



Council of the
European Union

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Eingelangt am 16/01/24

Brussels, 16 January 2024
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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 02/c/01/24

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 17 November 2023 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 9 January 2024 (Annex 2);
- the confirmatory application dated 11 January 2024 and registered on the same day (Annex 3).

From: document-request@consilium.europa.eu <document-request@consilium.europa.eu>
Sent: Friday, November 17, 2023 3:32 PM
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.

Form of address

DELETED

Family name

DELETED

First name

DELETED

E-mail

DELETED

Occupation

Media

I submit this request on my own behalf.

Name of the organisation

Full postal address

DELETED

Telephone

Requested document(s)

All documents that contain information about the deliberations in the preparatory bodies of the Council regarding the "Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary" - doc. 12551/22 + ADD1 (COM(2022) 485 final + ANNEX)

In particular, all documents that contain information about the deliberations on the above-mentioned file during the meetings of the Budget Committee on 22 September, 28 September, 25 October, 9 November, 2 December, 8 December and 12 December 2022, and during the meetings of COREPER II on 5 October, 12 October, 26 October, 30 November-1 December and 12 December 2022.

By documents, I mean documents that contain information about the content of deliberations, and documents examined during the above-mentioned meetings, including the unredacted version of the Legal Service opinion on the handling in the Council of the proposal (document number: 12904/22).

1st option

EN

2nd option

HU

This is an automatic reply from the General Secretariat of the Council of the European Union concerning your request for access to Council documents.

This notification was sent from an unattended mailbox. Please do not reply.



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, 9 January 2024

DELETED

E-mail: **DELETED**

Ref. 23/3354-mj-mw/mf

Request made on: 17.11.2023

Deadline extension: 08.12.2023

Dear **DELETED**

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

You request access to documents that contain information about the deliberations in the preparatory bodies of the Council regarding the Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

The General Secretariat of the Council ('GSC') has identified the documents below as related to your request.

Please note that the following documents are public and available for downloading in the [Public register](#) of Council documents.

ST 12551/22, ST 12551/22 ADD1, ST 13101/22, ST 13207/22, ST 13368/1/22 REV1, ST 13861/22, ST 13973/22, ST 14029/22, ST 14521/22, ST 14888/22, ST 15192/22, ST 15364/2/22

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).

REV2, ST 15850/22, ST 15850/22 ADD1, ST 15850/22 ADD2, ST 15890/22, ST 15893/22, ST 16320/22, ST 16350/22

CM 4477/22, CM 4560/22, CM 5010/22, CM 5248/22, CM 5666/22, CM 5699/22, CM 5822/22

You will find attached the following documents:

WK 13279/2022, WK 14187/2022, WK 17064/2022, ST 12694/22.

Please also find attached partially accessible versions of the following documents ².

WK 12444/2022, WK 12831/2022 ADD2, WK 15217/2022, WK 16927/2022, WK 17294/2022.

However, I regret to inform you that full access cannot be given since these documents contain personal data which is necessary for the organisation of the work of the Council. The data protection rules at EU level ³ provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data. After carefully considering all the principles related to this request, on balance the GSC has concluded that disclosure of the personal data contained in these documents would undermine the protection of privacy and the integrity of the identified individuals ⁴.

Please find attached a partially accessible version of document 12904/22.⁵ However, I regret to inform you that full access 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 for a Council Implementing Decision (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 the 'Conditionality Regulation') ⁶.

In the requested document the CLS analyses several procedural aspects related to the handling by the Council and its preparatory bodies of the above proposal by the Commission.

The decision-making procedure to which this opinion pertains was finalized with the adoption of Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (hereafter the 'Council Implementing Decision') ⁷.

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

³ Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295 21.11.2018, p. 39).

⁴ Article 4(1)(b) of Regulation (EC) No 1049/2001

⁵ Article 4(6) of Regulation (EC) No 1049/2001.

⁶ OJ L 433I, 22.12.2020, p. 1.

⁷ OJ L 325, 20.12.2022, p. 94

After careful consideration of your request under Regulation (EC) No 1049/2001, the GSC has reached the conclusion that full access cannot be granted to the requested document.

The legal advice contained in the requested document is particularly sensitive, as it addresses contentious procedural aspects which relate to the manner in which the measures adopted on the basis of the Conditionality Regulation are to be implemented. It is worth noting in this regard that there are Court proceedings currently ongoing, brought by six Hungarian Universities against the Council (and the Commission as well in four of the cases) (Cases T-115/23, T-132/23, T-133/23, T-138/23, T-139/23 and T-140/23), for the annulment, pursuant to Article 263 TFEU, among others, of Article 2(2) of the Council Implementing Decision. Given that the high risk of litigation has hence materialised, the way in which the Council examined, deliberated and took a decision on the Commission's proposal, is likely to come under the scrutiny of the Union's jurisdiction. In that sense, full disclosure of the legal advice, which specifically addresses those issues, is likely to undermine the ability of the Council to effectively defend itself in the ongoing proceedings.

The legal advice is also particularly broad in scope and deals with horizontal issues which go beyond the Council Implementing Decision 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, or even in a wide range of other files.

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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice and court proceedings under Regulation (EC) No 1049/2001, 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 requested document was not issued in the context of a legislative procedure and, therefore, is not subject to the higher standard of transparency applicable under Regulation (EC) No 1049/2001 when the Council is acting in its legislative capacity.

In view of the foregoing, full access to document 12904/22 is refused on the grounds of Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of legal advice and court proceedings).

Since paragraphs 1 and 2 of the requested document have already been disclosed in the past, you will also be granted access to them.

I regret to inform you that access to documents WK 12831/2022, WK 12831/2022 ADD1 and WK 15657/2022 cannot be given for the reasons set out below.

Document WK 12831/2022 of 28 September 2022 is a meeting document from the GSC to the Budget Committee. It contains a presentation made by the Commission for presenting its replies to Member States questions on the Rule of Law/Conditionality Regulation at the Budget Committee meeting on 28 September 2022.

Document WK 12831/2022 ADD1 of 5 October 2022 is a meeting document from the GSC to the

Budget Committee. It contains the Commission's replies to Member States questions on the Rule of Law/Conditionality Regulation as requested in the Budget Committee meeting on 28 September 2022.

Document WK 15657/2022 of 17 November 2022 is a note from GSC to the Budget Committee. It contains the Commission's replies to MS questions on the Rule of Law/Conditionality Regulation following the Budget Committee meeting on 25 October 2022.

The Commission, consulted as author of these documents, is opposed to their release.

The GSC is of the opinion that these documents, owing to the sensitive nature of their content, cannot be released to the public.

The Council Implementing Decision ('CID') of 15 December 2022 has been challenged in Court and six separate cases have been opened in front of the Court of Justice of the EU. Hence, these documents cannot be disclosed as they detail aspects related to the assessment for and adoption of the CID, currently challenged in front of the Court relevant to the procedure for the lifting of measures under the Conditionality Regulation.

Release of the documents is likely to undermine the ability of the Council to effectively defend itself in the ongoing proceedings.

Therefore, the GSC considers that these documents cannot be disclosed on the grounds of Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of legal advice and court proceedings).

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice and court proceedings under Regulation (EC) No 1049/2001, 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 documents.

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

From: **DELETED**

Sent: Thursday, January 11, 2024 3:34 PM

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

Subject: Re: Ref. 23/3354-mj-mw/mf

Confirmatory Application - 23/3354-mj-mw/mf

Dear Council of the European Union, Dear Sir/Madam,

Thank you for your letter of 9 January 2024 that constitutes an initial reply to my request for access to documents submitted under the reference number 23/3354-mj-mw/mf. Thank you for providing a list of already published documents and for disclosing some further documents either fully or partially.

However, by submitting this confirmatory application in accordance with Article 7(2) of Regulation 1049/2001, I would like to ask the Council to reconsider its position regarding the partial disclosure of document 12904/22 and the non-disclosure of documents WK 12831/2022, WK 12831/2022 ADD1 and WK 15657/2022.

Document 12904/22

The Council claims that the full disclosure of document 12904/22 would undermine the protection of legal advice and of court proceedings, therefore the document falls within the scope of the exception provided for in Article 4(2), second indent of Regulation 1049/2001.

I observe, first, that the Council's letter contains no arguments as to how full disclosure of the document, an opinion of the Council Legal Service, would specifically and actually undermine, in a reasonably foreseeable and not purely hypothetical manner, its interest in seeking and receiving frank, objective and comprehensive legal advice (see cases C-39/05 and C-52/05, *Turco and Sweden v Council*).

The Council claims that the scope of the legal advice goes beyond its implementing decision in question, and could be relevant for future implementing acts under the Conditionality Regulation (2020/2092). But this argument should weigh in favour of the disclosure of the requested document. There is a clear public interest in the transparency of the Council's procedural considerations, as this would enable the public to know what to expect as regards the handling of possible future cases under the Conditionality Regulation.

As to the protection of court proceedings, it must be stated at the outset that document 12904/22 was not drawn up solely for the purpose of court proceedings. As the General Court stated in paragraph 51 of its judgement in the case *Leino-Sandberg v Parliament* (T-421/17), other types of documents can only fall under the exception concerning the protection of court proceedings if it is established that their disclosure would oblige the institution to defend itself against assessments by its own staff which have, ultimately, been disregarded.

In its letter, the Council argues that the legal opinion addresses 'contentious procedural aspects', but does not substantiate that its full disclosure would oblige it to defend itself against ultimately disregarded opinions of its own staff. Therefore, it is not established that the full disclosure of the requested document would actually and specifically undermine the protection of court proceedings in a reasonably foreseeable and not purely hypothetical manner.

In any case, I contend that the scope of the redactions in the disclosed document is too broad. In the ongoing court cases, the affected Hungarian universities seek to annul Article 2(2) of the Council's implementing decision. This means that the opinion of the legal service can only have a relevant link with the ongoing court proceedings insofar as it concerns Article 2(2) of the implementing decision or the factual elements on which that particular measure is based, that is, findings concerning public interest trusts and entities maintained by them.

Documents WK 12831/2022, WK 12831/2022 ADD1 and WK 15657/2022

The Council claims that disclosure of three documents that contain the Commission's presentation and its replies to Member States' questions regarding the adoption of the implementing decision under the Conditionality Regulation would also undermine the protection of court proceedings.

This assessment, however, is manifestly wrong since the requested documents cannot fall under the exception laid down in Article 4(2) second indent of Regulation 1049/2001.

These documents were not drawn up solely for the purpose of court proceedings. According to the judgement in the Leino-Sandberg v Parliament case, cited above, other types of documents can only undermine the protection of court proceedings if their disclosure would reveal 'internal positions', and would oblige the institution to defend itself against those positions.

It is evident that the requested documents do not concern 'positions taken internally', since their author, the European Commission, communicated them to the Council (an entity separate from the Commission) or even gave a presentation based on them in the preparatory bodies of the Council.

The documents do not contain internal positions taken by the staff of the Commission or the Council, but rather express the official position of the Commission at the time, shared with the Council upon official request.

Moreover, even if we assume, counterfactually, that the requested documents could fall under the exception laid down in Article 4(2) second indent of Regulation 1049/2001, the arguments I presented regarding document 12904/22 hold equally true for these documents as well.

That is, the Council did not establish that their disclosure would actually and specifically undermine the protection of court proceedings in a reasonably foreseeable and not purely hypothetical manner, and, in any case, access should be given regarding the parts of the documents that have no relevant link with Article 2(2) of the implementing decision or the findings concerning public interest trusts and the entities maintained by them.

11.01.2024.

Yours sincerely,

DELETED