Council of the
European Union

Brussels, 18 January 2021
(OR. en)

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 02/c/01/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 4 December 2020 and registered on 7 December 2020 (Annex 1);
- reply from the General Secretariat of the Council dated 6 January 2021 (Annex 2);
- confirmatory application dated 11 January 2021 and registered on 12 January 2021 (Annex 3).

ANNEX 1

[Email sent to the General Secretariat of the Council on 4 December 2020 at 19:50]

From: Alberto Alemanno <ask+request-8838-4be11c86@asktheeu.org>
Sent: Friday, December 4, 2020 19:50 PM
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: access to documents request - Council Legal Opinion proposal for a regulation on the protection of the Union´s budget

Re: Opinion of the Council Legal Service regarding the proposal for a regulation on the protection of the Union´s budget in case of generalised deficiencies as regards the rule of law in the Member States

Dear Council of the European Union,

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

Opinion of the Legal Service, 13593/18, 25 October 2018

The full text of the opinion has seemingly been already made publicly available by Agence Europe on 25 November 2020 in an article entitled "BUDGET: Hungary and Poland will coordinate their position on deadlock on MFF and Recovery Plan":
https://agenceurope.eu/en/bulletin/article/12609/24

Google drive link giving access to the opinion:
https://drive.google.com/file/d/1Bl1roGM0KLEUU7koVUudRglZh-EMIvL7/view

In the absence of an official disclosure of the opinion by the Council one cannot however verify the authenticity of the document made available by Agence Europe hence the present request submitted to your attention.

Yours faithfully,

Professor Alberto Alemanno
rue d'arlon 53, 1000 Brussels

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, 6 January 2021

Mr Alberto Alemanno
Email: ask+request-8838-4be11c86@asktheeu.org

Ref. 20/2292-ld/ns

Request made on: 04.12.2020
Registered on: 07.12.2020

Dear Mr Alemanno,

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 **13593/18**.[2] However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **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 legal opinion deals with issues which have been critical in the negotiations and which are broad in scope and highly contentious. Given that the instrument introduced by the proposal is of relevance for the allocation of funds to the Member States and has been one of the more difficult points for the overall discussions on the MFF and the Next Generation EU, there is a high litigation risk 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 and court proceedings under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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. The Legal Service could also 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. Lastly, the decision of the Council as regards public release of the requested document is subject to ongoing court proceedings before the General Court (T-252/19, Laurent Pech v Council). Disclosure of the requested document at this stage would therefore also disturb the serenity of those proceedings.

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 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.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.[3]

Yours sincerely,

Fernando FLORINDO

Enclosures:1

[3] 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.

ANNEX 3

Email sent to access@consilium.europa.eu on 11 January - 17:46]

From: Alberto Alemanno <ask+request-8838-4be11c86@asktheeu.org>
Sent: Monday, January, 11, 2021 17:46 PM
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: Internal review of access to documents request - Council Legal Opinion proposal for a regulation on the protection of the Union´s budget

Ref. 20/2292-ld/ns

Request made on: 04.12.2020

Registered on: 07.12.2020

Dear Council of the European Union,

I am writing to ask you to review your decision dated 6 January 2021 denying my request to obtain full access to document 13593/18 for the following reasons:

1/ Your decision fails to acknowledge and take any account of the fact that the full text of document 13593/18 has *already* been made publicly available by Agence Europe on 25 November 2020. Since the full text of document 13593/18 is now publicly available, how can the Council justify its refusal to make the same document available via its document register? Not doing so means that only those who have closely followed the MFF discussions would be aware of the disclosure of document 13593/18 by the media.

2/ Your Decision fails to take any account of the fact that the two national governments which have already formally indicated the lodging of an annulment action against the EU conditionality regulation – which is now known as Regulation 2020/2092 and which is the subject matter of document 13593/18 – have *already* gained access to the full text of document 13593/18. Your reference to the litigation risk is this context is therefore misplaced and irrational: There is no longer a risk of litigation and the two parties litigating the legality of Regulation 2020/2092 are in possession of the full text of document 13593/18. The only ones deprived from access to the full text of document 13593/18 are European citizens and their democratically elected representatives in breach of EU primary law and in particular, Article 10 TEU, Article 15 TFEU and Article 42 of the EU Charter of Fundamental Rights, which I must add your Decision fails to acknowledge.

3/ Your Decision fails to any account of the fact that representatives and elected officials from the Polish and Hungarian governments have *already* and *publicly* been relying on document 13593/18 to criticise and allege the illegality of what is now Regulation 2020/2092. See e.g. https://v4na.com/en/eu-council-legal-service-tying-eu-budget-to-rule-of-law-is-illegal-https://www.radiomaryja.pl/informacje/nasz-dziennik-opinie-sluzb-prawnych-ue-sa-druzgocace-i-wskazuja-ze-warunkowanie-budzetu-tzw-praworzadnoscia-jest-sprzeczne-z-traktatami/

This shows that both the Hungarian and Polish governments have *already* widely circulated document 13593/18. In the two articles whose links are shared above, it is furthermore indicated that document 13593/18 has been *declassified* on 25 November 2020. If so, why is your Decision not taking account of this? Be that at it may, the wide reliance by individuals associated with the Hungarian and Polish governments makes it irrational to claim that disclosure of document 13593/18 “would undermine the protection of legal advice” as the document is *already* widely available except on the Council’s document register.

4/ Your Decision fails to take account of the fact that the court proceedings before the EU General Court you mentioned (Case T-252/19) have concluded both as far as the written phase procedure of the case is concerned and the oral phase (the oral hearing in this case took place on 16 November 2020). The General Court in Case T-252/19 has furthermore already been given access to document 13593/18 so one may also find your claim that disclosure would “disturb the serenity of those proceedings” lacking any basis in fact.

5/ Your Decision finally fails to offer any reasoning regarding the alleged inexistence of an overriding public interest in disclosure. Your Decision also fails to offer any evidence that the Treaty right of access to documents and relevant interests in competition have been effectively balanced. On the contrary, it is submitted that there is an obvious overriding public interest in disclosure for the following factual and specific reasons:

(i) Document 13593/18 has been relied upon by the two governments which are subject to ongoing Article 7(1) TEU procedure for inter alia for their actions which have created a clear risk of a serious breach of the rule of law in order to prevent the adoption of a regulation which inter alia aims to prevent and sanction breaches of the rule of law, an obvious pressing issue which has been described by many governments, the European Parliament, civil society groups and many experts as an existential issue for the EU. When an existential issue for the EU is at stake, there is obvious overriding public interest in disclosing the document which is being used by those undermining the rule of law to the detriment of an informed debate since citizens and their elected representatives lack access to the same document;

(ii) More generally speaking, there is an overriding public interest in disclosing Document 13593/18 as it concerns the extent to which the EU's foundational values and in particular the rule of law can be better defended by a new tool which the European Commission, Council and European Parliament have described as essential to prevent breaches of the rule of law as they can inter alia seriously harm the financial interests of the EU;

(iii) The importance of the protection of the financial interests of the Union and the importance of respect for the rule of law have furthermore been also fundamentally underlined by the European Council in particular in its conclusions of 21 July 2021 and yet the decision makes no reference whatsoever to this specific context notwithstanding the body of evidence that this is an issue of the highest importance which has been repeatedly discussed at national and European levels, including at the level of the Heads of State and government;

(iv) Your Decision does not take any account of EU primary law and in particular the obligations imposed on the Council by Article 10 TEU and Article 15 TFEU, which means your Decision fails to balance competing interests taking into account the proper legal framework in a context where Document 13593/18 forms part of an ordinary legislative procedure. It is furthermore submitted there is an obvious overriding public interest in a specific situation where the ordinary legislative procedure concerns a subject matter linked to the EU's foundational values and their potential systemic violation by national governments in breach of their EU membership undertakings and obligations;

(v) Your Decision does not take any account of the adoption of Regulation 2020/2092 and of the fact that document 13593/18 was based on an earlier version of this Regulation first proposed in May 2018 by the European Commission when it conclude that the principle of transparency should not prevail over the interests indicated in the Decision. In fact, this conclusion is reached without any reasoning whatsoever with a mere reference to an allegedly balancing assessment which would have been made by the General Secretariat.

(iv) Your Decision does not take any account of the case law of the European Court of Justice in respect of the rule of law and which, if you had done so, would further strengthen the case for full disclosure due to the existing overriding public interest in this instance. Indeed, to follow Case C-64/16, the rule of law must be understood, including by the Council, as one of crucial values on which the whole EU legal order is based and without which there cannot inter alia mutual trust between the Member States. It therefore obvious that an overriding public interest in disclosure exists in a situation where the document whose disclosure is sought concerns a legislative proposal – now adopted – which is explicitly connected to the rule of law at a time where the European Council has strongly emphasised the imperative, indeed strategic need for "all Member States" to "fully" respect it.

In light of the above, you are therefore requested to review your previous Decision dated 6 January 2021.

Yours faithfully,

Alberto Alemanno, Jean Monnet Professor of EU Law, HEC Paris
Founder of The Good Lobby
Rue d'Arlon 53 - B 1000
Brussels Belgium