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INFORMATION NOTE

From:	Legal Service
To:	Permanent Representatives Committee (Part 2)
Subject:	Judgment of the General Court in case T-252/19 Laurent Pech v. Council

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (02.06.2021)

I. Introduction

1. By judgment of 21 April 2021, the General Court (Second Chamber) annulled the Council's confirmatory decision¹ of 12 February 2019 refusing full public access to an opinion of the Council Legal Service on the compatibility with the EU Treaties of 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 ("the opinion")².

¹ Reply adopted by the Council on 12 February 2019 to confirmatory application 29/c/02/18 for public access to document ST 13593/18. The text of the confirmatory reply is reflected in document 15099/18.

² Document ST 13593 2018 INIT

2. The opinion was rendered in the framework of the legislative procedure leading to the adoption of the Regulation on a general regime of conditionality for the protection of the Union budget³, which has given rise to long discussions and controversies and is part of the broader political debate for the adoption of the MFF 2021-2027 and the NGEU, the Regulation being now subject to annulment proceeding before the Court of Justice.
3. The Council refused full public access to the opinion pursuant to the second indent of Article 4(2) (protection of legal advice) and Article 4(3), first subparagraph (protection of decision making process) of Regulation (EC) No 1049/2001⁴. The General Court finds that none of those grounds have been sufficiently established by the Council in the contested decision.
4. **DELETED**
5. **DELETED**

³ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1–10

⁴ 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, 31.5.2001, p. 43–48

II. Findings of the Court

a) Assessment of the risk of a serious prejudice to decision-making process

6. According to the General Court, the contested decision does not contain tangible elements⁵ which would allow to conclude that a foreseeable and not purely hypothetical risk existed that the decision-making process might be undermined (point 48 of the judgment).
7. As regards the specific legal issues discussed in the legal opinion, the General Court finds that those are neither particularly sensitive nor their disclosure would seriously harm the decision-making process.
8. In that respect, the General Court notably held that :
 - the opinion in question addresses issues, such as the legal basis, the conditionality regime and the reversed qualified majority, which are regularly raised during a legislative procedure and essential to it, and conversely are neither particularly sensitive nor new subjects in EU law (points 53 and 57);
 - that the controversial nature of the legal issues covered by the opinion and the sensitivity of the debate on the draft legislative act do not per se justify application of the exception related to the protection of the decision-making process since disagreement between the Council's members is more the rule than the exception (point 56);

⁵ On the failure to adduce tangible evidence see notably judgment of the General Court in Case T-540/15, *De Capitani v. Parliament*, points 66, 99 and 104. See also judgment of the General Court of 7 June 2011 in Case T-471/08, *Toland v. Parliament*, point 78 and judgment of General Court of 18 September 2015 in Case T-395/13, *Miettinen v. Council*, point 63.

- the argument according to which a distinction must be made between documents reflecting positions of political decision-makers, on the one hand, and those drawn-up by technical services, such as a legal service, on the other, may not be sustained since it is common practice for political decision-makers to obtain opinions from their specialist services and then to use such opinions as a form of guidance or point of reference in their decision-making (points 58).

9. **DELETED**

b) Assessment of the risk for the protection of legal advice

10. While confirming that the requested document contains legal advice, the General Court underlines that a legal opinion pertaining to a legislative file should in principle be disclosed unless, according to the criteria set in the *Turco* judgment, it is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process in question.

11. The General Court concludes that none of those conditions are met in the present case. As regards the particularly sensitive nature of the legal advice, this according to the General Court has to result from the content of the opinion itself and may not be deduced by the sensitivity of the decision-making process or the controversies raised on the issues discussed in the opinion during this decision-making process (point 85).
12. As regards the wide scope of the legal advice, the General Court does not retain the applicant's argument according to which legal advice should be considered broad in scope only if it encompasses issues which are not legislative in nature. Nevertheless, the General Court concludes that the issues discussed in the requested opinion, notably the analysis on the voting mechanism and on the appropriateness of the legal basis of the proposal are not such as to confer to the legal advice a wide scope. Similarly, the fact that the opinion makes reference to other regulations with similar mechanisms does not mean that it is a document with a broad scope beyond the legislative context in question (point 87).
13. Moreover, in respect to the high risk of litigation invoked by the Council, the General Court finds that the Council only referred in the contested decision to hypothetical legal actions and did not explain how disclosure of the opinion in its entirety could compromise its defence and its freedom to adapt its line of defence in judicial proceedings (points 89 to 91).

III. Assessment and way forward

14. **DELETED**

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16. **DELETED**

17. **DELETED**

18. Bearing in mind that questions raised above would merit further clarification by the Court of Justice and given the wide implications of this judgment for the work and the decision-making process of the Council, an appeal against the General Court's judgment before the Court of Justice would appear to be justified.

19. In accordance with Article 56 of the Statute of the Court of Justice of the European Union, such an appeal against the judgment may be lodged before the Court of Justice within two months of the notification of the decision appealed against. The deadline for submission of an appeal is 2 July 2021.
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