



Council of the
European Union

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Brussels, 23 November 2017
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INF 212

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 28/c/01/17

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 10 October 2017 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 6 November 2017 ([Annex 2](#));
- confirmatory application dated 16 November 2017 and registered on the same day ([Annex 3](#))

[E-mail message sent to access@consilium.europa.eu on 10 October 2017 - 16:19 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone: **DELETED**

Mobile:

Fax: **DELETED**

Requested document(s): Opinion of the Legal Service of the Council on the European Pillar of Social Rights

1st preferred linguistic version: DE - German

2nd preferred linguistic version: EN - English



Council of the European Union
General Secretariat

Directorate-General Communication and Information
Knowledge Management
Transparency
Head of Unit

Brussels, 6 November 2017

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Ref. 17/21119-rh/jj

Request made on: 10.10.2017

Deadline extension: 31.10.2017

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached a partially accessible version of document **12077/17**². However, I regret to inform you that full access cannot be given for the reasons set out below.

The requested document **12077/17 INIT** dated 19 September 2017 is an opinion from the Council Legal Service examining various legal aspects relating to the Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights (hereafter "the Proclamation"). It contains legal advice in para 3 to 49.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 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, OJ L 325, 11.12.2009, p. 35).

² Article 4(6) of Regulation (EC) No 1049/2001.

The decision-making process to which the legal opinion refers to is not legislative in nature and is, by now, finalised. Nevertheless, paragraphs 29 to 34 as well as paragraphs 38 to 40 and 48 of the Opinion concern considerations developed by the Council Legal Service on certain aspects of the recourse to atypical acts, mainly related to the limitations resulting from Treaty provisions to the adoption of atypical acts and reflections on the possible use of such acts by the EU judicature.

As a consequence, the legal advice covered by these paragraphs deals with issues which are very broad in scope and which go well beyond the proclamation of the European Pillar of Social Rights. It is relevant not only to the document in question (the Proclamation) but covers different atypical acts in various fields. Furthermore, the issues raised under these paragraphs remain novel and contentious. Due to this fact, the legal position remains to be clarified, especially since the issues in questions are not settled in the case law.

Disclosure of this part of the opinion would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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. 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 disclosing the requested document in relation to the interests in having a frank, objective and comprehensive legal advice under Regulation (EC) No 1049/2001, 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 interests so as to justify disclosure of the document.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested document. However, in accordance with Article 4 (6) of the Regulation (EC) No 1049/2001, you may have access to paragraphs 3 to 28, 35 to 37, 41 to 47 and 49.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).³

Yours sincerely,

Ramón CHISMOL IBÁÑEZ

Enclosure

³ Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to access@consilium.europa.eu on 16 November 2017 - 14:32]

From: **DELETED**

Sent: Thursday November 31, 2017 2:32 PM

To: SECRETARIAT DGF Access

Subject: Ref. 17/21119-rh/jj

Dear Madams and Sirs,

Please find enclosed our administrative appeal against your refusal of 6 November 2017 (see below) as well as our confirmatory application in the same matter.

Best regards,

DELETED

Council of the European Union
General Secretariat
Communication and Information
Knowledge Management
Transparency
Rue de la Loi/Wetstraat, 175
B-1048 Brussels

by e-Mail to: access@consilium.europa.eu

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16 November 2017
17JJ0097

Administrative appeal and confirmatory application for full access to document 12077/17 of 19 September 2017 – Opinion of the Legal Service: 'Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights – legal considerations'

Our application of 10 October 2017; Your decision to refuse access of 6 November 2017;
Your reference: 17/2119-rh/jj

Dear Sir/Madam,

In connection with the above, we hereby submit an

administrative appeal

against the decision to refuse access and submit a

confirmatory application

for

full access to document 12077/17 of 19 September 2017 – Opinion of the Legal Service: 'Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights – legal considerations' to be granted to Arbeitsgemeinschaft berufsständischer Versorgungseinrichtungen e. V. (ABV), Luisenstraße 17, D-10117 Berlin.

Grounds:

You justify the merely partial disclosure of the document we requested essentially as follows:

'Nevertheless, paragraphs 29 to 34 as well as paragraphs 38 to 40 and 48 of the Opinion concern considerations developed by the Council Legal Service on certain aspects of the recourse to atypical acts, mainly related to the limitations resulting from Treaty provisions to the adoption of atypical acts and reflections on the possible use of such acts by the EU judicature.

As a consequence, the legal advice covered by these paragraphs deals with issues which are very broad in scope and which go well beyond the proclamation of the European Pillar of Social Rights. It is relevant not only to the document in question (the Proclamation) but covers different atypical acts in various fields. Furthermore, the issues raised under these paragraphs remain novel and contentious. Due to this fact, the legal position remains to be clarified, especially since the issues in question are not settled in the case law.

Disclosure of this part of the opinion would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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. 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.'

Decision to refuse access of 6 November 2017, p. 2.

We wish to submit the following comments on these arguments:

1. Observations concerning atypical acts going beyond the proclamation

Insofar as you seek to justify the refusal on the ground that the document contains observations not only concerning the proclamation of the European Pillar of Social Rights but, beyond that, concerning atypical acts in general, it can be responded, first of all, that it is not clear why, in that case, at least those observations which relate only to the proclamation of the Pillar are not disclosed.

2. Issues which are very broad in scope

In light of the above, disclosure of at least those observations which relate specifically to the Pillar cannot be opposed on the ground that the more general considerations set out by the Legal Service concerning atypical acts deal with 'issues which are very broad in scope'.

In our view, moreover, even a general opinion given concerning the legal characterisation of atypical acts does not involve 'issues which are very broad in scope'. The additional elements which you have put forward by way of justification are not convincing. On the contrary, they suggest that the observations concerned could not in any way jeopardise legal advice.

As you yourselves state, the issues raised 'remain novel and contentious', 'the legal position remains to be clarified' and the issues 'are not settled in the case-law'. If, therefore, the general legal issues relating to atypical acts discussed in the document have – undisputedly – not yet been settled conclusively, this means, conversely, that numerous legal opinions on these issues already exist and are tenable. The legal opinion of the Legal Service is therefore only one among many.

Nor is it apparent why the legal opinion of the Legal Service should jeopardise future legal advice. After all, the Council Legal Service is only an administrative research entity – and not, for instance, a judicial body – and consequently its position and remit do not lend any particular significance to its considerations regarding legal issues.

Besides, the document is merely an academic opinion. It is consequently non-binding in character and purely of the nature of a recommendation.

Lastly, knowledge of the relevant literature on specific legal issues is a necessary basis for every legal decision-making process, in order to provide any legal advice at all.

3. Future Council reticence and undermining of the Legal Service's ability to defend Council decisions before the courts

In the grounds for your refusal you invoke the argument that disclosure could lead the Council to display more caution in future when calling on the Legal Service, and could undermine the Legal Service's ability to defend Council decisions before the courts. However, it has already been conclusively clarified in the case-law that such grounds are insufficient.

Judgment of the General Court of 4 May 2012, T-529/09, confirmed by the Court of Justice in its judgment of 3 July 2014, C-350/12 P; see also the landmark judgment of the Court of Justice of 1 July 2008, C-39/05 P and C-52/05 P.

The risk that the disclosure of the document could specifically and actually undermine an institution's interest in seeking and receiving frank, objective and comprehensive advice must be reasonably foreseeable and not purely hypothetical.

The grounds you put forward are not sufficient to establish the existence of such a risk by any detailed reasoning. In fact, the grounds, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues, are not substantiated by any specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive advice.

What seems to be the underlying reasoning – namely that the disclosure of the legal opinion could give rise to doubts over the lawfulness of adopted legal acts, specifically the European Pillar of Social Rights – is not sufficient to constitute a threat to the protection of legal advice.

Moreover, regarding the argument concerning the risk of a threat to the ability of the Council Legal Service to defend, in court proceedings, a position on which it had issued a negative opinion, it should be borne in mind that, as has been observed in the case-law on a number of occasions, an argument of such a general nature cannot justify an exception to the transparency required by Regulation No 1049/2001.

4. No specific threat to the protection of legal advice

The grounds relied on in the decision to refuse access, in view of their general and hypothetical nature, are not sufficient to show that the public interest relating to the protection of legal advice may be undermined.

We would also point out here, for the sake of completeness, that according to the case-law the general nature of the grounds concerned cannot be justified by the impossibility of providing further evidence, given the sensitive content of the requested document.

5. No proper consideration of the legally protected interest in disclosure

The interest in the disclosure of the document was not sufficiently taken into account. The benefits of greater openness set out in recital 2 of Regulation (EC) No 1049/2001, namely that it enables citizens to participate more closely in the decision-making process and ensures that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system, were not properly weighed up. These considerations are clearly of particular relevance when the Council is adopting acts, as is apparent from recital 6 of Regulation (EC) No 1049/2001, according to which wider access must be granted to documents in precisely such cases. This must also hold for atypical acts, to ensure that the protection cannot be undermined or circumvented. Indeed, this protection is even more necessary for atypical acts, which, due to their questionable nature, are much more difficult for those concerned to assess than normal legislative measures.

In this case, there is an overriding public interest in the disclosure of the document, since it would contribute to conferring greater legitimacy on the institutions and would increase EU citizens' confidence in those institutions by making it possible to have an open debate on the points where there may be a divergence of opinion. It is acknowledged in the case-law that it is precisely openness concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergent points of view to be openly debated. It is therefore in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.

Considering these acknowledged case-law principles – which we have cited verbatim – in the context of the present case, it is clear that they must apply here. The European Pillar of Social Rights is a large-scale Commission project which should '[deliver] new and more effective rights for citizens', according to the Commission's latest official statement.

Source:

https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en

(retrieved on 16.11.2017).

Therefore, European citizens – and also, more specifically, the ABV, which is the umbrella organisation for the professional pension schemes responsible for the social security of affiliated independent professionals in the Federal Republic of Germany – have a particular interest in knowing whether and to what extent the Pillar, as an 'atypical act', actually confers rights.

6. Loss of confidence in the EU institutions and illegitimacy of the European Pillar of Social Rights

The refusal to disclose the legal and actual effects of the European Pillar of Social Rights on citizens will inevitably considerably undermine trust in the institutions – especially the Council, in this case. Deliberately keeping citizens, and state and non-state organisations to which the European Pillar may apply, unaware of its possible consequences also delegitimises its proclamation.

7. The Pillar does not appear to be legally binding

In this context, it is all the more astounding that, according to that part of the conclusions made available from the opinion of the Legal Service, 'the Proclamation is not a measure creating or extending legal rights and obligations and does not correspond to any act to be adopted pursuant to the Treaties'. Rather, it 'constitutes an atypical act which is not legally binding and does not create directly enforceable rights'.

If this – which completely contradicts the Commission claim cited above (!) – were indeed entirely true and the proclamation of the Pillar, as an atypical act, were in no way legally binding, there would ultimately be no conceivable reason why the undisclosed passages of the opinion should nevertheless be capable of jeopardising legal advice.

(Complimentary close)

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