



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 20 March 2012**

**6764/12**

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**"I/A" ITEM NOTE**

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

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No. prev. doc.:	6763/12
Subject :	Public access to documents - Confirmatory application made by Mr Martin Andersson (No 04/c/01/12)

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Delegations will find enclosed a draft reply from the Council to confirmatory application No 04/c/01/12, approved by the Working Party on Information by written consultation which ended on 20 March 2012.

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

DK, FI and SE: *"DK, FI and SE stress the importance of workable time limits by the Council Secretariat when using the written procedure, which was not the case. For that reason, DK, FI and SE did not have sufficient time to examine all documents in detail. From the outset it seems that the possibility of granting partial access has not been thoroughly examined and at least partial access to the documents could have been extended without jeopardizing the decision-making process or the protection of legal advice."*

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 and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

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## DRAFT

**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION No 04/c/01/12,**  
**made by e-mail on 20 February 2012,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to documents 18771/11, 18771/11 COR 1, 18713/11 and 18673/11**

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 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 documents 18713/11, 18771/11, 18771/11 COR 1 and 18673/11.  
Document **18713/11** is a note from the Presidency to COREPER on a Proposal for a Council Regulation adjusting with effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto (hereafter: proposal for the adjustment of remuneration).  
Document **18771/11 and its COR 1**<sup>1</sup> (hereafter together referred to as document 18771/11) is an "A" Item Note from COREPER to the Council was drafted with view to an action before the Court of Justice in relation with the report from the Commission to the Council on the exception clause submitted to the Council on 13 July 2011 and supplementary information on this report adopted by the Commission on 24 November 2011.  
Document **18673/11** contains an opinion of the Legal Service on a proposal for a Council Regulation adjusting with effect from 1 July 2011 the rate of contribution to the pension scheme of officials and other servants of the European Union (Article 83a(4) and Annex XII to the Staff Regulations).

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<sup>1</sup> Document 18771/11 COR 1 is a corrigendum to this note.

2. In its reply dated 9 February 2012, the General Secretariat:
- refused full public access to document 18713/11 pursuant to the second subparagraph of Article 4(3) of the Regulation (protection of the Council's decision-making process ); partial access was given to points 1, 6 and 7 of that document;
  - refused full public access to document 18771/11 pursuant to the second subparagraph of Article 4(3) of the Regulation (protection of the Council's decision-making process ) and also pursuant to Article 4 (2), second indent (protection of court proceedings and legal advice); partial access was given to points 1, 2 and 3 and to the invitation at the end of the main part of the document; and
  - refused full public access to document 18673/11 pursuant to the first subparagraph of Article 4(3) of the Regulation (protection of an ongoing decision-making process) and also pursuant to the second indent of Article 4 (2) of the Regulation (protection of legal advice).
3. In his confirmatory application dated 20 February 2012, the applicant asks the Council to reconsider its decision. Concerning document 18673/11 he argues that the reasons set out in the General Secretariat's initial reply do not suffice to establish in concrete terms that the disclosure of the requested document would harm the efficiency of the negotiations. Furthermore, referring to joined Court cases C-39/05 P and C-52/05 P <sup>2</sup> and Court case C-506/08 P <sup>3</sup>, the applicant contests that divulgation of this document would undermine the exceptions invoked by the Council.
4. The Council has thoroughly re-examined the documents concerned. In the light of its examination, the Council has come to the following conclusions:

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<sup>2</sup> Judgment of 1 July 2008, Sweden and Turco / Council (C-39/05 P and C-52/05 P, ECR 2008 p. I-4723.

<sup>3</sup> Judgment of 21 July 2011, Sweden / MyTravel and Commission, not yet published.

## **I. The factual background**

5. First of all, the Council would recall the factual background on which the requested documents were issued.
6. On 17 December 2010, the Council, given a serious and sudden deterioration of the economic and social situation within the European Union, requested the Commission to implement Article 10 of Annex XI to the Staff Regulations and therefore present an appropriate proposal for the annual adjustment 2011.
7. In reply, the Commission submitted, on 13 July 2011, the “report on the exception clause (Article 10 of Annex XI to the Staff Regulations)” to the Council. On the basis of this report, the Commission concluded that the conditions for applying the exception clause were not met.
8. The Council did not share the Commission's conclusions and repeated, on 4 November 2011, its request to the Commission to implement, having regard to data reflecting the economic and social situation, Article 10 of Annex XI ("the exception clause") to the Staff Regulations and to submit an appropriate remuneration adjustment proposal based on that Article in time to allow the European Parliament and the Council to examine and adopt it before the end of 2011.
9. In reply, the Commission presented on 25 November 2011 "supplementary information on the Commission report on the exception clause of 13 July 2011" to the Council. The Commission's conclusions remained that the conditions for applying the exception clause were not met. On the same day, the Commission submitted to the Council a proposal for a regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto which was not based on the exception clause but on the normal method for salary adjustment.<sup>4</sup>

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<sup>4</sup> COM(2011) 820 final.

10. On 19 December 2011, the Council adopted Decision 2011/866/EU not to adopt that Commission proposal <sup>5</sup> and decided to bring an action against the Commission before the Court of Justice for its refusal to trigger the exception clause under Article 10 of Annex XI to the Staff Regulations. That action is currently pending before the European Court of Justice.<sup>6</sup>
11. In January 2012, the Commission decided to bring an action against the Council before the Court of Justice for annulment of Council Decision 2011/866/EU. Moreover, on 25 January 2012, it sent a letter to the Presidency of the Council inviting the Council to act on its proposal of 24 November 2011 with a view to a possible action for failure to act (Article 265 TFEU) against the Council before the European Court of Justice.
12. Moreover, on 25 November 2011, the Commission submitted a proposal for a Council Regulation adjusting, from 1 July 2011, the rate of contribution to the pension scheme of officials and other servants of the European Union <sup>7</sup> (hereafter: proposal for the adjustment of the pension contribution rate). This proposal concerns a non-legislative decision making process which raises a number of sensitive political and legal issues.<sup>8</sup> In the course of deliberations, the Council Legal Service was requested to issue an opinion on the question whether there was a link between the latter proposal and the said proposal on the adjustment of salaries and pensions and whether the Council has a discretion in relation to the rate of contribution to the pension scheme and in relation to the time at which to adopt it. This decision-making process is still ongoing and there is a concrete risk of interinstitutional litigation.

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<sup>5</sup> OJ L 341 of 22 December 2011, p. 54.

<sup>6</sup> Case 66/12.

<sup>7</sup> COM(2011) 825 final.

<sup>8</sup> See Article 83a of the Staff Regulations and Annex XII thereto which provide the legal basis for the proposal.

## II. The Assessment

### 1. The protected public interest as regards documents 18713/11 and 18771/11

13. Document **18713/11** contains information on the decision of Coreper on how to proceed with the dossier of the Commission proposal for a Council Regulation adjusting remuneration.
14. Document **18771/11** is an invitation from Coreper to Council to take action before the Court of Justice in the context of the said Commission proposal. The last sentence of point 4 of the document contains legal advice.
15. Both documents are related to non-legislative decision-making processes and directly related to two highly sensitive interinstitutional cases currently pending before the European Court of Justice.<sup>9</sup> While, in the case of document 18771/11, the decision-making process has come to an end in that the Council has decided to initiate legal proceedings, the proceedings hereunder are still pending.<sup>10</sup> Were the information and the legal advice contained in the said documents to be made public, it would be used by interested parties who would thereby *de facto* interfere with the proper course of the Court proceedings. The Council would risk to be obliged to respond to arguments raised in public debate outside of the proceedings. In addition, such a result would also make the Council refrain from drawing up comprehensive preparatory documents in similarly sensitive situations in the future, thereby seriously affecting its decision-making capacity on particularly sensitive issues.
16. For these reasons, full public release of the said two documents would affect the protection of the public interest as regards the decision-making process of the Council (see the first and second subparagraph of Article 4(3) of Regulation 1049/2001) and, in the case of document 18771/11, also the protection of legal advice (second indent of Article 4(2) of the Regulation).

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<sup>9</sup> Cases C-63/12 and C-66/12.

<sup>10</sup> Case C-66/12.

## **2. The protected public interest as regards document 18673/11**

17. As set out above under point 12, document 18673/11 contains an opinion of the Legal Service related to an ongoing non-legislative decision-making process. It contains legal advice, except for its point 1 to 4.
18. The decision-making procedure is exceptionally sensitive. Its outcome is dependent on particularly delicate political negotiations within the Council which are still ongoing and strongly conditional upon legal considerations. The requested legal advice is essential part of these considerations. Were the legal advice in question released, there is a substantial risk that its use by interested parties which are not part of the negotiating process would negatively affect these negotiations and would thereby significantly delay an agreement or even make it fail. It is therefore in the public interest to protect this exceptionally delicate legal advice.
19. It follows from the preceeding point that disclosure of the legal advice in question would, with a high likelihood, negatively affect an ongoing decision-making process. Moreover, that process must also be seen in connection with the two pending Court cases mentioned above and deliberations on a proposal of the Commission for the reform of the Staff Regulations.<sup>11</sup> This general conflictual context further increases the risk of a negative impact on the decision-making process on the adaptation of the pension contribution rate.
20. This assessment shows that contrary to the applicant's argumentation the Council's risk assessment is based on concrete and sensitive circumstances and not on abstract assumptions. Moreover, this situation must also be distinguished from Cases C-39/05 and C-52/05 P since it does not concern a legislative procedure. In addition, it must also be distinguished from case C-506/08 P which concerned legal advice given in a finalized administrative procedure where related Court proceedings had come to an end.

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<sup>11</sup> COM(2011) 890 final.



21. It follows that full public release of the above document would affect the protection of the public interest as regards the protection of legal advice under the second indent of Article 4(2) of the Regulation and as regards an ongoing decision-making process of the Council, first subparagraph of Article 4(3) of Regulation 1049/2001.

**3. The weighing of the public interest with respect to documents 18713/11, 18771/11 and 18673/11**

22. The Council has carefully weighed the interests at stake individually for each of the three requested documents and for each of the above two exceptions. While the Council would underline that the *Turco* case-law invoked by the applicant applies only to legislative procedures, it has in any event thoroughly taken into account the interest of transparency, openness and public participation. Nevertheless, the Council is convinced that, in a context of the ongoing court proceedings as regards documents 18713/11 and 18771/11 and, as regards document 18673/11, in view of the extremely sensitive issues arising in relation to the Commission proposal for the adaptation of the pension contribution rate, the public interest invoked by the applicant does not establish an overriding public interest in disclosure.

23. For the above-mentioned reasons, the Council concluded that full public access to documents 18713/11 and 18771/11 (including its COR 1) has to be refused pursuant to the first and second subparagraph of Article 4(3) (protection of the Council's decision-making process) and the protection of legal advice with respect to document 18771/11 (second indent of Article 4(2) of the Regulation). With respect to document 18673/11, it must be refused pursuant to the second indent of Article 4(2) (protection of the public interest as regards legal advice) and the first subparagraph of Article 4(3) of 1049/2001 Regulation (protection of the Council's ongoing decision making-process).

24. The Council also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the documents under scrutiny. The Council concluded that in view of the arguments set out above, it was not possible to grant more extensive public access to the documents than initially granted.