



Council of the
European Union

Brussels, 24 November 2022
(OR. en)

15241/22

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API 104

NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Public access to documents
- Confirmatory application No 20/c/01/22

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 4 October 2022 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 11 November 2022 (Annex 2);
- the confirmatory application dated 22 November 2022 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Tuesday, 4 October, 2022 10:32]

From: **DELETED**

Sent: mardi 4 octobre 2022 10:32

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Consilium - Electronic Request for Access to documents [ENGLISH]

This e-mail has been sent to access@consilium.europa.eu using the electronic form available in the Register application.

This electronic form has been submitted in ENGLISH.

Ms

Family name

DELETED

First name

DELETED

E-mail

DELETED

Occupation

DELETED

On behalf of

DELETED

Full postal address

DELETED

Telephone

DELETED

Mobile telephone

Fax

Requested document(s)

ST 12904 2022 INIT - OPINION OF THE LEGAL SERVICE27/09/2022

Handling in the Council of the proposal for an implementing act submitted on the basis of the Regulation on a general regime of conditionality for the protection of the Union budget (No 2020/2092) - Remarks on certain procedural aspects



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 11 November 2022

DELETED

Email: **DELETED**

Ref. 22/2024-em/nb

Request made on: 04.10.2022

Deadline extension: 25.10.2022

Dear **DELETED**,

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

I regret to inform you that access to document **12904/22** cannot be given for the reasons set out below.

Document **12904/22** is an opinion of the Council Legal Service (CLS) dated 27 September 2022. It was issued in the context of a Commission proposal of implementing act (COM(2022) 485 final) on the basis of Regulation (EU, Euratom) No **2020/2092** on a general regime of conditionality for the protection of the Union budget (hereafter Conditionality Regulation).

In the requested document the CLS analyses several procedural aspects related to the handling by the Council and its preparatory bodies of the Commission's proposal. After careful consideration of your request under Regulation (EC) No **1049/2001**, the General Secretariat of the Council (GSC) has reached the conclusion that full access cannot be granted to the requested document.

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).

Firstly, it should be recalled that the measures proposed by the Commission which are currently examined by the Council are aimed at the protection of the Union's budget and financial interests. Indeed, the proposal of implementing act concerns the possible suspension of an important share of the Union's budgetary commitments under certain operational programs of the Union's Cohesion Policy to Hungary. Therefore, these measures are susceptible to have serious economic consequences for the Member State in question, as well as for the Union as whole. Since the requested opinion concerns the procedural rules governing the examination of the proposed measures, its full disclosure would create a reasonably foreseeable risk of undermining the public interest as regards the economic policy of the Union and of the Member State in question. Consequently, the GSC considers that the requested document falls within the scope of the mandatory exception provided under Article 4(1)(a) fourth indent of Regulation (EC) No 1019/2001.

Secondly, the decision-making process in the context of which the requested opinion was issued is still ongoing. In that regard, the GSC considers that full disclosure of the requested document would create a non-hypothetical risk of external pressure and interference which would undermine the institution's decision-making process. Therefore, the requested document also falls within the scope of the exception provided under Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

Thirdly, the legal advice contained in the requested document is particularly sensitive, as it addresses contentious procedural aspects which relates to the manner in which the measures adopted on the basis of the Conditionality Regulation are to be implemented. The legal advice is also particularly broad in scope and deals with horizontal issues which go beyond the proposed implementing act in question. As such, the legal advice contained in the requested document would be relevant for future implementing acts that could be proposed by the Commission on the same basis.

Moreover, certain aspects of the legal advice contained in this opinion are relevant in the context of a case which is still pending before the Court of Justice (Case C-408/21 P Council v. Pech). Consequently, the GSC considers that disclosure of the requested document would undermine the protection of legal advice and of court proceedings, and therefore falls within the scope of the exception provided under Article 4(2) second indent of Regulation (EC) No 1049/2001.

Although Article 4(1) of Regulation 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public's interest in disclosure, as far as the refusal is also based on the exemptions laid down in Article 4(2), second indent (protection of legal advice and court proceedings) and Article 4(3), first subparagraph (protection of ongoing decision-making) of Regulation (EC) No 1049/2001, and for the sake of completeness, the GSC 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 that respect, it is worth noting that the the adoption of the proposed implementing act is a non-legislative procedure, and therefore, is not subject to the higher obligation of transparency applicable under Regulation (EC) No 1049/2001 when the Council is acting in its legislative capacity.

In the view of the foregoing, full access to document 12904/22 is refused on the grounds of Article 4(1)(a) fourth indent (protection of the economic policy of the Union and the Member States), 4(3) first subparagraph (protection of an ongoing decision-making process) and 4(2) second indent (protection of legal advice and court proceedings) of Regulation (EC) No 1049/2001.

However, the GSC has decided, in accordance with Article 4(6) of Regulation (EC) No 1049/2001 to grant you partial access to paragraphs 1 and 2 of document 12904/22.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosure

[E-mail message sent to access@consilium.europa.eu on Tuesday, 22 November, 2022 15:56]

From: DELETED

Sent: mardi 22 novembre 2022 15:56

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: TR: Ref. 22/2024-em/nb

Dear Mr Florindo,

Thank you for your response to the request for access to document 12904/22 (the document) and for granting partial access to paragraphs 1 and 2 of the document.

You are hereby notified that I am exercising my right to review the decision to request for access to the document within 15 working days, enshrined in Art 7(2) of Regulation (EC) No 1049/2021 for the reasons set out below.

Firstly, I would like to amend my request by postponing the date of the request for access to the document, setting it at a time after the publication of the Council's implementing decision on the Commission proposal on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary. I argue that this would mitigate the risks emerging from Art 4(3) first subparagraph related to the protection of an ongoing decision-making process, as the process will already be completed at the point in time of access.

Secondly, I would like to clarify that the document requested is to be used under the framework of a study requested by the EP BUDG Committee entitled “The tools for tackling the breaches of the rule of law that constitute a risk to the EU budget” (IP/D/ALL/FWC/2020-001), and therefore on behalf of the European Parliament, with the aim of interpreting how to better protect the Union’s budget and financial interests. Consequently, risks emerging from Art 4(1)(a) the fourth indent in relation to the protection of the economic policy of the Union and the Member States are mitigated since the document would be used for research purposes, and all information included in the project will be controlled by the European Parliament, which has among its objectives the protection of the economic policy of the Union and the Member States. In this vein, it is proposed that a non-disclosure agreement be adopted if necessary.

In light of the above, a review of the refusal of access to the document is requested.

Yours faithfully

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