



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 June 2014

10381/14

**INF 210
API 65**

NOTE

Subject: Public access to documents
- Confirmatory application No 16/c/01/14

Delegations will find attached:

- request for access to some documents sent to the General Secretariat of the Council on 2 April 2014 and registered on 3 April 2014 ([Annex 1](#)).
- 1st reply from the General Secretariat of the Council dated 29 April 2014 and 2nd reply from the General Secretariat of the Council dated 19 May ([Annex 2](#))
- confirmatory application dated 28 May 2014 and registered the same day ([Annex 3](#)).

[E-mail sent to Access@consilium.europa.eu using the electronic form available in the Register application on 2 April 2014 - 6:55 pm]

First Name: **DELETED**

Postal Address:

Family Name: **DELETED**

Email: **DELETED**

Request document(s):

I would like to be given full access to the following documents (all relation to the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union):

- ST 15979 2013 REV 1
- ST 16176 2013 INIT
- ST 6493 2014 INIT

Should full access not be legally possible at this stage, I kindly request you to give me such full access as soon as it becomes possible.

Thank you in advance.



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

RUE DE LA LOI, 175
B - 1048 BRUSSELS
Tel: (32 2) 281 67 10
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E-MAIL:

access@consilium.europa.eu

Brussels, 29 April 2014

DELETED

e-mail:

DELETED

Ref. 14/0615-mj/dm

Dear **DELETED**,

We have registered your request of 2 April 2014 for access to documents **15979/1/13 REV 1**, **16176/13** and **6493/14**. 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 documents¹ (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure² and has come to the following conclusion:

You may have access to document **6493/14**.

Document **15979/1/13 REV 1** is a note of 21 November 2013 from General Secretariat of the Council to the Permanent Representatives Committee on a proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. It concerns the preparation for the Competitiveness Council on 2-3 December 2013.

This proposal was submitted by the Commission to the European Parliament and to the Council on 12 June 2013. The Working Party on Competition started its examination on 10 July 2013. Since then, it has been examined by the Working Party several times.

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

You may have access to this document except to a paragraph which refers to the opinion of the legal service on the legal basis of the proposal. The General Secretariat is unable to grant access to this part of the document, since its disclosure would prejudice the protection of the legal advice pursuant to Article 4(2), second indent, of the Regulation.

The necessary consultations concerning document **16176/13** are still in progress and you will be notified of a decision as soon as possible.

Statutory remedy notice

Pursuant 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

Enclosures

¹ Confirmatory applications are published in the Council's Register of documents. If you introduce a confirmatory application, your personal data will be published in the documents related to your confirmatory application only if you have given your explicit consent for this. Your reply relating to the publication of your personal data will in no way prejudice your rights under Regulation (EC) No 1049/2001.



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THE EUROPEAN UNION**
GENERAL SECRETARIAT
Directorate-General F
Communication
Transparency

*- Access to Documents/
Legislative transparency*

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access@consilium.europa.eu

Brussels, 19 May 2014

DELETED

e-mail:
DELETED

Ref. 14/0615-ADD-mj/ns

Dear **DELETED**,

Further to the letter sent to you on 29 April 2014 regarding your request for access to several documents, the General Secretariat of the Council has now finished the examination of the remaining document 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 documents¹ (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure² and has come to the following conclusion:

Document **16176/13** is a legal opinion relating to the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The opinion analyses whether the legal bases proposed by the Commission for the Directive, i.e. Articles 103 and 114 TFEU, are appropriate. The document consequently contains legal advice.

The legal advice covered by this opinion deals with issues which are contentious and likely to be subject to litigation. Some aspects of the advice are also very broad in scope. The legal advice is therefore particularly sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. 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. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts.

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the document.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of the Regulation, you may have access to points 1-10, 13 and 14, of the document.

Statutory remedy notice

Pursuant 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

Enclosure

¹ Confirmatory applications are published in the Council's Register of documents. If you introduce a confirmatory application, your personal data will be published in the documents related to your confirmatory application only if you have given your explicit consent for this. Your reply relating to the publication of your personal data will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 28 May 2014 - 4:28 pm]

From: DELETED

Dear Sir, Madam,

With reference to your below e-mail with attachment, I hereby send you attached the confirmatory application concerning my request.

Please do not hesitate to contact me should you require any further information from my side. I am looking forward to receiving your answer as soon as possible.

Best regards,

DELETED

To: General Secretariat of the Council
Directorate F - Communication and transparency
Mr J. Thomsen
Date: 28 May 2014
Ref.: 14/0615-ADD-mj/ns

Dear Mr Thomsen,

Thank you for your letter of 19 May last with the abovementioned reference. In that letter you indicated that the General Secretariat of the Council considers that it is unable to grant full access to document 16176/13, as I had requested.

By means of the present letter I would like to ask the General Secretariat of the Council, in application of Article 7(2) of Regulation 1049/2011, to reconsider this position. In this context I note the following.

In the first place, it is argued in your letter that the (non-accessible part of the) document in question is particularly sensitive, because it contains legal advice that (i) deals with issues that are contentious and likely to be subject to litigation and (ii) some aspects thereof are very broad in scope.

As regards point (i), it would appear however that this argument applies to (almost) all legal advice. Issues that are not contentious and that do not imply a risk of litigation will generally not require advice of the Legal Service of the Council. This would thus amount to a general refusal to grant access to legal advice of the present type. That would however be evidently contrary to the obligations of the Council under Regulation 1049/2001, as interpreted by the Court of Justice, in

particular in its *Turco* ruling (joined cases C-39/05P and C-52/05P). I also note in this connection that your letter in no way specifies why this particular case would be different.

As regards point (ii), with respect, also this argument is difficult to understand. To begin with, the submission that some of the aspects of the legal advice in question are very broad in scope has not been explained in any way in your letter. This makes this argument not only difficult to understand, but also impossible to objectively verify. Moreover, the parts of the document in question that were disclosed indicate that this legal advice concerns the question whether the legal basis that the Commission proposed for the draft directive is appropriate (see para. 1 of the document). As your Legal Service itself notes, answering this question necessarily involves a case-by-case assessment, in light of the aim and content of the proposed measure (see para. 5 of the document). Consequently, it appears that this legal advice actually deals with a rather specific and concise issue, the relevance of which is limited to this particular case.

With respect to both of the abovementioned points I further note that in other, (seemingly) similar cases the Secretariat General of the Council did give access to opinions of the Legal Service. I refer for instance to the request for access that was the subject of the decision by the European Ombudsman in case 1170/2009/KM. Another example is the access that I myself have been granted to document 6052/04. In this light it is even more difficult to understand why full access has now been refused.

In the second place, it is noted in your letter that disclosure of "*such a document*" would undermine the protection of legal advice under Article 4(2), second indent, of Regulation 1049/2001 and that there is no overriding public interest in disclosing it. However, both the Court of Justice and the Ombudsman have already expressly dismissed arguments of this type. Indeed, the former has expressly held that "*Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's Legal Service relating to a legislative process*" (see the aforementioned *Turco* judgment, para. 68). In his aforementioned decision the Ombudsman rightly pointed in this connection to recital 2 of the said Regulation, noting that accountability to the citizens is particularly important in relation to legislative procedures (see para. 38 of that decision). That the line of argumentation set out in your letter cannot justify non-disclosure in a situation such as the one at issue here applies all the more so, given that this argumentation appears to apply to documents of this type generally ("*such a document*") and therefore not to the *particular* document to which I asked to be given full access.

Lastly, for the sake of completeness I recall that, as the Court of Justice pointed out in its aforementioned *Turco* judgment (see para. 70-71), any possible exception to the general obligation to disclose a document such as the one at issue here (i) must be justified on the basis of "*a detailed statement of reasons*" and (ii) can "*only apply for the period during which protection is justified on the basis of the content of the document*". As explained in the foregoing, in the present case no such detailed statement of reasons has been given. Neither has any limitation in time of the refusal to disclose the requested document been specified.

In conclusion, I kindly request you to reconsider your refusal, which I believe to be untenable for the reasons set out above. I therefore again ask to be given - full - access to the document in question **without undue delay**.