



Council of the
European Union

Brussels, 23 April 2021
(OR. en)

8133/21

INF 106
API 56

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 14/c/01/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 19 March 2021 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 21 April 2021 (Annex 2);
- confirmatory application dated 23 April 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 19 March 2021 - 14:35 using the electronic form available in the Register application]

From: DELETED

Sent: Friday, March 19, 2021 2:35 PM

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

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

Family name: DELETED

First name: DELETED

E-mail: DELETED

Requested document(s)

Dear Madam, Sir,

I would like to request full access to two opinions of the legal service, specifically those in Council docs:

10357/19

5942/21

Many thanks,

Kind regards,

DELETED



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, 21 April 2021

DELETED

Email: **DELETED**

Ref. 21/0706-mj/ns

Request made on: 19.03.2021

Deadline extension: 14.04.2021

Dear **DELETED**,

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

Please find attached document 5942/21 COR 1 and partially accessible versions of documents 10357/19 and 5942/21.² However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **10357/19** dated 14 June 2019 comprises an opinion of the Legal Service related to the Commission Delegated Regulation of 13.3.2019 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the deployment and operational use of cooperative intelligent transport systems (the "ITS Directive").

The requested opinion contains legal advice and, in particular, analyses the following issues :
a) the compatibility of the Delegated Regulation with the ITS Directive, b) the conferral of implementing powers and c) the procedural questions related to the preparation and adoption of the Delegated Regulation.

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).

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

You may have access to most of document 10357/19, namely to its paragraphs 1 to 42, 50 to 67 and points a) to f) of paragraph 75 pursuant to Article 4 (6) of Regulation (EC) No 1049/2001.

However, the General Secretariat of the Council is unable to grant public access to a limited part of this legal opinion for the reasons set out below. Although the decision-making process at stake has been concluded, the remaining paragraphs analyse sensitive legal issues of interinstitutional relevance and provide legal advice which is particularly broad in scope and applies in principle to all delegated acts. Such legal advice goes beyond the file in question and is relevant to a wide range of current and future dossiers.

Full disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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. Moreover, 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. 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.

Document 5942/21 is an opinion of the Council Legal Service entitled "Commission Delegated Regulation (EU) .../... of 6.11.2020 amending Delegated Regulation (EU) 2019/1122 as regards the functioning of the Union Registry under Regulation (EU) 2018/841 of the European Parliament and of the Council – Compliance of a delegated act with the empowerment foreseen in the basic act".

Document 5942/21 **COR 1** is a corrigendum to this document.

Following an introductory part (paragraphs 1 to 2), the legal opinion is structured in three further parts consisting in (i) a presentation of the legal framework, namely Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (hereafter, "the LULUCF Regulation") and the proposed Commission Delegated Regulation (paragraphs 3 to 16); (ii) a legal analysis (paragraphs 17 to 33) and (iii) a conclusion (paragraph 34).

While the introduction and part (i) remain descriptive, parts (ii) and (iii) consist in legal guidance aimed at assisting the Council to decide whether the Delegated Regulation by the Commission falls within the remit of the empowerment established in the basic act. This document falls within the legal protection of legal advice as foreseen in Article 4(2), second indent, of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

In that regard, it should be stressed that, on 22 February 2021, pursuant to Article 16(6) of the LULUCF Regulation, the Council decided to object to the adoption by the Commission of the Delegated Regulation (see ST 6295/21 and ST 6281/21, available in the Council Register). Indeed, it deemed that the Delegated Regulation did not comply with the powers delegated to the European Commission in the LULUCF Regulation. As a consequence, the Delegated Regulation cannot enter into force and the Commission is expected to submit a new delegated act on the same subject in the near future. Thus, the legal advice contained in the requested document is expected to be still of relevance for the deliberations of the Council at that coming stage. Even if the delegated act that may be adopted at the end of the procedure foreseen in Article 16 of the LULUCF Regulation may be an act of the Commission, it cannot be excluded that the legality of such delegated act will be contested before the EU Courts and that the Council could be involved in the court proceedings. Thus, the possibility that the legal advice at issue 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 also affect the ability of the legal service to effectively defend its position before the Union courts in relation to the forthcoming delegated act. 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 influence.

Besides, full disclosure of this legal advice at this stage would adversely affect the internal discussions within the Council and would hence risk compromising the institution's capacity to determine its position on the forthcoming delegated act on the same subject and thus undermine the decision-making process pursuant to Article 4(3) of Regulation No 1049/2001.

In the view of the above, the General Secretariat of the Council is unable to grant you full access to document 5942/21. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to the parts of this document containing paragraphs 1 to 16.

As regards the existence of an overriding public interest in disclosure of documents 10357/19 and 5942/21 in their entirety, 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 interests so as to justify full disclosure of the documents.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Fernando FLORINDO

Enclosures : 3

[E-mail message sent to access@consilium.europa.eu on 23 April 2021 - 08:21]

Dear Madam, Sir,

I would like to make a confirmatory application.

Please find my reasoned request in attachment.

Kind regards,

DELETED

Ref. 21/0706-mj/ns

23/04/2021

Dear Mr. Florindo,

Thank you for your answer of 21 April 2021.

I would hereby like to make a confirmatory application to get full access to the requested files since the Council's partial rejection of my request is not in line with the transparency regulation and the case law of the Courts.

Before addressing four specific erroneous points of your answer, I would like to generally invite the Council to decide and act in this matter as the legislative body which it is. The Council is not an intergovernmental forum (anymore) but should act in full transparency in its legislative capacity. The specific issue of my request (the delegation of powers under Article 290 TFEU) goes to the heart of the democratic life of the EU and citizens should be fully aware of the mechanics informing the legislature's choice to delegate (or not) powers to the Commission.

1. You justify your refusal to give access to a number of paragraphs since these "analyse sensitive legal issues of interinstitutional relevance and provide legal advice which is particularly broad in scope and applies in principle to all delegated acts. Such legal advice goes beyond the file in question and is relevant to a wide range of current and future dossiers."

These are essentially the same type of reasons unsuccessfully invoked by the Council in *Pech v. Council* (ECLI:EU:T:2021:203).

On the broad scope, the General Court's findings in *Pech v. Council* (paras 86-88) as regards legal basis and voting procedure are applicable mutatis mutandis to the question of delegated acts. This cannot therefore be a reason to withhold access. On the sensitive legal issues of interinstitutional relevance which you invoke, the General Court found in *Pech v. Council* that the fact that certain legal issues would be controversial in itself is no reason to withhold access (para. 85). Your answer does not in any way set out why the documents to which access was requested are specifically sensitive.

2. In your answer you further state that "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."

However, it follows from *Sweden and Turco v. Council* that such a general argument cannot be relied upon by the Council. In addition, contrary to the situation at issue in *Pech v. Council* where the Council argued there was a high risk of litigation (which was not accepted by the General Court – para. 90), you do not even argue in your answer that there is a high risk. The argument based on possible litigation is therefore completely hypothetical and insufficient to deny access.

3. In your answer you also state 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."

A fortiori this general possibility cannot be a reason to deny access since it applies to any advice by the legal service and if the argument would be correct, Article 4(2) of the Regulation would simply institute a rule excluding all legal advice from the transparency regime. As the General Court held in *Pech v. Council* (para. 96) "the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure." Your answer of 21 April does not meet this standard.

4. In your answer you also referred to Article 4(3) and stated that full disclosure would jeopardize ongoing decision-making.

Firstly however, the decision-making on the draft delegated act in question is not ongoing anymore since the draft has been definitively rejected and will never be adopted. The Council cannot therefore rely on Article 4(3) of the Regulation. Even assuming Article 4(3) could be invoked because the Commission will probably submit a new draft (which however will be different from the one previously presented), your answer does not indicate any tangible element which would allow the conclusion to be drawn that the risk that the decision-making process might be undermined is reasonably foreseeable and not purely hypothetical. The answer simply makes general assertions of the type rejected by the General Court in *Pech v. Council* (para. 49 et seq.). Differently from the latter case however, the documents requested in the present case are even more detached from ongoing decision-making (since the draft on which the advice was given is definitively rejected).

In light of the above I would kindly ask the Council to reconsider its decision granting only partial refusal.

Sincerely,

DELETED
