



Council of the  
European Union

Brussels, 14 April 2020  
(OR. en)

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**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 11/c/01/20

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 04 March 2020 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 24 March 2020 (Annex 2);
- confirmatory application dated 8 April 2020 and registered on the same day (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 04 March 2020 - 12:26 using the electronic form available in the Register application]

Title/Gender: Ms

Family Name: Leino-Sandberg

First Name: Päivi

E-Mail: **DELETED**

Occupation:

On behalf of:

Address:

Telephone:

Mobile:

Fax:

Requested document(s): ST 11422 2018 INIT. dated 25-07-2018

The Horizon Europe package of proposals - Legal bases

I request full access to the said document, instead of the three first pages that are currently made publicly available.



**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, 24 March 2020

Ms Päivi Leino-Sandberg  
Email: **DELETED**

Ref. 20/0531-em/vk

Request made on: 04.03.2020

Dear Ms Leino-Sandberg,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

Please find attached a partially accessible version of document **11422/18**.<sup>2</sup> However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **11422/18** comprises an opinion of the Council Legal Service addressed to the Research Working Party and to the Friends of the Presidency Group on the European Defence Fund and concerns the legal bases of the Horizon Europe package of proposals.

The decision-making process on the proposals subject to the legal opinion is still currently ongoing. Moreover the discussions are sensitive and complex and the issue analysed in the opinion forms an important part of the basis for the discussions. Disclosure of the legal advice would adversely

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<sup>1</sup> 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).

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

affect the negotiations by impeding internal discussions of the Council on the proposal and would hence risk compromising the capacity of the institutions to reach an agreement on the dossier and thus seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse access to the document at this stage.<sup>3</sup>

Moreover, the legal advice covered by this opinion deals with legal issues which are sensitive. Full disclosure of the document 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 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. For these reasons, disclosure of the document would undermine the protection of legal advice. Therefore, the General Secretariat has to refuse full access to this document.<sup>4</sup>

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 documents.

However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have access to paragraphs 1 to 4 of this opinion.

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.<sup>5</sup>

Yours sincerely,

Fernando FLORINDO

Enclosure

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<sup>3</sup> Article 4(3) of Regulation (EC) No 1049/2001.

<sup>4</sup> Article 4(2), second indent, of Regulation (EC) No 1049/2001.

<sup>5</sup> Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[letter attached to e-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 8 April 2020 - 15:02]

Helsinki 8 April 2020

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

*Subject:* Request for an opinion of the Council Legal Service addressed to the Research Working Party and to the Friends of the Presidency Group on the European Defence Fund and concerns the legal bases of the Horizon Europe package of proposals (document 11422/18) made on 4 March 2020; Ref. 20/0531-em/vk

## **1. Subject of dispute**

On 4 March 2020, I requested access to an opinion of the Council Legal Service (document 11422/18). In its letter of 24 March 2020, the General Secretariat provided partial access (four first paragraphs of the 28 page long opinion) to the requested document. The General Secretariat justified its refusal to grant full access relying on the following reasons.

First, the General Secretariat referred to the ongoing decision-making process, which is protected under Article 4(3) of Regulation (EC) No 1049/2001. According to the General Secretariat, ‘the discussions are sensitive and complex and the issue analysed in the opinion forms an important part of the basis for the discussions. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence risk compromising the capacity of the institutions to reach an agreement on the dossier and thus seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse access to the document at this stage.’

Second, the General Secretariat refers to Article 4(2), second indent, of Regulation (EC) No 1049/2001. It argues that ‘the legal advice covered by this opinion deals with legal issues which are sensitive. Full disclosure of the document 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 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. For these reasons, disclosure of the document would undermine the protection of legal advice. Therefore, the General Secretariat has to refuse full access to this document’.

Finally, ‘[a]s 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 documents’.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, I hereby ask the Council to review this decision for the following reasons. I also give my explicit consent to disclose my name in relation to documents relating to this confirmatory application.

## 2. Application of Article 4(3) of Regulation (EC) No 1049/2001

Under Article 4(3)

*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the **decision has not been taken by the institution**, shall be refused if disclosure of the document would **seriously undermine the institution's decision-making process**, unless there is an overriding public interest in disclosure.*

*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations **within the institution** concerned shall be refused even after the decision has been taken if disclosure of the document would **seriously undermine the institution's decision-making process**, unless there is an overriding public interest in disclosure (emphasis added).*

First, Article 4(3) clearly refers to decision-making within the institution. Therefore, the references to a risk of the institutions reaching agreement among themselves are at best indirectly relevant for the application of the said exception.

Second, as regards the argument that ‘the discussions are sensitive and complex and the issue analysed in the opinion forms an important part of the basis for the discussions’, this matter is already publicly known, as are the positions of the institutions on the legal basis. Based on the European Parliament’s legislative observatory,<sup>1</sup> the negotiations on the dossier have reached a stage where the Parliament has adopted its resolution in first reading and the Council has adopted a partial general approach. While the Parliament’s resolution<sup>2</sup> builds on the legal bases used by the Commission in its Proposal,<sup>3</sup> that is Articles 173(3) and 182(4) TFEU, the Presidency document establishes that

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<sup>1</sup> [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0225\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0225(COD)&l=en)

<sup>2</sup> European Parliament legislative resolution of 17 April 2019 on the proposal for a decision of the European Parliament and of the Council on establishing the specific programme implementing Horizon Europe - the Framework Programme for Research and Innovation (COM(2018)0436 – C8-0253/2018 – 2018/0225(COD)).

<sup>3</sup> Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing the specific programme implementing Horizon Europe – the Framework Programme for Research and Innovation (COM(2018) 436 final).

*The Presidency text proposes to base the Specific Programme on article 182(4) TFEU alone, in line with the Opinion of the Council Legal Service<sup>3</sup> and the orientation of the Council. This change was supported by all delegations and was complemented by a transfer of all text relating to the European Institute of Innovation and Technology to the Framework Programme Regulation. Consequently, the Decision should be adopted by the Council after consultation of the European Parliament.<sup>4</sup>*

Therefore, the fact that the institutions disagree on the choice of legal basis is publicly known.

In this regard, the General Secretariat argues that the ‘disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal’. What makes this argument essentially redundant is that the Council has already in September 2018 held an open session where the legal basis and the requested document were specifically discussed.<sup>5</sup> Based on the discussion, all Member States supported the position expressed in the requested document. Therefore, it is difficult to see how its disclosure would hamper the Council’s internal discussions. The analysis contained in it enjoys the support of delegations in the Council, and has formed the basis of the Council position in interinstitutional negotiations.

Furthermore, the document relates to a legislative file. 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.<sup>6</sup> 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*, the European Court of Justice (‘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.’<sup>7</sup> 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.’<sup>8</sup> Because of the importance of the openness of legislative documents within the democratic European Union, any application of exceptions to documents of that nature must be interpreted ‘all the more strictly’.<sup>9</sup>

According to the actual wording of Article 4(3), it is not enough that 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

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<sup>4</sup> Presidency document 14264/18, para 4, available at <http://data.consilium.europa.eu/doc/document/ST-14264-2018-INIT/en/pdf>.

<sup>5</sup> Competitiveness Council, Public session, Friday, 28 September 2018. The recording is available at <https://video.consilium.europa.eu/en/webcast/e8e35e1f-7cd0-4fa0-ae9c-5bc2713a9ec4>.

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

<sup>7</sup> Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 46.

<sup>8</sup> Case C-57/16 P *ClientEarth v Commission* EU:C:2018:660, para 84.

<sup>9</sup> *Ibid*, para 101.



reasonably foreseeable risk that access to the documents at issue would seriously undermine' the relevant decision-making processes.<sup>10</sup> In my view, the Council has failed to do so but 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*.<sup>11</sup>

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

### 3. Article 4(2), second indent, of Regulation (EC) No 1049/2001

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, such as *Turco* and *Miettinen* quoted above.

First, the same considerations relating to the legislative nature detailed above with respect to Article 4(3) is also of relevance to the application of Article 4(2). For these reasons, Article 4(2) must be interpreted particularly strictly.

Secondly, 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 advice<sup>12</sup>; 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'<sup>13</sup>; 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.<sup>14</sup>

Presuming that the first stage of this test has been carried out correctly by the Council in this case, the second stage has clearly been misapplied. More specifically, all of the arguments adduced in favour of withholding the documents according to Article 4(2) have been expressly rejected by the CJEU.

First, the General Secretariat argues that 'the legal advice covered by this opinion deals with legal issues which are sensitive' but without explaining what makes these legal issues sensitive. Based on its argumentation relating to the application of Article 4(3), it can be presumed, however, that the Council suggests – albeit indirectly – that particular sensitivity could be established by the fact that a legal opinion addresses a legal basis that is contested among the institutions. This is a claim the Court has specifically rejected, stressing the importance of the legal basis debates in the adoption of EU legal acts:

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<sup>10</sup> Ibid, para 121.

<sup>11</sup> Case T-395/13 *Miettinen v Council* EU:T:2015:648.

<sup>12</sup> *Turco*, paras 38-39.

<sup>13</sup> Ibid., paras 40-43.

<sup>14</sup> Ibid., para 44.



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 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).<sup>15</sup>

What is more in this case is that the Council itself has already opted to have an open deliberation on the matter. However, the Council Legal Service does not take the floor in that session. For this reason, while Member States take the floor in that open session in defense of its position, the details of that position are not known to the public. As the Court argued in *Miettinen*, ‘the transparency of the choice does not weaken the decision-making process, but strengthens it’.

Second, your argument that release of the Document would ‘be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service’ was rejected by the ECJ in *Turco* as being a general and unsubstantiated argument.<sup>16</sup>

Your subsequent argument that disclosure of the Document ‘could affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts’ was rejected expressly in the case *Miettinen*.<sup>17</sup> What is more, it seems unclear how this could even hypothetically be the case in the current matter. Based on the public deliberation of the Council on the choice of legal basis, Member States argued unanimously that the Council should follow the legal opinion in question. Therefore, it seems highly unlikely that the Legal Service might end up in a position where the Council refused to follow its advice, which would leave the Legal Service to defend a position that it did not initially support.

And, finally, your argument that ‘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’ was also explicitly rejected in *Turco*.<sup>18</sup>

Article 4(2) has therefore been misapplied in this instance and full access should be granted to the Documents.

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<sup>15</sup> Case T-395/13, *Miettinen v. Council*, EU:T:2015:648, paras 70-71

<sup>16</sup> *Ibid*, paras 62-63.

<sup>17</sup> *Miettinen*, para 31.

<sup>18</sup> *Turco*, para 64.

#### 4. Existence of an overriding public interest

Assessing the existence of an overriding public interest is the third part of the test established by the Court in *Turco* quoted above. In your reply, you deal with the issue of an overriding public interest in disclosure, which is applicable to both Article 4(3) and Article 4(2). In this regard, you provide that ‘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 documents’. You do not provide any further justifications for this conclusion.

On the contrary to your conclusion, it appears clear that an overriding public interest in disclosure does apply to the Documents in this instance. In *Turco*, a case involving a document directly analogous to the Documents, the Court held that an overriding public interest in disclosure was ‘constituted by the fact that disclosure of documents containing the advice of an institution’s legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.’ In this instance, an overriding public interest is constituted by the very same reasons and justifies its existence. In addition, the legislative document in question concerns the application of EU budgetary funds, which as a topic is of a high relevance for the general public.

Therefore, regardless of the inapplicability of Articles 4(2) and (3) to the Document outlined above, the Document should still be released due to the existence of an overriding public interest in disclosure.

#### 5. Requested action

For the above reasons, I request that the Council disclose the full Document at its earliest possible convenience. Overall, it does not enhance the Council’s legitimacy that it seeks to recycle argumentation that has been expressly rejected by the Court over and over again in relation to similar types of documents.

Yours sincerely,

*Päivi Leino-Sandberg*

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