



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application made by Mr David Price (No 09/c/01/12)

Delegations will find attached:

- request for access to document sent to the General Secretariat of the Council on 2 February 2012 and registered on the same day ([Annex 1](#))
- reply from the General Secretariat of the Council dated 16 March 2012 ([Annex 2](#))
- confirmatory application dated 30 March 2012 and registered on the same day ([Annex 3](#))

[E-mail message sent on 2 February 2012 - 16:00]

Subject: Role of ECJ in ESM and other treaties

Hello,

I was told there were two legal opinions (at least, maybe three) from Council services on the insertion, application and operation of the European Court of Justice in the ESM and ESFS and other euro treaties pacts etc. I would be grateful if you could send me as soon as possible a copy of these and any other legal advice on this institutional topic.

Many thanks.
David Price
Editor
Bron Communications
www.schuman.info
Eurdemocracy.



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

Directorate-General F
Press
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Transparency

- Access to Documents/
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Brussels, 16 March 2012

Mr David Price

e-mail:

DELETED

Ref. 12/0191-mf/lb/mi

Dear Mr Price,

Your request of 2 February 2012 for access to "*legal opinions from Council services on the insertion, application and operation of the European Court of Justice in the ESM and ESFS and other euro treaties pacts*" has been registered by the "Access to Documents" unit. 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 documents (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35). On 23 February 2012, 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:

The General Secretariat was able to identify only one opinion of the Council Legal Service related to the European Court of Justice in the context mentioned in your request. This opinion is to be found in document 5788/12.

Document **5788/12** is an opinion 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 (the "draft Treaty"). The draft treaty has subsequently been signed by 25 Member States but still remains to be ratified. The opinion analyses whether Article 8 of the draft Treaty, conferring jurisdiction on the European Court of Justice as regards compliance by Member States with the so-called "balanced budget rule", is compatible with European Union law. The document consequently contains legal advice.

The aim of the draft Treaty is to strengthen economic governance, including by introducing the abovementioned "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 document would undermine the protection of the public interest as regards Member States' economic and monetary policies by making known to the public a comprehensive legal analysis on issues affecting those policies. This is especially the case as the opinion assesses questions linked to the balanced budget rule which is at the heart of the draft Treaty.

Moreover, given the sensitivity of the legal issues dealt with in the document and the high political and financial importance of the draft Treaty there is a real risk of litigation in the future which is likely to involve a Court review of the questions analysed in the Legal Service opinion. If access were to be given to the document in question this would undermine the protection of legal advice by making public an internal opinion of the Legal Service intended for the Member States. This clearly risks affecting the ability of those concerned to defend their position in a possible future case before the European Court of Justice. 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 the opinion 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 this document, since its 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 Regulation 1049/2001.

Disclosure would furthermore prejudice the protection of legal advice in the second indent of Article 4(2) of Regulation 1049/2001. 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 document and that, consequently, no overriding public interest in disclosure exists.

The General Secretariat has closely examined the document to assess whether certain parts could be extracted as not being covered by any of the abovementioned exceptions, cf. Article 4(6) of Regulation 1049/2001. However, it has concluded that all parts of the document are covered by exceptions.

According 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

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 30 March 2012 - 14:55]

Mr Jakob Thomsen
Secretariat
DGF Access
Council of Ministers,
EU

Dear Mr Thomsen,

Thank you for your reply to my request of 2 February 2012 for the Legal Opinions on the draft treaty for the Fiscal Compact. This is an urgent matter and of great importance to all European citizens as it concerns legislation and a treaty that is presently under consideration by a number of Parliaments of Member States. I first made my request directly to officials of the Council press service but was told that I would have to request the document formally through the web service of the Council. This involved a period UP TO fifteen days before delivery, even though it was an extremely urgent matter.

You state that 'On 23 February 2012, the time-limit for replying to your application was extended by 15 working days.' I would like to point out that this delay was not caused by me but simply that the reply from the Council was not originally executed within the statutory 15 days as required by Community law. I was told by an official on the phone that the Council had failed to respect the deadline. In effect the Council gave itself extra time. I am in no way to blame.

You write that the Council has decided that not a word, not a comma, of any document will be released. This is not acceptable. I request that all documents in full should be released.

As to the substance of your reply I am asking for an immediate release, if necessary following a re-evaluation of grounds of the refusal to supply the Legal Opinions on the draft Fiscal Compact treaty aka 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'. You have identified only one document which you refer to as document 5788/12. I was told by your press office there were at least two.

My reasons are the following:

1. You state: 'Disclosure of the document would undermine the protection of the public interest as regards Member States' economic and monetary policies by making known to the public a comprehensive legal analysis on issues affecting those policies.' The subject matter of the treaty is the stability of the European currency known as the euro. This is a public good. It is difficult to argue that the public should be protected from full knowledge of the stability and legality or otherwise of their own public good. It is in the public's interest to have complete information. Trillions of euros are at stake and any dubious practice should be exposed. That is the public's interest. This ultimate and authentic interest should be protected by having the fullest exposure of the facts. The Legal Opinion should be released.

2. The Legal Opinion deals with the jurisdiction of the European Court of Justice which the Treaty attempts to render active in the affairs of a limited number of Member States. That is, a group of governments wants the Court to be able to act in a deal of their own that excludes the entire Community but where the excluded States and peoples have interests that will be affected, perhaps seriously. This is of prime importance, not only to the signatory States but also the EU non-signatory States. It is therefore essential that the document be fully exposed to the entire EU and all its taxpayers and citizens. The rule of law and democracy must not be excluded from the deal. The position of the Court is paramount. Any doubt about the Court's power must be ventilated. The Document therefore needs to be released.

3. You state: 'there is a real risk of litigation in the future which is likely to involve a Court review of the questions analysed in the Legal Service opinion. If access were to be given to the document in question this would undermine the protection of legal advice by making public an internal opinion of the Legal Service intended for the Member States.' This gives the impression that the Member States -- by which you seem to mean the Member States governments who signed the deal -- are somehow at odds with the people of those States. You also imply that those Member State governments are reluctant to expose their acts to the justice of the Court. I am sure that, in a European Community based on the rule of law and in the EU generally, the people and I hope the governments would affirm that justice should be paramount in all actions of government. The Legal Opinion is therefore the common property of both the people -- who pay for the salaries of the lawyers in the Council's legal service -- and only indirectly the governments who only act as intermediaries, agents and servants for the people who pay. This argument provides no ground that the Legal Opinion, presently inside the Council building and on its computers, all paid for by public taxes, should be restricted to the agents and servants of the people and refused to the people themselves. The citizens are the owners of the Opinion. The document should therefore be released.

4. You state that providing me with a copy of the legal advice '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.' This is clearly in contradiction with the major principles of European treaties: openness and democracy. Even the Lisbon treaty makes this clear in black and white. The Union is based on representative democracy (TEU Art 10), that the Council and European Council is democratically accountable (Art 10) every citizen has the right to participate in the democratic life of the Union -- including having access to information; and decisions should be taken as openly and as closely as possible to the citizens (paras 1 to 4). Article 11 says that the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their opinions. Legal Opinions about the essential legal structures involving the entire economic and monetary structure of the EU or even 25 Member States must be part of that exchange of opinions. Openness is further emphasized in TFEU Art 15: the Council should 'conduct its work as openly as possible.' This also says that the Council should meet in public when considering draft legislation (para 2). It makes nonsense of this Lisbon treaty, European Law and hard-won democracy if the consideration of any matter that refers to the Legal Opinion should be silenced from the public ear. In a Council open to the public will all direct and indirect references to this secret document be expunged from the airwaves and from the record? The only motive for that is to protect the dubious actions of ministers, not the public. This is ridiculous. The public has a right to know. The document should be released.

5. You state that the Legal Opinion 'analyses the possibilities and conditions in general for conferring jurisdiction on the European Court of Justice by agreement.' By agreement of whom? It is against the principles of democracy and openness that, for example, a dubious practice is subject to collusion among those who are responsible. Access to Justice should not be restricted by those guilty of crooked practice. The EU is presently suffering from a number of cases where the ministers have refused to take warnings about fraud, maladministration and malpractice in a number of Member States. As a result multiple hundreds of billions of euros are being raised in loans to deal with the problem. Future generations will have to pay. The Council's record with the Court also raises the alarm. In 2004, a number of Member States governments were condemned by the European Court of Justice and not only refused to take the action required by the Court but shrugged their shoulders at taking the Court seriously. This sentence in the reply therefore underlines all the more the reason why the Legal Opinion should be provided to the public.

6. As to the substance of the Legal Opinion relative to the jurisdiction of the European Court in the Fiscal Treaty signed by 25 Member States, there are three possibilities.

(a) The draft treaty lies fully inside the jurisdiction of the EU Court of Justice. In this case there is no need to hide the Legal Opinion as it endorses the juridical powers and oversight of the Court in all activities of Member states within the draft treaty.

(b) The draft treaty does not fall inside EU activities and EU law. In this case it is imperative that the Legal Opinion be published immediately so that the matter can be discussed within Member States' parliaments and by the public in general. Otherwise the Council could be considered a party to fraud.

(c) The draft treaty is a dubious construction. In this case it must be borne in mind above all that the Council is not a private organisation. It represents the governments of the people. It is not authorized to act as a cartel of political parties that wink at dubious practice with Community money. Is the Council proposing to go to Court against the people? Is it at war with the justice of the EU Court of Justice? If the draft treaty is of dubious construction then the sooner the Legal Opinion is released the better, both for the people, and the Court and for the Council.

7. You cite Regulation 1049/2001 in two places of Article 4, that you say supports your exemption from disclosure. In fact they do exactly the opposite. They urge that full disclosure must be met.

Article 4 para 1 (a).4. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

— the financial, monetary or economic policy of the Community or a Member State.

Exempting or refusing disclosure of the Legal Opinion would only help monetary and economic policy if it were fraudulent. The integrity of the European Economic system demands the full understanding as to whether the draft treaty falls fully under the rule of law and does not unjustly impinge on citizens' interests. The Legal Opinion should therefore be immediately released so that Parliament and public can understand the legal, moral, social, economic and monetary principles and values on which it is based.

Article 4 para 2.2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— court proceedings and legal advice,

unless there is an overriding public interest in disclosure.

An overriding public interest in full disclosure does exist as it is everyone's interest that the treaty should be solidly, democratically founded and on complete justice and openness. The Opinion does not involve a case of an individual or association or one Member State against another or an institution, the main ground for the article indent. The exemption does not apply as it deals with the framework of law, the legitimacy of the draft treaty. The Legal Opinion should therefore be released immediately.

8. It is essential that the Legal Opinion be released in the present circumstances. A great deal of legislation and a number of treaties are being proposed at the moment in very disturbing and unorthodox processes. Decisions involving sums of money multiple times the whole annual budget of the EU are being arranged in closed door meetings by politicians -- often in the dead of night. The public needs to have a clear understanding of what is going on.

When it comes to this draft treaty, the contents and interaction with the institutions, already under stress and disoriented by non-democratic abuse, are difficult for the average citizen to fathom. It is not clear whether this treaty comes under the Community or EU rule of law. It is also a very technical matter where the citizen needs help in understanding the legal issues.

Failure to disclose is totally against the letter and the spirit of the legislation on democratic transparency. The aim of the transparency legislation is to ensure clear and open democracy, not hinder it. The drafting of the draft treaty was also conducted in abnormal ways. These irregularities should not be compounded by subtle or hidden blocking mechanisms in legal access to the Court of Justice, thus obstructing the right of every individual, association, and Member State of the Union.

It is essential therefore that the Legal Opinions of all the institutions are published in full. As the Council -- or a certain group of Member States who are also part of the Council -- are the prime movers in this operation, the Council services should set the example of openness and expel any suspicion of dubious practice.

I am therefore requesting the immediate release of the Legal Opinion, document 5788/12 and any other document on the draft treaty. I confirm that my name and this reply may be held on the register.

Yours sincerely,

David Price
Schuman Project
