



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 May 2012

8673/12

**INF 60
API 41
JUR 213**

NOTE

from : General Secretariat of the Council

to : Delegations

No. prev. doc.: 8672/12

Subject : Public access to documents

- Confirmatory application made by Mr David Price (No 09/c/01/12)

Delegations will find enclosed a draft reply from the Council to confirmatory application No 09/c/01/12, made by Mr David Price, approved by the Working Party on Information on 11 May 2012.

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

"DK, EE, FI, SE stress the importance of giving the public the possibility to participate in the decision-making by giving out information on important matters of the Union. Based on the content of the document DK, EE, FI, SE are of the opinion that disclosing at least parts of the document would not harm the interests protected by the exceptions referred to in the draft reply and therefore DK, EE, FI and SE cannot concur with the reasoning nor the outcome presented in the draft reply."

It is suggested that the Council, by written procedure, record its agreement on the draft reply annexed to this document.

The Annex is available in English only.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 09/c/01/12,
made by e-mail on 30 March 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 5788/12

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 document 5788/12, an opinion of the Council Legal Service drawn up in the context of intergovernmental negotiations taking place outside the institutional framework of the Union for a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the "Fiscal Compact Treaty"). That opinion analyses whether Article 8 of the Fiscal Compact 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.
2. In its reply dated 16 March 2012, the General Secretariat refused public access to the document pursuant to Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State) and the second indent of Article 4(2) (protection of legal advice) of Regulation No 1049/2001.
3. In his confirmatory application dated 30 March 2012, the applicant claims that the General Secretariat could not have relied on the above two exceptions in Article 4 of Regulation No 1049/2001. He also argues that insufficient weight has been placed on the countervailing public interest in disclosure.

4. The Council has considered the confirmatory application in the light of the applicant's arguments and has concluded as indicated below.

The identification of the relevant documents

5. Before examining the details of the application, it is necessary to address the applicant's question as to whether all documents covered by his request have been identified. The applicant refers to information received from the Council's Press Office that two opinions of the Council Legal Service had been drawn up concerning the Fiscal Compact Treaty. In that regard it should be underlined that the applicant's initial request was related to public access to any Legal Service opinion regarding the role of the Court of Justice in the context of that Treaty. There is only one opinion of the Council Legal Service relating to the role of the Court of Justice. An additional opinion was drawn up by the Council Legal Service in respect of the Fiscal Compact Treaty but it does not concern the role of the Court of Justice.

The context of the legal advice

6. To begin with, it is important to recall the context in which the requested legal advice was provided.
7. Against the background of an increasingly difficult economic and financial situation, the Heads of State or Government of the euro area Member States agreed, on 9 December 2011, to create a reinforced architecture for economic and monetary union in order to urgently address the worsening situation.
8. In the following period, intensive negotiations took place in the context of the Euro Group Working Group ad hoc Working Group on a Fiscal Stability Union to deliver on this objective in accordance with the political guidelines given on 9 December 2011. These efforts led to the endorsement, on 30 January 2012, of the draft Fiscal Compact Treaty by the euro area Member States. On 2 March 2012, 25 Member States signed the Fiscal Compact Treaty. The ratification process is still ongoing.

9. The Fiscal Compact Treaty is an intergovernmental agreement outside the legal and institutional framework established by the EU Treaties. It is the result of a highly sensitive and political negotiation arising from a serious economic and financial situation.
10. The Treaty remains the focus of acute economic and political sensitivity as efforts to address the serious economic and financial situation continue and the Treaty itself is subject to national ratification procedures across the European Union.

Assessment of the requested document

11. The requested document contains legal advice. It analyses whether Article 8 of the draft Treaty, conferring jurisdiction on the European Court of Justice as regards compliance by the signatories with the obligation to transpose into national law the balanced budget rule, would be compatible with European Union law.
12. The opinion was requested at the Ministerial Meeting on a draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union on 23 January 2012. As noted above, the Fiscal Compact Treaty does not constitute a piece of Union legislation as the applicant contends but an international agreement between 25 Member States. Article 8 of the Fiscal Compact Treaty, which confers jurisdiction on the Court of Justice of the European Union and which is the provision dealt with in the Legal Service Opinion to which access is sought, itself reflects this intergovernmental character of the Fiscal Compact Treaty. Indeed, had this been EU legislation, then the jurisdiction of the Court of Justice of the European Union would have followed directly from the Treaties.
13. The Council notes that the purpose of Regulation No 1049/2001 is to ensure the widest possible access to documents for citizens. It equally provides in the fourth indent of Article 4(1)(a) and the second indent of Article 4(2) for exceptions to the right of public access to documents in cases where such public access would undermine, *inter alia*, the protection of the financial, monetary or economic policy of the Union or a Member State and legal advice, unless there is, in the latter case, an overriding public interest in disclosure. Both of these exceptions are engaged in this case.

The exception related to the protection of the financial, monetary or economic policy of the Union or a Member State

14. Article 4(1)(a) of the Regulation is a mandatory exception for the protection of the financial, monetary or economic policy of the Union or a Member State. Once it is established that the requested document falls within the sphere of financial, monetary or economic policy and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests.
15. As noted above the Fiscal Compact Treaty was concluded in response to an exceptional economic and financial crisis bearing directly on the financial, monetary and economic policies of the Union and Member States and is a key part of the Union's response to that crisis. As indicated in the initial reply to the applicant, the aim of the draft Treaty is to strengthen economic governance, hereunder by introducing a so-called "balanced budget rule". The legal opinion at issue here deals directly with the arrangements for ensuring compliance with that rule. It thus provides legal advice on an enforcement mechanism that is essential for the efficient implementation of the economic and financial policy of participating Member States. It covers matters which are of particular legal and political sensitivity in that regard and which have been, and remain, the subject of intensive debate. In addition, the Treaty is currently in the process of being ratified.
16. This demands particular caution as regards access to the Legal Service opinion in question whose disclosure could impact the political and legal debate as well as the ratification process. This would moreover be in the context of an economic situation where the smooth establishment and functioning of this new element in the financial and economic policies of participating Member States is essential.
17. It should be stressed that this cannot be taken to indicate - as the applicant claims - that the opinion gives a negative reply as to the compatibility of Article 8 of the Fiscal Compact Treaty with European Union law. When assessing requests for access to Council Legal

Service opinions, the reply to such a request will not depend on whether or not the legal advice concludes that an envisaged measure is legal but solely on the application of Regulation No 1049/2001.

18. The applicant also states that the exception set out in Regulation No 1049/2001 regarding the protection of financial, monetary or economic policy of the Union or a Member State could only become relevant in case of fraudulent economic policy. This must clearly be rejected for obvious reasons. It is evident that this exception does not have as its aim to protect fraudulent business. The exception reflects the appreciation by the legislator of the need, as here, to protect the financial, monetary and economic policies of the Union and Member States.
19. Those policies were at the heart of the discussions regarding the Fiscal Compact Treaty and, given its content and subject-matter, and the on-going sensitivity of this issue, access to the opinion in question would undermine the protection of the public interest as regards the policies of the Union and Member States on such aspects.

The exception relating to the protection of legal advice

20. As explained above, the opinion contains legal advice on issues of an extreme sensitivity regarding a treaty which is the subject of a continuing and intense political process and which deals with on-going matters of the highest economic and financial significance. There is a real and concrete risk that elements of the Fiscal Compact Treaty, including its Article 8, be subject to legal scrutiny before national and Union Courts. The Legal Service's opinion could if released be invoked in such proceedings. In such a case, public release of the requested document would negatively affect the capacity of participating Member States to defend their position in court – as noted above in an economic situation which requires a smooth set-up of this new element of the financial and economic policy of participating Member States. This combination of sensitive circumstances would create a particular risk that Member States and the Council would be deterred from requesting such sensitive legal advice in similar situations in the future. The Council therefore fully reiterates what is already stated in its reply to the initial request for access.

21. With respect to this exception, the Council has carefully weighed the interests at stake. While the Council fully recognises the importance of transparency, openness and public participation it is nevertheless convinced that, in a context where the negotiations on the Treaty involved exceptionally sensitive and essential interests, and taking into account the on-going ratification process as well as requirements of participating Member States' fiscal and economic policy in the current economic situation, the public interests invoked by the applicant do not establish an overriding public interest in disclosure.

Conclusion

22. For the abovementioned reasons, the Council concluded that full public access to document 5788/12 has to be refused pursuant to Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the participating Member States), and the second indent of Article 4(2) (protection of the public interest as regards legal advice).
23. The Council also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the document under scrutiny. The Council concluded that it remained justified not to grant access to any part of the document as the whole document is covered by relevant exceptions and as it is not possible to extract parts as not falling under an exception.
-