



Council of the
European Union

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Brussels, 29 February 2024
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API 33

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 07/c/01/24

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 8 February 2024 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 28 February 2024 (Annex 2);
- the confirmatory application dated 28 February 2024 and registered on the same day (Annex 3).

From: **DELETED**

Sent: Thursday, February 8, 2024 10:07 AM

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

Subject: Re: Ref. 23/3795-ws/vk

Dear Council Secretariat,

Many thanks for this letter. Based on it, I am not sure what the status of this request is.

I addressed the request to the Council, and there were reasons for that.

I am not particularly interested in the opinions themselves, but rather in the existence of any EFC internal rules or guidelines that govern the preparation of its opinions under the RRF, including possible amendments. If you do not have any such documents in your possession, I would be glad if you could confirm this.

With best wishes,

DELETED

Faculty of Law

University of Helsinki

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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, 28 February 2024

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E-mail: **DELETED**

Ref. 24/0542-ws/el

Request made on: 14.02.2024

Dear **DELETED**,

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

You have requested “any EFC internal rules or guidelines that govern the preparation of its opinions under the RRF, including possible amendments”.

As the secretariat of the **Economic and Financial Committee** (EFC) is under the responsibility of the European Commission, the Council has not issued any such documents itself.

Nevertheless, the General Secretariat of the Council (GSC) has found in its possession copies of the following Commission documents covered by your request:

- a note of 19 August 2021, referenced “ecfin.cef.cpe(2021)5390851” and with the title “Implementation of the Recovery and Resilience Facility: Payment requests and the preparation of the EFC opinions – Secretariat issues note”

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).

- a note of 8 May 2023, referenced “ecfin.cef.cpe(2023)4269533” and with the title “Implementation of the Recovery and Resilience Facility – Streamlining the adoption of EFC Opinions on Commission’s preliminary assessments – Secretariat Note”
- a note of 22 December 2023, referenced “ecfin.cef.cpe(2023)12917998” and with the title “Preparation of the EFC opinions under the Recovery and Resilience Facility: Lessons learnt – January 2024”

The GSC has duly consulted the Commission concerning the possible release of these documents.²

Taking into account the explanations provided by the Commission, the GSC has come to the conclusion that the documents must be withheld.

Indeed, the documents contain sensitive information about the conduct of the work in the EFC (and also the Economic Policy Committee (EPC)) – including on ongoing files – release of which would severely affect the decision-making processes in the EFC and the EPC and also in the Commission and the Council to the extent that they are associated to the work of the EFC and the EPC, in especially delicate areas of interest to the financial and economic policy of the European Union and its Member States.³

The GSC therefore has to refuse access to these documents.⁴

We have also looked into the possibility of releasing parts of the documents.⁵ However, as the information contained in each of the documents forms an inseparable whole, the General Secretariat is also unable to give partial access to them.

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

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

³ It should be noted, in this regard, that Article 12 of the EFC Statutes and Article 15 of the EPC Statutes declare the proceedings of these bodies to be confidential.

⁴ Article 4(1)(a), fourth indent, and – in the absence of any indication of an overriding public interest in release – also Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

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

From: **DELETED**

Sent: Wednesday, February 28, 2024 2:33 PM

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

Subject: Re: Ref. 24/0542-ws/el

Dear Council Secretariat,

Many thanks for your response. I hereby file my confirmatory application pursuant to Article 7(2) of Regulation (EC) No 1049/2001 and request full access to all three documents identified in your response.

As a preliminary point of consideration, the EU Treaties do not establish that “the secretariat of the Economic and Financial Committee (EFC) is under the responsibility of the European Commission”. On the contrary, if to anyone, Article 134 TFEU allocates the responsibility for laying down detailed provisions concerning the Economic and Financial Committee to the Council. The bureaucratic choice of placing the responsibility for the EFC on the Commission cannot have an impact on the applicable rules on transparency and access to documents.

As regards the Council’s response, the only justification for the refusal to disclose the three documents identified is that according to your letter, “the documents contain sensitive information about the conduct of the work in the EFC (and also the Economic Policy Committee (EPC)) – including on ongoing files – release of which would severely affect the decision-making processes in the EFC and the EPC and also in the Commission and the Council to the extent that they are associated to the work of the EFC and the EPC, in especially delicate areas of interest to the financial and economic policy of the European Union and its Member States.” The footnotes make further reference to Article 12 of the EFC Statutes and Article 15 of the EPC Statutes, which, according to the Secretariat, “declare the proceedings of these bodies to be confidential” and Article 4(1)(a), fourth indent, and Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

This brief justification fails to meet the requirements of Article 15 TFEU, Regulation 1049/2001 and relevant jurisprudence on all accounts.

First of all, as regards the claimed confidentiality of the EFC and EPC work, I refer to Article 15(3) TFEU, under which “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.” Under 42 of the CFR, “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the

institutions, bodies, offices and agencies of the Union, whatever their medium.” As the Council must know, Regulation 1049/2001 applies to all documents held by the institutions. Under Article 18 of Regulation 1049/2001, “Each institution shall adapt its rules of procedure to the provisions of this Regulation.” Therefore, it is clear that the Institutions cannot approve their own internal rules that are not compatible with the Treaties and secondary legislation approved by the EU legislature, thereby effectively restricting the fundamental rights of EU citizens. A Council decision approved under Article 242 TFEU, giving the Council the power to “determine the rules governing the committees provided for in the Treaties” cannot divert from Treaty provisions by declaring some matters and all documents relating to them categorically confidential so that no substantive examination needs to be made, unlike the Council seems to suggest.

I would also like to point out that this is not the way the Council has previously applied the provisions, as there are various EFC related documents that can already be accessed through the Council online register of documents.

As regards the Council’s argumentation more specifically, I refer to the Court’s ruling in *Turco v the Council*, under which “When the Council is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001. In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly”.

Following this, the Court lays down a three-stage procedure, where it specifies that the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to the protected interest and, if so, it must decide which parts of it are actually concerned and may be covered by that exception. Second, the Council must examine whether disclosure of the relevant parts of the document ‘would undermine the protection’ of the relevant interest protected by the exception. “The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical”.

Finally, in respect of the interests protected under Article 4(2) and 4(3), it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure, keeping in light the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. The reasons for any decision of the Council in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated: “ If the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned” (para 49 of the ruling).

The decision of the Council fails to meet these criteria in all respects. It fails to engage in a substantive examination; it fails to examine whether the disclosure of information would indeed risk the interest protected by the invoked exception, and as regards Article 4(3), fails to examine the existence of a public interest. As regards the substance of the documents, based on their titles, they seem to contain primarily procedural information about the way in which the EFC examines certain issues relating to the implementation of the RRF. It is difficult to see how procedural matters could be confidential. With regard to the existence of a public interest, I stress that the involvement of the EFC was introduced in the Special meeting of the **European Council** (17, 18, 19, 20 and 21 July 2020) as a guarantee for monitoring the use of the EU's €800 billion temporary recovery instrument. How exactly the EFC does this job of supervising and allocating billions of EU taxpayers' money is a matter of a vast public interest.

Based on the information available on the Commission RRF website, it seems that the time allocated in the EFC to an examination of payment requests varies a great deal. The Commission's assessment of the first Spanish payment request was dated on 3 December 2021, and its subsequent implementing decision on 22 December 2021; the Commission assessment on Italy's fourth payment request is dated on 28 November 2023, and its implementing decision is dated on 21 December 2023. These two examples leave roughly three weeks for the assessment of the EFC. However, the preliminary examination of Portugal's third and fourth payment request is dated on 13 December 2023, and the relevant Commission implementing decision (authorising several billion of non-repayable support to Portugal) only nine days later, on 22 December 2023. The question of how specific and careful the analysis of the EFC actually is, and what procedure and possible criteria are being applied, is a matter of a great public interest for EU taxpayers, also keeping in mind that this task derives from a clear assignment given by the leaders in the **European Council** aimed to ensure the proper use of RRF funds. The point that a matter is of a great importance is not a reason to claim it confidential. On the contrary, this is a pressing reason to conduct the matter "as openly as possible" (Article 1 TEU).

On these grounds, I hereby request the Council to reconsider its position, including possible partial access.

Helsinki, 28 February 2024,

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