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European Union

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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	7463/24
Subject:	Public access to documents - Confirmatory application No 08/c/01/24

Delegations will find attached a draft reply to confirmatory application No 08/c/01/24
(see 7463/24).

REPLY TO CONFIRMATORY APPLICATION 08/c/01/24
made by email on 6 March 2024 and registered on 7 March 2024

The Council has considered the 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 documents¹ (hereinafter referred to as “Regulation (EC) No 1049/2001”) and Annex II to the Council's Rules of Procedure² and has come to the following conclusion:

1. On 20 February 2024, the Applicant submitted a request for access to “The documents sent by France to the Belgian Presidency of the Council of the EU concerning the reduction of the administrative burden or simplification for farmers, after 1 February and with a view to the Agriculture Council of 26 February”. The request was registered on the same day.
2. On 28 February 2024, the General Secretariat of the Council (“GSC”) replied to this application indicating that it had identified one document as falling under the scope of this request, and refusing access to the said document, on the basis of Article 4(3), of Regulation (EC) No 1049/2001.
3. On 6 March 2024, the Applicant introduced a confirmatory application and asked the Council to reconsider the GSC's decision. The Applicant claimed that the Council should disclose the said document since: (a) the contributions asked for by the Belgian Presidency of the Council of the EU had the clear goal of preparing the discussions of the Council (Agriculture and Fisheries) held on 26 February 2024 and to assist the Commission in formulating proposals, and that at this stage, the Presidency had already published a summary of the contributions received, the Council session had taken place, and the Commission had published its proposals; (b) there existed an overriding public interest in the disclosure of this document, given that it pertains to the Common Agricultural Policy, the largest budgetary item in the EU's budget.

¹ OJ L 145, 31.5.2001, p. 43.

² Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35.

4. The Council has carefully considered this confirmatory application. It has assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and on account of the Applicant's arguments, whether full public access can be provided to the requested document.

ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) NO 1049/2001

5. The document identified by the General Secretariat of the Council and falling under the scope of the request is a working document from the French delegation which constituted an initial contribution from the said delegation for the discussions within the Council and its preparatory bodies.
6. In its special meeting of 1 February 2024, the European Council discussed the challenges in the agricultural sector and concerns raised by farmers. Recalling the essential role of the Common Agricultural Policy, it called on the Council and the Commission to take work forward as necessary and concurred to keep the situation under review³.
7. The Council (Agriculture and Fisheries) held on 26 February 2024 an exchange of views on the *Need for rapid and structural responses to the current crisis situation in the agricultural sector*⁴. In this meeting, the Council confirmed its political will to respond effectively to the concerns expressed by farmers and agreed, as a first step, on a set of concrete measures that should be a priority for the short-term response to the ongoing crisis.
8. Concerning the short-term, the Commission put forward a proposal on 15 March 2024⁵ for a Regulation making certain first amendments to basic acts of the Common Agricultural Policy (CAP). This proposal followed the exchanges in the 26 February Council meeting. Preparatory views on a short-term response, such as are contained in the document, therefore essentially form part of the now-ongoing legislative procedure.
9. In addition, the Council insisted on 26 February to examine ways of improving the situation of farmers in the mid- to long-term, including a review, which is already ongoing, of the basic acts of the CAP.

³ Document EUCO 2/24, paragraph 40.

⁴ Documents ST 6295/24 + ADD1.

⁵ COM(2024) 139 final.

10. The Council further provided political guidance for the way forward and for a structural approach in the medium and long term. It also invited the Special Committee on Agriculture to continue to examine the suggestions and proposals in line with the political guidance provided, and to report back to the Council. The other parts of the document therefore relate to the context of an ongoing, mid- to long-term decision-making process.
11. Article 4(3), first subparagraph, 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*”. The General Court has ruled that this provision is intended to ensure that the institutions are able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted; accordingly, disclosure to third parties of documents forming part of a decision-making process still pending at the date on which the decision on the request for access is adopted must be refused⁶.
12. Having carried out a new assessment of the requested document, the Council considers that its release would cause serious prejudice to the ongoing decision-making process concerning the measures to be taken in the context of the current crisis and challenges in the agricultural sector. In carrying out this assessment, the Council has striven to strike a balance between the need to protect the said decision-making process and the legitimate interest in transparency, considering all relevant aspects and the context in which the document was drafted.
13. It follows from the case-law that the institutions, in duly justified cases, may refuse access to documents which show the individual position of a Member State where their disclosure would undermine, in an actual and reasonably foreseeable way, the interests protected by the exceptions provided for in Article 4 of the Regulation⁷. Brevity in the institution’s explanation of this fact is justified, in particular, by the need not to undermine those sensitive interests through disclosure of the very information which those exceptions are designed to protect⁸.

⁶ Judgment of the General Court of 13 March 2024, *ClientEarth and Leino-Sandberg v Council*, Joined Cases T- 682/21 and T- 683/21, ECLI:EU:T:2024:165, paragraphs 93-95.

⁷ Judgment of the General Court of 14 September 2022, *Pollinis v. Commission*, Joined Cases T- 371/20 and T- 554/20, ECLI:EU:T:2022:556, paragraph 107.

⁸ Judgment of the Court of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 82.

14. Here, the requested document contains a large number of different preliminary suggestions for possible future measures by the French delegation relating to various parts of the CAP, some relating to short-term, and some to mid- to long-term adaptations.
15. Premature disclosure of this document, at the stage where positions are still not firm and clear and where many issues remain to be discussed, could create confusion and be mistakenly considered to represent a formal position of the French delegation. At this stage of discussions, the requested document was drawn up for internal use only as part of deliberations and preliminary consultations within the Council, and only reflects a preliminary state of play of internal reflections on the matter of both the short-term and the medium- to long-term changes. These reflections are still subject to an iterative process.
16. Moreover, release to the public of the information contained in the requested document would expose the Council to undue pressure by stakeholders directly or indirectly affected by the measures under discussion. It should be recalled that, under the Court's case-law, the protection of the decision-making process from targeted external pressure constitutes a legitimate ground for restricting access to documents relating to the decision-making process⁹. The Council may refuse access to a document when it can reasonably expect there to be a reaction beyond what could be expected from the public in any ongoing decision-making process and there is a reasonably foreseeable risk that this pressure would substantially affect the decision to be taken.¹⁰
17. The context of the decision-making processes at hand – both the short-term amendments to the basic acts of the CAP and the mid-to long-term further review and possible further amendments – is particularly marked by the ongoing farmers' protests around Europe. Notably, protests in Brussels have included the use of arson, Molotov cocktails, destruction of property, roadblocks, and physical injury to police officers by protesters. These protests have occurred regularly, including importantly at the last meetings of the Council, in its Agriculture formation, and of the European Council (26 March, 26 February, 1 February)¹¹. This form of

⁹ Judgment of the General Court of 9 September 2014, *MasterCard and Others v. Commission*, T-516/11, ECLI:EU:T:2014:759 paragraphs 71-72.

¹⁰ Judgment of the General Court of 25 January 2023, *De Capitani v Council*, T-163/21, ECLI:EU:T:2023:15, paragraph 85.

¹¹ 'Farmers' protest: Police use tear gas and water cannons to quell violent Brussels demo' (*Politico*, 26 March 2024) < <https://www.politico.eu/article/farmers-protests-new-brussels-demo-begins-with-bonfire-outside-eu-parliament/> >; 'Brussels: Farmer protests turn violent, as EU ministers meet' (*DW*, 27 March 2024) < <https://www.dw.com/en/brussels-farmer-protests-turn-violent-as-eu-ministers-meet/a-68675827> >; 'Chaos, fires and tear gas roil Brussels as farmers clash with police' (*Politico*, 26 February 2024) <

protest constitutes actual and targeted pressure by external stakeholders that goes far beyond what is to be expected in a normal decision-making process. The publication of individual Member States' preliminary views, which may express preliminary ideas not necessarily consistent with the demands of protesters and giving a wrong image of the position of particular delegations, therefore has a real and tangible risk of preventing the members of the Council from pursuing their work effectively and coming to an agreement and bringing the decision-making process to a close.

18. It is under these particular and exceptional circumstances that the Council considers that its refusal for access to the document, as well as its brevity in explaining the sensitive contents of the document, is justified under Article 4(3), first subparagraph of the Regulation.
19. The applicant argued the existence of an overriding public interest in the disclosure of the requested document. The Council has carefully assessed this argument and has concluded that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the need to safeguard the decision-making process of the institution pursuant to Article 4(3), first subparagraph of the Regulation, as described above. Although the Council acknowledges that the public interest in documents relating to legislative amendments is generally high, it is under the particular circumstances described above that in this case, the Council's ability to make changes related to the CAP despite the harsh external pressure must prevail.
20. It follows that the conditions of the exception in Article 4(3), first subparagraph of the Regulation apply.
21. The Council has also thoroughly re-examined the document in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001. Following this examination, the Council has concluded that partial access to this document cannot be granted, since its content is considered an inseparable whole and its release would seriously undermine the protection of the ongoing decision-making process.

<https://www.politico.eu/article/manure-and-fire-farmers-escalate-protests-in-brussels/> >; 'Fires and a toppled statue: Farmers clash with police by EU Parliament' (*Politico*, 1 February 2024) < <https://www.politico.eu/article/fires-water-cannon-toppled-statue-farmers-clash-police-eu-parliament/> >.

CONCLUSION

22. For the reasons set out above, the Council concludes that access to the said document must be refused in its entirety on the grounds of Article 4(3), first subparagraph of the abovementioned Regulation.
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