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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	7852/21 INIT
Subject:	Public access to documents - Confirmatory application No 12/c/01/21 = English translation

Delegations will find in the Annex the above-mentioned translation.

On Wednesday 31 March 2021, you gave notice of the decision not to allow me full access to ST 6817/21 INIT, which contains the Council Legal Service (CLS) opinion on the legal basis of the European Commission's proposal for a Directive on adequate minimum wages in the EU. This letter is an appeal against the decision not to make public the opinion of the CLS.

My English is by no means perfect. In case anything is unclear, the Swedish version is the original.

ST 6817/21 INIT is not a working paper, but rather an official document decided by an institution within the EU, the Legal Service (CLS). This document provides important information to all EU citizens, who must be able to convey their views on the Directive on minimum wages to their politicians on an equal footing and in the public debate on the proposal. The document should therefore be disclosed.

The wording of recital 11 ('all documents [...] should be accessible') and Article 1(a) ('to ensure the widest possible access to documents') [of Regulation No 1049/2001] must, from a legal point of view, be interpreted very strictly, otherwise the whole purpose of the Regulation is undermined. The document should therefore be disclosed.

Such interpretations are also supported by judgments of the Court of Justice of the European Union. One example is the judgment in joined cases C-39/05 P and C-52/05 P. The Court of Justice of the European Union underlines that, in legislative procedures, transparency for citizens is all the more important and that the EU has in principle an obligation to disclose opinions of the Council Legal Service on a legislative procedure. The Court of Justice of the European Union states:

‘[...] as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness 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.’ ‘Regulation No 1049/2001 **imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process**’.

Only in exceptional cases, where the opinion is particularly sensitive or where the scope of the opinion goes beyond the legislative procedure in question, is it possible not to disclose a document. None of these criteria apply to your refusal to disclose the document.

(<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0039>)

Your refusal to disclose the document is also contrary to the political guidelines laid down by the President of the European Commission, Ursula von der Leyen. On page 21 of her programme, she describes the guiding principle of EU openness: ‘I also believe we need more transparency throughout the legislative process. I will work together with the European Parliament and the Council to make this happen. Citizens should know who we, as the institutions who serve them, meet and discuss with and what positions we defend in the legislative process.’ (A Union that strives for more – My agenda for Europe, by candidate for President of the European Commission, Ursula von der Leyen.)

The arguments put forward in the reply to me concerning the document’s non-disclosure are, to a large extent, invalid or misinterpretations of the possibilities for exemptions provided for in Article 4(2) and (3). See, for instance, the judgment cited above.

You write that ‘publication of the legal advice at this stage would adversely affect the negotiations and would thus risk jeopardising the ability to reach an agreement and seriously undermine the decision-making process’, pursuant to Article 4(3). This is a misinterpretation of that article. It is important to distinguish between what happens in the negotiations and how individual representatives assess the document in the decision-making process on the basis of the final document itself. Document 2020/0310 (COD) is not a proposal for an assessment of the legal basis for the proposal for a directive on minimum wages, but an agreed legal assessment of the legal basis for the proposal.

The argument that the assessment of the legal basis is a highly controversial issue is not correct. A large majority of Member States support the proposal and several independent experts outside the EU have said that the Directive can be based on Article 153(1)(b) TFEU. According to newspaper reports, the conclusion reached by the CLS is the same.

You write that in the future the Council will not always be cautious in requesting legal opinions if this becomes public. You do not in any way substantiate this claim, but it must be seen as an unsubstantiated assumption and is not a legal argument to stop the publication of the CLS's assessment in this case.

You also write that publication of the assessment may make it more difficult for the CLS to defend Council decisions before European Union courts. This is unrelated to an assessment of the legal basis for the proposal for a directive. If the directive is subject to a judicial assessment, a very different document to the current assessment is required. For this reason, your argument cannot be used as a legal basis to stop publication.

You write that the CLS may be subject to external pressure, which in the future may influence legal assessments if the document is disclosed. The CLS lawyers are employed to make independent legal assessments without taking public opinion into account. If they fail to do so, it is a matter for management, and not a matter that should determine whether a document should be disclosed. It is surprising that such an argument should be used in this context, and there is nothing in Regulation (EC) No 1049/2001 to suggest that you can proceed in this way.

If you refuse to disclose the document to me, you must have specific reasons linked to this particular case and to this particular Council decision. You cannot employ general arguments, but must state what is specific in this case and what distinguishes it from other cases. No such reasons have been given.

In addition, the proposal for a directive on minimum wages affects and is in the interests of millions of EU residents. It is therefore important that no detail should be withheld and that no part of the Council decision should come as a surprise to the general public.

The Council has already distributed the document to third parties. The news agency, Agence Europe, has received it and refers to it, and the news can be read by anyone who pays for it. It should not be the case that some EU citizens have access to the document, while others do not.

Sincerely

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