



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 18493/11

Subject : Public access to documents
- Confirmatory application No 26/c/01/11

Delegations will find enclosed a draft reply from the Council to confirmatory application No 26/c/01/11, as it stands after examination by the Working Party on Information at its meeting on 20 January 2012.

The Danish, Finnish, Slovenian and Swedish delegations indicated that they would vote against the draft reply and made the following statement:

DK, FI, SI and SE: *"We cannot concur with the interpretation of regulation 1049/2001 in the draft reply in light of the judgment in the Turco-case (C-39/05 and C-52/05 P) and taking into consideration the importance of openness in legislative procedures emphasised by the Lisbon Treaty."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Finnish, Slovenian and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 26/c/01/11,
made by e-mail on 12 December 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 15452/11

The Council has considered this 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 documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 15452/11 which contains an opinion of the Council's Legal Service setting out its views on the question of Union's competence to adopt measures on spatial planning foreseen in Article 10 and Annex VII of the Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC and as regards the respect of the subsidiarity principle.
2. In its reply dated 21 November 2011, the General Secretariat refused full public access to the document pursuant to Article 4(2), second indent (protection of legal advice) of the Regulation and the protection of an ongoing decision-making process under the first subparagraph of Article 4(3). Pursuant to Article 4(6) of the Regulation, partial access was granted to points 1 to 2 of document 15452/11.
3. In his confirmatory application dated 12 December 2011, the applicant claims that the reply from the General Secretariat is incompatible with the second indent of Article 4(2), the first subparagraph of Article 4(3) and Article 4(6) of Regulation 1049/2001. The applicant also claims that the reply fails to comply with the findings of the Court of Justice of the EU in

joined Cases C-39/05 P and C-52/05P (the “Turco case”). Moreover, the applicant argues that insufficient weight has been placed on the countervailing public interest in disclosure. In support of his claims and the arguments advanced in favour of a public interest in disclosure will be described in more detail in their context below.

4. The Council has examined the above-mentioned document in the light of the applicant’s arguments and has come to the following conclusion:
5. The requested document contains legal advice, except for its points 1 to 2.
6. First of all, the Council recalls that the purpose of Regulation (EC) No 1049/2001 is to ensure the widest possible access to documents for citizens. It remains, however, that the second indent of Article 4(2) and the first subparagraph of Article 4(3) of that Regulation provide for exceptions to the right of public access to documents in cases where such public access would undermine, respectively, the protection of legal advice and the institution's decision-making process, unless there is an overriding public interest in disclosure.
7. The requested document relates to an ongoing decision-making process on a proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC. It contains a legal advice by the Council Legal Service on the Union's competence to adopt measures regarding spatial planning, such as those foreseen in Article 10 and Annexes VII to IX of the proposal based on the legal basis proposed by the Commission, Article 194(2) TFEU. In addition, the Council Legal Service examines the respect of the principle of subsidiarity in this regard.
8. The legal advice contained in the requested document has the following characteristics distinguishing it from any legal advice given in a legislative procedure:
 - first, the question analysed by the Legal Service, notably the delimitation of the scope of Article 194(2) TFEU of other Treaty provisions is a new issue, since a legal basis on a Union policy on energy was introduced by the Treaty of Lisbon. As a result, the limits of the power of the Union legislator under this Article, notably in respect of the adoption of measures of spatial planning, are not yet well traced, nor has the Court had the occasion to date to address the question of the scope of the said Treaty Article;

- second, the Council Legal Service gives an analysis of the compliance of the proposed measures with the principle of subsidiarity. This issue has proven contentious not only in the framework of the Council's preliminary discussions but also in national parliaments. In fact, certain national parliaments have given opinions contesting the compatibility of the proposal with the principle of subsidiarity;
 - third, both aspects of the legal advice are subject to a politically and legally contentious debate, where it is not unreasonable to expect that the Directive, if adopted, will be challenged before the Court on the specific grounds analysed by the Council Legal Service in its legal opinion - issues which have not yet been addressed by the Court;
 - fourth, both issues examined in the legal opinion are of a general, horizontal nature, which are likely to be invoked in other, future decision-making procedures involving the delineation of Article 194(2) TFEU on energy policy, in particular with regard to the aspects of spatial planning are concerned. This poses the risk of a distorted application of the legal advice in question, regardless of the particular circumstances of the case.
9. While in the *Turco* case, the Court of Justice held that that the institutions cannot rely on a general need for confidentiality in respect legal advice relating to legislative matters¹, it has also recognised the possibility for an institution to refuse public access to a specific legal opinion given in the context of a legislative process, "*being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question*".² In view of the particular characteristics of the legal opinion in question (as discussed in point 8 above) the Council considers that it must be protected against disclosure, both on account of its particularly sensitive nature and its horizontal scope. Divulgence of such a document would undermine the protection of legal advice, since 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, since it could find itself in a situation where it would need to defend a decision it has

¹ Cases C-39/05 P and C-52/05 P, *Sweden and Turco vs Council*, [2008] ECR I-4723, § 57.

² *Ibid.*, § 69. Emphasis added.

taken against a - potentially critical - advice given by its Legal Service. Moreover, disclosure of the legal advice would also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts, a scenario that is not merely hypothetical in view of the contentiousness of the above issues. 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.

10. In addition, in view of the fact that Council's decision-making procedure is in a preliminary stage, there is a risk that the divulgation of the requested legal opinion, addressing the above-mentioned issues which are both politically and legally contentious, would have the impact of impeding internal discussion within the Council and would adversely affect the Council's capacity to achieve progress on the proposal.
11. In his confirmatory application, the applicant attempts, first, relying on the Court of Justice' *Turco* judgment, to show that the General Secretariat's reply is inconsistent with Article 4(2), second indent of Regulation 1049/2001. The Council would like to make the following observations on this issue:
12. The applicant contests whether the General Secretariat has correctly identified the parts of the requested document containing legal advice, on grounds that it has not given access to some of the arguments in the requested document. The Council confirms that the parts of the document containing legal advice have in deed been identified. In this regard, it would be contrary to both the letter and the spirit of Regulation 1049/2001 to hold that only if the Council gave partial access to some of the arguments in the legal advice could it be deemed to fulfil its obligation to identify whether the requested document contained legal advice. As regards the assessment of the prejudice to the protection of legal advice, the Council refers back to the explanations it has provided in points 8 and 9 above. Regarding the applicant's contention that the General Secretariat's arguments on the assessment of the prejudice to the protection of legal advice are general and abstract, and as such, do not meet the applicable legal standard, the Council refers to § 50 of the *Turco* judgment, where the Court confirms the possibility for the institution to base its refusal on general presumptions which apply to certain categories of documents, as far as it establishes that the general considerations

normally applicable to a particular type of document are in fact applicable to a specific document in question. As it is clear from point 8 above, the Council has in fact substantiated the need for protection of the legal advice on the basis of the specific content of the document.

13. As regards, secondly, the applicant's arguments regarding the violation of the first subparagraph of Article 4(3) of the Regulation, the Council would like to point out that in the legislative procedure at hand, the Council's discussions on the precise issues examined in the requested legal opinion are unusually complex, both legally and politically, as the Council has already pointed out above (point 8). In these conditions, the publication of the legal opinion in question would in fact seriously undermine the protection of the Council's ongoing decision-making procedure.
14. As regards the applicant's arguments regarding the existence of an overriding public interest in disclosure, the Council indeed balanced the protection of legal advice and the protection of its ongoing decision-making procedure against the public interest invoked by the applicant, including the advantages stemming from increased openness, democracy and accountability, the importance of the achievement by the EU of the 2020 target for increasing energy savings, as well as the promotion of efficient cogeneration. However, on account of the particularly sensitive nature and the horizontal scope of the legal opinion in question as well as the unusual complexity of the Council's discussions on these issues in the legislative procedure, the Council believes that in the specific case at hand, the public interests invoked by the applicant would not outweigh the protection of legal advice under Article 4(2), second indent and the protection of the Council's decision-making procedure under Article 4(3), first subparagraph of Regulation 1049/2001.
15. The Council has also examined the possibility of providing, in accordance with Article 4(6) of Regulation 1049/2001, a more extensive partial access to the document. It concluded that public access may also be granted to points 5, 6-13 and 25 of the requested document, which are not covered by any exceptions to the right of public access.