



Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 17/c/01/23

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 22 March 2023 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 16 May 2023 (Annex 2);
- the confirmatory application dated 17 May 2023 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Monday, 22 March 2023 at 13:58 using the electronic form available in the Register application]

From: **DELETED**

Sent: Mercredi 22 mars 2023 13:58

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

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

Ms

Family name

DELETED

First name

DELETED

E-mail

DELETED

Occupation

Academia

On behalf of

Full postal address

Telephone

Mobile telephone

Fax

Requested document(s)

The public register does not indicate whether legal advice in any form exists relating to three Commission proposals:

- “Proposal for a Regulation on the establishment of the Reform Support Programme” COM(2018) 391 final.
- “Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function (EISF Proposal)” COM(2018) 387 final.

- Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area, COM(2019) 354 final, with the exception of Legal Service note to the Eurogroup in inclusive format on ‘Budgetary instrument for convergence and competitiveness: examination of the legal status, relationship and effects of the enabling clause and the intergovernmental agreement’ dated 15 October 2019, which is already available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13116_2019_REV_1&from=EN .

Under Article 15 TFEU, Article 42 CFR and Regulation 1049/2001 I hereby request access to all other legal advice given in relation to these three proposals and in the possession of the Council.



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, 16 May 2023

DELETED

Email: **DELETED**

Ref. 23/0861-em/ns

Request made on: 22.03.2023

Deadline extension: 17.04.2023

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹ We apologise for the delay in replying to your request.

We have identified the following documents as matching your request:

- **5347/19** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function;
- **6582/19** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme;
- **5483/20** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme;
- **13116/19 + REV1** – Contribution of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area.

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).

You will find attached documents **13116/19**, **13116/19 REV1** and **5483/20**.

Please find attached partially accessible versions of documents **5347/19** and **6582/19**.² However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **5347/19**, dated 15 January 2019, contains an opinion of the Council Legal Service (CLS) on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Stabilisation Function and document **6582/19**, dated 19 February 2019, is a CLS opinion on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme ("RSP Proposal").

In these two opinions, the CLS addresses similar issues concerning the choice of the legal basis for each proposal and the restriction of the geographical scope of Member States entitled to receive final assistance under these proposals.

More specifically, the opinion in document **5347/19** discusses the suitability of the legal basis proposed by the Commission for the adoption of the Regulation on the establishment of a European Investment Stabilisation Function ("EISF"), the restriction of the group of Member States that are entitled to receive EISF support and the use of an international instrument to provide this support.

The opinion in document **6582/19** examines the appropriateness of the proposed legal basis for the adoption of the Proposal – as far as the Reform Delivery Tool and the Convergence Facility are concerned – and the restricted geographical scope of application of the Convergence facility.

After careful consideration, the General Secretariat of the Council (GSC) has reached the conclusion that full access cannot be granted to the requested documents. In this respect, these two legislative proposals are closely linked, so the same exceptions to the disclosure of the requested documents apply here.

These legal opinions analyze issues that remain novel, delicate, and particularly sensitive. Moreover, the legal advice provided in each requested document is also broad in scope, since it is particularly relevant for other current or future files. Consequently, given the sensitivity of the issues discussed which remain acutely relevant in the context of ongoing legislative files, the risk of future litigation is considered as high and reasonably foreseeable. Additionally, 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. Moreover, 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. Therefore, full access to the opinion should also be refused on the ground of Article 4(2), second indent, of Regulation (EC) No **1049/2001** (protection of legal advice).

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

What is more, the issues raised in the opinion are novel and crucial for the discussions in numerous files. In this respect, the discussions are sensitive and complex. The issues analyzed in the opinion are central for the negotiations and their disclosure could have wide-ranging consequences for the ability to achieve a position both for the Council and with the other co-legislator. Under these conditions, disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council and would hence risk compromising the capacity of the Council and the institutions to reach an agreement on the above files. In addition, should the opinion be released, third parties may attempt to influence or exert pressure on the policy choices to be made by the institutions in the specific decision-making procedures in question. Thus, disclosure of the requested document would seriously undermine the decision-making process pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

As regards the existence of an overriding public interest in disclosure 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 interest so as to justify disclosure of the document.

In the light of the foregoing, the General Secretariat of the Council considers that full access to document 5347/19 and document 6582/19 should be refused on the basis of Article 4(2) (protection of legal advice) and Article 4(3) (protection of decision-making process) of Regulation (EC) No 1049/2001.

However, in line with Article 4(6) of the Regulation (EC) No 1049/2001, you may have access to paragraphs 7 to 20 of document 5347/19, in addition to paragraphs 1 to 6, which have been made public previously.

Regarding document 6582/19, the GSC was unable to identify any parts which are not covered by the abovementioned exceptions, in addition to paragraphs 1 to 17 previously made public.

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

Enclosures: 5

[E-mail message sent to access@consilium.europa.eu on Wednesday, 17 May 2023 2:02]

From: **DELETED**

Sent: Mercredi 17 Mai 2023 2:02

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

DELETED

Subject: Ref. 23/0861-em/ns

Dear General Secretariat,

I hereby attach my confirmatory application relating to decision received today.

Best wishes,

DELETED

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

Subject: Ref. 23/0861-em/ns

Request made on: 22.03.2023 Deadline extension: 17.04.2023

To the Council of the European Union,

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, I hereby request the Council to review the decision of 16 May 2023 by the Council Secretariat on the following grounds as regards documents 5347/19 and 6582/19.

The Council informs me that following my request of 22 March 2023 it has identified the following documents:

- **5347/19** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function;
- **6582/19** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme;
- **5483/20** – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme;
- **13116/19** + **REV1** – Contribution of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area.

The Council provides access to documents 13116/19, 13116/19 REV1 and 5483/20.

The first two documents are made partially accessible, however, in a manner where the whole legal analysis is blanked out. The Council argues that in these two opinions, the CLS addresses similar issues concerning the choice of the legal basis for each proposal and the restriction of the geographical scope of Member States entitled to receive final assistance under these proposals. More specifically, the opinion in document 5347/19 discusses the suitability of the legal basis proposed by the Commission for the adoption of the Regulation on the establishment of a European Investment Stabilisation Function (“EISF), the restriction of the group of Member States that are entitled to receive EISF support and the use of an international instrument to provide this support. The latter opinion also examines the appropriateness of the proposed legal basis for the adoption of the Proposal – as far as the Reform Delivery Tool and the Convergence Facility are concerned – and the restricted geographical scope of application of the Convergence Facility. The General Secretariat concludes that “full access cannot be granted to the requested documents. In this respect, these two legislative proposals are closely linked, so the same exceptions to the disclosure of the requested documents apply here.”

The General Secretariat of the Council considers that full access to document 5347/19 and document 6582/19 should be refused on the basis of Article 4(2) (protection of legal advice) and Article 4(3) (protection of decision-making process) of Regulation (EC) No 1049/2001.

Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of legal advice).

The Council Secretariat argues that

These legal opinions analyze issues that remain novel, delicate, and particularly sensitive. Moreover, the legal advice provided in each requested document is also broad in scope, since it is particularly relevant for other current or future files. Consequently, given the sensitivity of the issues discussed which remain acutely relevant in the context of ongoing legislative files, the risk of future litigation is considered as high and reasonably foreseeable. Additionally, 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.

Moreover, 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. Therefore, full access to the opinion should also be refused on the ground of Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of legal advice).

First of all, it seems necessary to remind the Council that all of the requested documents relate to a legislative file. These deliberations merit specifically high openness under Article 15 TFEU, which is further elaborated in secondary legislation and the Court's case law. As the Court recently reminded the Council in case *de Capitani*, 'primary EU law establishes a close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency', and the 'principles of publicity and transparency are therefore inherent in the legislative procedures of the European Union'.¹

According to Regulation 1049/2001, all institutional documents are subject to the principle of 'widest possible access', however, legislative documents are supposed to be afforded even wider and, where possible, direct access.² Pursuant to Regulation 1049/2001 and the consistent jurisprudence of the CJEU, institutional transparency with respect to legislative documents is of paramount importance in the democratic present of the European Union. As the Council certainly knows, in the case of *Turco* concerning legal advice given in the legislative context, the ECJ expressed that, '[o]penness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.'³ And, more recently, in *ClientEarth*, the ECJ built upon this idea by providing that, 'the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices.'⁴ Because of the importance of the openness of

¹ Case T-163/21, *Emilio De Capitani v the Council*, para 36, 38.

² Regulation 1049/2001, recital 6 and Article 12(2).

³ Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 46.

⁴ Case C-57/16 P *ClientEarth v Commission* EU:C:2018:660, para 84.

legislative documents within the democratic European Union, any application of exceptions to documents of that nature must be interpreted ‘all the more strictly’.⁵

As regards the exception relating to Article 4(2), second indent, the General Secretariat’s line of argumentation is familiar from a number of Court cases, which the Council has lost. The ECJ has held that with respect to application of Article 4(2), a three-stage test must be applied by the institutions. According to this test, the institutions must: first, be satisfied that the document, or parts of that document, actually relate legal advice⁶; secondly, assess whether disclosure of the document or the parts of the document covered by the exception would actually undermine, in a ‘reasonably foreseeable and not purely hypothetical’ manner, the institutions ‘interest in seeking legal advice and receiving frank, objective and comprehensive advice’⁷; and, finally, ‘ascertain whether there is any overriding public interest justifying disclosure’ regardless of whether they have determined that the interest protected by the exception would be undermined.⁸

Presuming that the first stage of this test has been carried out correctly the Council in this case, the second stage has clearly been misapplied. The Court has specifically established that:

*conferring particularly sensitive character on all legal advice concerning a novel question would result in impeding in practice the disclosure of a large proportion of that advice. It is precisely when they are dealing with novel questions that the institutions request advice from their legal service.*⁹

Moreover,

as regards the risk invoked by the Council that disclosure of the requested document would impede its negotiating capacities and the chances of reaching an agreement with the Parliament, [...] a proposal is designed to be debated, in particular as regards the choice of legal basis. Moreover, as the applicant states, in the light of the importance of the choice of legal basis of a legislative act, the transparency of the choice does not weaken the decision-making process, but strengthens it. In that regard, as the Court of Justice has held, 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

⁵ Ibid, para 101.

⁶ *Turco*, paras 38-39.

⁷ Ibid., paras 40-43.

⁸ Ibid., para 44.

⁹ Case T-395/13, *Miettinen v. Council*, para. 43.

allowing divergences between various points of view to be openly debated. It is 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 (judgments in Sweden and Turco v Council, cited in paragraph 20 above, EU:C:2008:374, paragraph 59, and Sweden v MyTravel and Commission, cited in paragraph 31 above, EU:C:2011:496, paragraph 113).¹⁰

In conclusion, the argumentation invoked by the Council Secretariat is a standard reasoning invoked by the Council in relation to various requests for legal opinions, and one that has been repeatedly rejected by the Union Courts.¹¹ It is clear that the legal advice exception has been misapplied and full access to the Document should be granted.

Article 4(3) (protection of decision-making process) of Regulation (EC) No 1049/2001.

The Council Secretariat further argues that

What is more, the issues raised in the opinion are novel and crucial for the discussions in numerous files. In this respect, the discussions are sensitive and complex. The issues analyzed in the opinion are central for the negotiations and their disclosure could have wide-ranging consequences for the ability to achieve a position both for the Council and with the other co-legislator. Under these conditions, disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council and would hence risk compromising the capacity of the Council and the institutions to reach an agreement on the above files. In addition, should the opinion be released, third parties may attempt to influence or exert pressure on the policy choices to be made by the institutions in the specific decision-making procedures in question. Thus, disclosure of the requested document would seriously undermine the decision-making process pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

¹⁰ Case T-395/13, *Miettinen v. Council*, EU:T:2015:648, paras 70-71

¹¹ For a summary, see Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge University Press 2021), Ch 4.

According to the actual wording of Article 4(3), it is not enough that the interest would be merely ‘undermined’ but rather that the interest would be ‘seriously undermined’ by release of the document. More specifically, the institution must show that there is a ‘specific, actual and reasonably foreseeable risk that access to the documents at issue would seriously undermine’ the relevant decision-making processes. In its response, the Council Secretariat has simply provided a number of general and unsubstantiated arguments. Arguments precisely of this nature were firmly rejected by the ECJ in *ClientEarth* as being insufficient. Dismissal by the Court of similar arguments by the Council can also be found in, for example, *Miettinen*.¹² In *de Capitani*, the Court stressed that

*it should be recalled that, in a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public. If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.*¹³

The Court also stressed that it is incumbent on the Council to demonstrate that there is, ‘as regards the legislative procedure in question [...] a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation’.¹⁴

According to Eur-lex, the last time the Council has deliberated on the Commission proposal for a Regulation on the establishment of a European Investment Stabilisation Function (COM (2018) 387)) is on 15 October 2019, for more than three and a half years ago,¹⁵ when the discussion was integrated to that on the Budgetary instrument for convergence and competitiveness.¹⁶ As regards the Proposal for a Regulation on the establishment of the Reform Support Programme (COM (2018) 391), I am sure that the Council is aware of the fact that the proposal has been withdrawn by the Commission for three years ago (COM (2020)408 final). Therefore, in relation to these two files there is no ongoing decision making process that could even in theory be harmed by disclosure.

¹² Case T-395/13 *Miettinen v Council* EU:T:2015:648.

¹³ Case T-163/21, *Emilio De Capitani v the Council*, para 84.

¹⁴ Para 85.

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52018PC0387> .

¹⁶ See 13116/1/19.

The Council has not explained how access to the two legal opinions at issue would specifically, effectively and in a non-hypothetical manner seriously undermine decision-making, as repeatedly required by the Court in its case law quoted above.

For these reasons, Article 4(3) has been misapplied and full access to the Document should be granted.

Overriding public interest

Finally, the Secretariat argues,

As regards the existence of an overriding public interest in disclosure 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 interest so as to justify disclosure of the document.

In practice, the Secretariat makes no attempt to consider what such a public interest justifying disclosure might be.

In legal literature it has been broadly recognised that the recent legislative initiatives and instruments involve a fundamental reinterpretation of the EU's competence in the area of cohesion policy, in particular as regards Article 175(3) TFEU.¹⁷ As the Council Secretariat's decision indicates, the legal contours of this provision and its reinterpretation seem to be at the centre of the two opinions to which I have requested access.

¹⁷ On this, see e.g. Päivi Leino-Sandberg & Matthias Ruffert 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433, Vincent Delhomme & Tamara Herve, 'The European Union's response to the Covid-19 crisis and (the legitimacy of) the Union's legal order, Yearbook of European Law, 2023, 00, 1–35.

In practice, the new interpretation of the said legal basis have led to 1 203.2 billion euro being spent in the area of ‘Cohesion, Resilience and Values’ during the current MFF, out of which 776.5 billion through the Next Generation EU.¹⁸ This development has vast consequences for the use of EU funds. Given the amount of spending under the novel and untested reinterpretation of the scope of Article 175(3) TFEU there should be even greater scrutiny of the purported public interest justification for withholding the documents. Vague or conclusory allusions to the public interest in confidentiality are not enough. An argument about lacking public interest in how the legal construction has been created is therefore clearly void. The public interest in how the Council legal service has interpreted the provision is decisive for a core aspect of the future of EU integration and fundamental for safeguarding the democratic nature of EU policy making.

Requested action

For the above reasons, I request that the Council discloses the two remaining documents in full at its earliest possible convenience.

New York, 16 May 2023

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¹⁸ https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_fi.