection of decision making process) of Regulation (EC) No 1049/2001.
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