



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 5 March 2013

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API 20**

NOTE

from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application No 04/MIETTINEN S./01/13

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 18 January 2013 and registered on 18 January 2013 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 22 February 2013 ([Annex 2](#))
- confirmatory application dated 25 February 2013 and registered on the same day ([Annex 3](#))

[E-mail message sent on 18 January 2013 - 12:06]

This e-mail has been sent to access@consilium.europa.eu using the electronic form available in the Register application

This electronic form has been submitted in EN

Title/Gender: Mr - Mr

Family Name: Miettinen

First Name: Samuli

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobilephone:

Fax:

Requested document(s): Council Document 15309/12 'Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (12683/12 DROIPEN 107 JAI 535 GAF 15 FIN 547 CADREFIN 349 CODEC 1924) - Legal basis'

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

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Communication
Transparency*

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Brussels, 22 February 2013

Mr Samuli Miettinen

e-mail:

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Ref. 13/0079-mi/ws/ns

Dear Mr Miettinen,

We have registered your request of 18 January 2013 for access to document 15309/12. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents¹ (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure². On 8 February, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

¹ Official Journal L 145, 31.5.2001, p. 43.

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

Document **15309/12** is an opinion of the Council Legal Service relating to a proposal for Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law¹. The document analyses whether Article 325(4) TFEU is an appropriate legal basis for the proposal. It consequently contains legal advice.

The decision-making process in question is currently ongoing and the issues analysed in the opinion form an important part of the basis for the discussions which are sensitive and complex. Disclosure of the legal advice would therefore adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence risk compromising the capacity of the Council to reach an agreement on the dossier and thus undermine the institution's decision-making process pursuant to Article 4(3), first subparagraph, of the Regulation.

Moreover, the legal advice covered by this opinion deals with an issue, i.e. the correct legal basis for measures containing criminal law provisions, which is novel and which has implications going beyond the legislative procedure in question. The issue is therefore both politically sensitive and contentious. As a consequence, the legal advice is very sensitive.

Disclosure of such a document would undermine the protection of legal advice under Article 4(2), second indent, of the Regulation and 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 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. Lastly, the Legal Service could 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.

¹ COM (2012) 363 final.

As regards the existence of an overriding public interest in disclosure the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the document.

Accordingly, pursuant to Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of the Council's decision-making process), of the Regulation, the General Secretariat is unable to grant you full access to this document.

However, pursuant to Article 4(6) of the Regulation, you may have access to those parts of the document which are not covered by these 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 reply¹.

Yours sincerely,
For the General Secretariat

Jakob Thomsen

Enclosure

¹ 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 25 February 2013 - 15:39]

Subject: Re: Ref. 13/0079-mi/ws/ns

Message

Dear Sir or Madam,

Please find attached my confirmatory request under Regulation 1049/2001, addressed to Jakob Thomsen. I look forward to receiving your response in due course. Please also find attached his letter, which is annexed to my confirmatory request since I refer to its reasoning.

Yours faithfully,

Samuli Miettinen

Samuli Miettinen

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Dear Mr. Thomsen,

Thank you for your letter of February 22 2013, addressing my request of 18. January 2013 for access to document 15309/12 (Opinion of the Legal Service, Subject: Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law – legal basis). I am pleased that the document is now partially accessible as of 21.2.2013. However, I am sorry to hear that the opinion has been only partially made accessible to the public. I hereby lodge a confirmatory application and also grant permission for my application to be made public.

Your letter (annexed to this application, which I am also happy to be made public) observes that Document 15309/12 is an opinion of the Council Legal Service relating to the proposed Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law Com (2012) 363, 2012/0193 (COD). According to its main grounds, the disclosure of legal advice related to a 'sensitive, complex and ongoing' process would risk compromising the capacity of the Council to reach an agreement. Therefore your reply invokes Article 4(3), first subparagraph, of Regulation 2001/1049. The document in question does not appear to have been classified under Regulation 1049/2001.

Your letter also invokes Article 4(2), and suggests that the disclosure of a 'politically sensitive and contentious' document would 'undermine the protection of legal advice under Article 4(2), second indent, of the Regulation and make known to the public an internal opinion of the Legal Service, intended for the members of the Council'. Although labelled legal advice, the document does not relate to court proceedings but an on-going legislative procedure. Three separate reasons are given: disclosure 'may lead the Council to display caution when requesting similar opinions from its Legal Service'; 'could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts'; and 'the Legal Service could come under external pressure which could affect the way in which legal advice is drafted...'.

Finally, your letter notes that 'As regards the existence of an overriding public interest in disclosure the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the document.'

First, in relation to the overall process in the context of which the document has been drafted this concerns, as your letter states, a politically sensitive and contentious matter. This is cited as a reason for non-disclosure. I would ask this position to be reconsidered. If the advice is meaningful and has a bearing on the legislative process, it must therefore be in the overriding public interest that it is disclosed. Those documents with a bearing on the decision-making process, including documents which are designated by the Council Legal Service as ‘legal advice’, must be accessible to the public concerned by that legislation. This is the case especially when as, your letter acknowledges, ‘the legal advice covered by this opinion deals with an issue, i.e. the correct legal basis for measures containing criminal law provisions, which is novel and which has implications going beyond the legislative procedure in question’. One of the implications of this choice of legal base relates to the availability of directly applicable criminal law measures in any future use of Article 325(4). If the opinion is likely to impact this process, public interest favours its disclosure. If it is not, then Article 4(3) of the Regulation cannot be invoked in this connection since the document cannot seriously undermine the institution’s decision-making process.

Second, I request confirmation of which of these grounds relate to which parts of the document with sufficient precision for those references to be amenable to review. In particular, I ask for confirmation that all of the reasons which are stated relate to the entirety of that part which has not been made publically accessible or if not, which reasons relate to which parts of the document. I also ask that it is reconsidered whether there is nothing following paragraph 4, page 2, which might be made accessible to the public, as your letter suggests.

Third, I ask for reconsideration of whether there is any ‘specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council’s interest in receiving frank, objective and comprehensive advice’. A specific and foreseeable threat cannot exist merely because there is a difference of opinion regarding legal basis. Furthermore, the risks posed to legal defence of the measure in future have likewise been dismissed as valid grounds.

Public interest in the transparency of the decision-making process would become meaningless if documents influencing the legislative process were unavailable or available only after the decision-making process has come to an end. I look forward to the response of the Council on this matter.

Yours sincerely,

Samuli Miettinen

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Annex: Letter of 22. February 2013 from Jakob Thomsen, Council General Secretariat