RAT DER EUROPÄISCHEN UNION

Brüssel, den 9. November 2012 (12.11)
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REV 1

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I/A-PUNKT-VERMERK

der	Gruppe "Information"
für den	AStV (2. Teil)/Rat
Nr. Vordok.:	14525/12
Betr.:	Zugang der Öffentlichkeit zu Dokumenten – Zweitantrag Nr. 20/c/01/12 von Herrn Van den Plas

Die Delegationen erhalten in der Anlage den Entwurf einer Antwort des Rates auf den Zweitantrag Nr. 20/c/01/12, wie er sich aus der Prüfung durch die Gruppe "Information" in ihrer Sitzung vom 26. Oktober 2012 ergeben hat.

Die dänische, die estnische, die niederländische, die finnische, die slowenische und die schwedische Delegation haben erklärt, dass sie gegen den Antwortentwurf stimmen werden.

DK, EE, NL, FI, SI und SE haben die folgende Erklärung abgegeben:
"Wir können weder der Begründung, dass es sich bei einer Rechtsberatung generell um eine sensible Angelegenheit handelt, noch der Begründung, dass kein übergeordnetes öffentliches Interesse an der Offenlegung besteht, uneingeschränkt zustimmen."

Die Mehrheit der Delegationen hat der Veröffentlichung des Abstimmungsergebnisses zugestimmt.

Der Ausschuss der Ständigen Vertreter wird daher gebeten, dem Rat vorzuschlagen, dass er auf seiner nächsten Tagung

– dem in der Anlage enthaltenen Antwortentwurf – gegen die Stimmen der dänischen, der estnischen, der niederländischen, der finnischen, der slowenischen und der schwedischen Delegation – unter Teil A der Tagesordnung zustimmt und
– beschließt, das Abstimmungsergebnis zu veröffentlichen.

Die Anlage liegt nur in englischer Sprache vor.

ANLAGE

DRAFT
REPLY ADOPTED BY THE COUNCIL ON .....
TO CONFIRMATORY APPLICATION No 20/c/01/12,
made by e-mail on 28 September 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 12130/04

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:

Background

1. The applicant refers to document 12130/04, a contribution from the Council Legal Service to Coreper which examines the question of the voting method to be used for adopting Council conclusions.

2. In its reply dated 7 September 2012, the General Secretariat granted public access to the introductory paragraph of the document, but refused public access to the remaining parts pursuant to the exception set out in the second indent of Article 4(2) of Regulation No 1049/2001 (protection of legal advice).

3. In his confirmatory application dated 28 September 2012, the applicant explains that his request for access to document 12130/04 on Council conclusions was submitted in order to better understand why the Council did not adopt conclusions endorsing the long-term actions contained in the 2050 climate and energy roadmaps which were supported by 26 out of 27 delegations.

4. In support of his confirmatory application the applicant claims that "it is a right of the Union's citizens and representative groups to be able to know and understand each of the different procedures frequently used in the Council and to know the reasons why a particular procedure is used on any given occasion." In that regard the applicant mentions that the headings of the document, which are publicly accessible, indicate that "there is more than one scenario in which, and there is more than one method by which, the Council can adopt conclusions." The applicant also argues that, in the light of the background having prompted the request, the Council as an institution "manifestly frustrates the public will and public interest" by withholding access to document 12130/04 and by not otherwise providing public access to an explanation of its (non)actions adopting conclusions only by consensus. On that background the applicant concludes that there is an overriding interest in disclosure of the document based on the public interest in climate protection. Finally, the applicant claims that there has been a manifest error in the reply given by the Council to confirmatory application 16/c/01/12.

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

The argument contending a manifest error in the reply given by the Council to confirmatory application 16/c/01/12

6. The applicant refers to a reply sent by the Council on 25 September 2012 to confirmatory application no 16/c/01/12. The initial request referred to "access to a document or documents describing the basis on which the Council adopts conclusions". The initial reply, which was subsequently confirmed by the Council, stated that the Council had failed to identify any documents corresponding to the request. It also underlined that when examining a confirmatory application for access to documents, the Council is limited to the scope of the initial request.

7. According to Article 7(2) of Regulation No 1049/2001, in the event of a total or partial refusal, the applicant may make a confirmatory application asking the institution to reconsider its position. That provision is to be read as referring to the position taken as regards the specific request concerned. The scope of a confirmatory reply is therefore confined to the specific partial or full refusal to grant access. Regulation No 1049/2001 does not foresee a mechanism whereby the Council can be asked to reconsider a confirmatory reply.
The present reply will therefore only address the partial refusal to grant access to document 12130/04 which was communicated to the applicant on 7 September 2012.

Assessment of the requested document

8. It is recalled that the legal advice contained in the requested document was not given in the context of any decision-making process. The wider access to documents which is established with regard to documents relating to legislative acts therefore does not apply.

9. The Council notes that, although the purpose of Regulation No 1049/2001 is to ensure the widest possible access to documents for citizens, it equally provides for exceptions to that right, *inter alia*, where such access would undermine the protection of legal advice, unless there is an overriding public interest in disclosure, see Article 4(2), second indent, of Regulation No 1049/2001. That exception is engaged in this case.

10. The requested document contains legal advice. It examines in an abstract way the applicable procedure for the adoption of Council conclusions, based on different scenarios. Consequently, and as underlined in the initial reply, the legal advice is of a very general nature and its scope is exceptionally broad.

11. Moreover both the subject-matter of conclusions and the issues relating to their adoption can be matters of great sensitivity.

12. The European Court of Justice has specifically recognised the possibility to withhold legal advice of such particularly sensitive and broad character[1]. Disclosure of such a document would undermine the protection of legal advice and would create a particular risk that Member States and the Council would be deterred from requesting advice of such a sensitive and broad nature in similar situations in the future.

13. Furthermore, there is a real and concrete risk that Council conclusions, including the basis on which they were voted, could become subject to litigation before Union Courts as it has already happened in the past[2]. 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 the Council to defend its position in court by providing the other party to the case with a procedural advantage.

14. By reference to the above the Council therefore confirms and reiterates what is already stated in its reply to the initial request for access as regards the applicability of the exception related to the protection of legal advice pursuant to Article 4(2), second indent, of Regulation No 1049/2001.

No existence of an overriding interest in disclosure

15. The applicant refers to the public interest in protecting the climate and in introducing the relevant measures to that effect. The Council agrees that these are important values. However, it is difficult to see how access to the requested document would impact the policies in this field. As already mentioned, the document contains legal advice, setting out an abstract description of the applicable procedure for adopting Council conclusions according to different scenarios and from a strictly legal point of view. It is not concerned with environmental issues.

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1 Judgment of the European Court of Justice of 1 July 2008 in joined cases C-39/05 and C-52/05 P, *Sweden and Turco/Council*, point 69.

2 See judgment of the European Court of Justice in case C-27/04, *Commission/Council*.

16. In the light of the above, and taking into account the particular sensitivity of the requested document, notably its exceptionally broad scope, the Council confirms that, on balance, the applicant has not demonstrated that an overriding public interest in disclosure exists.

Otherwise not providing public access to explanations of actions adopting conclusions

17. Finally, for the reasons given above in paragraph 7 this confirmatory reply is necessarily limited to the partial refusal to grant access to document 12130/04.
However it should be underlined that Regulation No 1049/2001 does not oblige the institution concerned to enter into argumentation on matters of substance or - as the applicant seems to imply - to undertake an expansive research in order to uncover any document which may be of relevance to that argumentation, when not covered by the wording of the initial request. For the same reason the Council will not address the arguments put forward under the heading of the confirmatory application entitled "Treaty requirements upon the Council".

Conclusion

18. For the abovementioned reasons, the Council concluded that full public access to document 12130/04 has to be refused pursuant to Article 4(2), second indent, of Regulation No 1049/2001 (protection of the public interest as regards legal advice).

19. The Council also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting extended partial access to the document under scrutiny and maintains the partial access in the initial reply.