



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 8 January 2013**

**17551/12**

**INF 197  
API 109**

**NOTE**

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from : General Secretariat of the Council  
to : Working Party on Information

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Subject : Public access to documents  
- Confirmatory application No 21/c/01/12

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 23 November 2012 and registered on 26 November 2012 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 30 November 2012 ([Annex 2](#))
- confirmatory application dated 7 December 2012 and registered on the same day ([Annex 3](#))

[E-mail message sent on 23 November 2012 - 18:37]

Title/Gender: Mr -

Family Name: Antpöhler

First Name: Carlino

E-Mail: **DELETED**

Occupation: Research Associate

On behalf of:

Address: **DELETED**

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Requested document(s): Documents 5551/12 und 5788/12

1st preferred linguistic version: DE - German

2nd preferred linguistic version: EN - Englisch

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**COUNCIL OF  
THE EUROPEAN UNION**

**GENERAL SECRETARIAT**

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Communication  
Transparency*

*- Access to Documents/  
Legislative Transparency*

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Brussels, 30 November 2012

**Mr Carlino Antpöhler**

**email:**

**DELETED**

**12/1794-mj/mf**

Dear Mr Antpöhler,

We registered your request of 23 November 2012 for access to documents 5551/12 and 5788/12 on 26 November 2012. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of the Access to Documents Regulation<sup>1</sup> (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

Documents **5551/12** and **5788/12** are opinions of the Council Legal Service drawn up in the context of intergovernmental negotiations taking place outside the ordinary institutional framework for a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG has subsequently been signed by 25 Member States<sup>3</sup>, but has not yet been ratified by all of them.

The opinion **5551/12** analyses whether Article 7 of the draft TSCG is compatible with European Union law. That Article contains a commitment of the Contracting Parties whose currency is the euro to support, under certain circumstances, proposals or recommendations submitted by the European Commission where it considers that an EU Member State whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure.

The opinion **5788/12** analyses whether Article 8 of the draft TSCG, conferring jurisdiction on the European Court of Justice as regards compliance by Member States with the "balanced budget rule", is compatible with European Union law.

<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents; Official Journal L 145 of 31.5.2001, p. 43.

<sup>2</sup> Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325 of 11.12.2009, p. 35.

<sup>3</sup> The United Kingdom and the Czech Republic have not signed the treaty.

Both documents thus contain legal advice.

The aim of the TSCG Treaty is to strengthen economic governance, including by ensuring a more effective application of the excessive deficit procedure and by introducing the "balanced budget rule". It was drawn up in a difficult political and economic context and bears directly on the economic interests of the Member States. Disclosure of the documents would undermine the protection of the public interest as regards Member States' economic and monetary policies by disclosing a comprehensive legal analysis of a legally, economically and politically sensitive question.

Moreover, given the sensitivity of the legal issues dealt with in the documents and the high political and financial importance of the TSCG there is a real risk of litigation in the future which is likely to bear on the issues analysed in the Legal Service opinions. If access were to be given to the documents in question this would undermine the protection of legal advice by making public internal opinions of the Legal Service intended for the Member States. This clearly risks affecting the ability of those concerned to defend their positions in a possible future court case. In addition, such a result could have the effect that comprehensive legal advice is not requested in similarly sensitive situations in the future, thereby seriously affecting the relevant decision-making processes on such issues.

It should also be added that document 5788/12 is very broad in scope as it analyses the possibilities and conditions in general for conferring jurisdiction on the European Court of Justice by agreement.

In the view of the foregoing, the General Secretariat is unable to grant you access to these documents, since their disclosure would prejudice the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State as set out in Article 4(1)(a), fourth indent, of the Regulation. Disclosure would furthermore prejudice the protection of legal advice pursuant to Article 4(2) of the Regulation; in that regard the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the abovementioned interest so as to justify disclosure of the documents and that, consequently, no overriding public interest in disclosure exists.

In conformity with Article 4(6) of the Regulation, the General Secretariat has closely examined the documents to assess whether certain parts of them could be extracted as not being covered by any of the abovementioned exceptions. However, it has concluded that all parts of the documents are covered by the exceptions.

Statutory remedy notice

Pursuant to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply<sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

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<sup>1</sup> Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001

[Confirmatory application - sent by e-mail on 7 December 2012 - 12:14]

Subject: 12/1794-mj/mf

Message

Dear Mr Thompsen, dear Mr Sieberichs, Dear Sir/Madam

Please find attached my confirmatory application concerning the requested documents.

Yours sincerely

Carlino Antpöhler

Attachment

Heidelberg, 07.12.2012

Dear Mr Thomsen, dear Sir/Madam,

I hereby submit a confirmatory application for access to the documents referred to in my initial application under Article 7(2) of Regulation (EC) No 1049/2001. You have stated that documents 5788/12 and 5551/12 correspond to my request. In your letter dated 30 November 2012 you completely rejected any access to either document.

Firstly, you state that disclosure "would undermine the protection of the public interest as regards Member States' economic and monetary policies" pursuant to Article 4(1)(a) of Regulation (EC) No 1049/2001. You do not go on to state how it would undermine that interest. Whilst Article 4(1)(a) of the Regulation does not provide for any weighing against the public interest, it is the case that one of the interests referred to would however have to be "specifically and effectively" undermined (Court of Justice, Joined Cases C-39/05 P and C-52/05 P, *Turco v. Council*, paragraph 49). Furthermore, the exceptions must be interpreted strictly (Court of Justice, Case C-64/05, *Sweden v. Commission*, paragraph 66). Unfortunately, your reasons do not contain any further statement of how the economic policy of the Community or of the Member States would be undermined. It is not apparent that disclosure would specifically undermine economic policy. The only aspect referred to concerns the compatibility of the adopted instruments with [EU] law. However, Article 4(2) of Regulation (EC) No 1049/2001 contains an exhaustive list of exceptions for such instances. With regard to economic policy, as well, there is a democratic public interest in the discussion about the legality of an instrument. This interest is no different from that in other areas and can therefore be deemed to be sufficiently protected by Article 4(2) of the Regulation.

Furthermore, there is a need for the case law concerning Article 4(1) of the Regulation to be adjusted. The case law as it currently stands dates back to the period before the Treaty of Lisbon entered into force. The Treaty contains a substantive change with regard to transparency. Article 10(3), second sentence, of the Treaty on European Union establishes transparency as a foundation of European democracy. This goes much further the previous legal position. It thus constitutes an essential pillar of European democracy. The existing case law must therefore be brought into line with this legal position. As is already the case with regard to citizenship of the Union under Article 20 TFEU, secondary law is to be understood in this context as having the effect of limiting the primary law obligation of transparency and must therefore be evaluated in terms thereof.

Consequently, Article 4(1)(a) of the Regulation must in particular comply with the principle of proportionality. Given the overriding significance of European democracy, a blanket exclusion of economic policy from the principle of transparency is not reasonable. Rather, interpretation must be compatible with primary law. Article 4(1)(a) of the Regulation, too, requires that the public interest be taken into account. The difference between the latter and Article 4(2) of the Regulation can be attributed to different interpretations of the burden of proof in paragraphs 1 and 2. Primary law thus permits transparency to be excluded if the applicant is not able to demonstrate that there is an overriding public interest. Only if such an interpretation is applied can the increased significance of transparency as a fundamental pillar of European democracy, as has been enshrined in primary law, be appropriately conveyed in secondary law. The public interest must therefore be taken into consideration.

With regard to both documents, the public interest outweighs the interests of the Institutions and the Member States. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union concerns one of the central further developments in the crisis. The public interest in the substance of this Treaty must therefore be accorded particularly high significance. The arguments submitted by the Council against disclosure have so far not been such as to outweigh this interest. It is not apparent that disclosure would undermine economic policy. Disclosure would not jeopardise the TSCG prior to any cases being brought before the Court. Neither the Member States nor the Community would be placed in a position where the safeguarding of their interests with regard to economic policy would be undermined.

It is further stated that the ability of those concerned to defend their rights in future cases before the Court would be prevented. In addition, reference is made to the ability of the Legal Service to function. Neither of these arguments is persuasive. It is precisely in the public interest to discuss the lawfulness of an instrument and thus to strengthen the legitimacy of the European Institutions (Court of Justice, Joined Cases C-39/05 P and C-52/05 P, *Turco v. Council*, paragraph 59). It would also enable the Council to explain, if need be, why a diverging legal opinion was not followed (*ibid.*). The undermining of the ability to function must be substantiated by detailed arguments (*ibid.*, paragraph 63), which has in no way been done in the present case. Lastly, account must be taken of the fact that the risk of the interest being undermined must be reasonably foreseeable and not purely hypothetical (*ibid.*, paragraph 43). In the present case, the risk can partially be ruled out and is partially purely hypothetical. The only foreseeable consequence with regard to the Treaty is litigation on the part of the Member States. However, given that the report was intended for the Member States, as you have stated, they are already in possession thereof. Disclosure can therefore no longer undermine any such interest. Litigation by other actors, in particular by European Institutions, is, however, not foreseeable, and therefore purely hypothetical.

Lastly, you state that the opinion (5788/12) is very broad in its scope as it analyses questions of a general nature. This can be taken account of by partial disclosure of the document in accordance with Article 4(6) of the Regulation. Moreover, it is not apparent how the broad scope of the opinion supposedly affects assessment under Article 4 of the Regulation.

In addition, the Institutions and the Member States can only have an interest in maintaining the confidentiality of documents that are not already accessible to the public. As is clear from an inquiry conducted in the House of Commons, the experts concerned were familiar at least with 5788/12 (P. Craig, written evidence for the House of Commons, European Scrutiny Committee, "Reinforcing the Eurozone", 2012, paragraph 29 [available at: <http://www.publications.parliament.uk/>]). It necessarily follows from the above that the document in question must be made accessible to the general public.

Therefore, no exception can be made from the general obligation of transparency and the documents must be disclosed.

I hereby consent to this letter being made public in the Register of documents.

Yours sincerely

Carlino Antpöhler