



Brussels, 28 October 2019
(OR. en)

13534/19

INF 289
API 148

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 35/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 25 August and registered on 26 August 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 7 October 2019 (Annex 2);
- confirmatory application dated 25 October 2019 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 25 August 2019 - 20:47 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s) Dear Madam, Sir,

I hereby request full access to the following documents:

- 7615/08

- 8634/11

With kind regards,

DELETED

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French



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, 7 October 2019

DELETED

Email: **DELETED**

Ref. 19/1836-mj-vl/jg

Request made on: 25.08.2019

Registered on: 26.08.2019

Deadline extension: 16.09.2019

Dear **DELETED**,

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

You requested access to documents **7615/08**, dated 14 March 2008, and **8634/11**, dated 4 April 2011.

Document **7615/08** comprises an opinion of the Council Legal Service which examines whether Article 133 TEC is the correct legal basis for the proposed Council Regulation amending and updating Regulation (EC) No **1334/2000** setting up a Community regime for the control of exports of dual-use items and technology.

Full public access is granted to this document.

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).

Document **8634/11** is an opinion of the Council's Legal Service which examines whether the proposals for Council Decisions concerning the signing and conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access could be validly adopted on the basis of Article 207 TFEU, as proposed by the Commission. The document contains legal advice except for its points 1 to 3.

The decision-making process to which the legal advice pertains is no longer pending within the Council. However, the legal advice contains elements that could easily be generalized and transferred to allegedly similar cases. Were it disclosed, there would be a risk that it could be distortedly applied to future cases regardless of the specific individual circumstances. In addition, the legal issues addressed in this document remain contentious. The legal opinion is thus sensitive.

The disclosure of such a document would therefore undermine the protection of legal advice under the second indent of Article 4 (2) of Regulation (EC) No **1049/2001**. It would disclose to the public an internal opinion from the Legal Service addressed to the members of the Council. The possibility that the legal opinion in question is made public may lead the Council to exercise caution when seeking similar written advice from its Legal Service. In addition, the disclosure of the legal opinion could also affect the ability of the legal service to effectively defend the decisions taken by the Council before the courts of the Union. Finally, the Legal Service could be subject to external pressures that could affect the way in which legal advice is formulated and thus compromise the ability of the legal service to express its views without being subject to outside influences.

With regard to the existence of a public interest superior to disclosure, the Secretariat considers that, in this case, the principle of transparency does not prevail over the aforementioned interest in seeking and receiving franc, objective and comprehensive legal advice.

In view of the above, the General Secretariat of the Council cannot grant you full access to document **8634/11**. However, in accordance with Article 4(6) of Regulation (EC) No **1049/2001**, you may have access to its paragraphs 1 to 3 which are already public.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).²

Yours sincerely,

Fernando FLORINDO

Enclosures

² Article 7(2) of Regulation (EC) No **1049/2001**.
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.

From: **DELETED**

Sent: Friday, October 25, 2019 3:40 PM

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

Subject: Re: Ref. 19/1836-mj-vl/jg

Dear Madam, Sir,

Many thanks for your email. I would like to submit a confirmatory application. Please find a letter with more details in attachment.

Best wishes,

DELETED

Dear Mr Florindo,

Many thanks for your kind response regarding my request for access to Council document 8634/11 (hereafter: the Opinion). In accordance with Article 7(2) of Regulation (EC) No 1049/2001 (hereafter: the Regulation), I hereby ask the Council to review its decision.

To support its refusal to grant full access, the Council invokes the exception relating to the protection of legal advice under the second indent of Article 4(2) of Regulation (EC) No 1049/2001. I do not contest that the Opinion constitutes legal advice. It is the Council's further argumentation that fails to convince. The Council has not adequately shown that disclosure "would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice."¹ Moreover, its examination of an overriding public interest in disclosure does not go beyond a mere statement. I will now set out these two objections in more detail.

As to the alleged undermining of the protection of legal advice

The Council presents five arguments.

First, the Council states that "the legal advice contains elements that could easily be generalized and transferred to allegedly similar cases. Were it disclosed, there would be a risk that it could be distortedly applied to future cases regardless of the specific individual circumstances."

Some context may be helpful here. The Opinion examines the appropriate legal basis for proposals for Council Decisions concerning the signing and conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access (hereafter: the Convention). Any sound legal basis analysis includes two steps. First, it sets out the criteria for the choice of legal basis and the rules on the application of the potential legal bases in play. Second, it applies these criteria and rules to the measure at issue. That the legal advice contains elements that "could easily be generalized and transferred to allegedly similar cases" is therefore self-evident. It is the essence of the first step that it applies in general. If this were sufficient to exclude access, no opinion on legal basis would be made public.

Perhaps the Council means that the application of the rules and criteria to the measure at issue (step 2) could be generalised. Such generalisation is indeed not possible. After all, the Court of Justice of the European Union (hereafter: the Court) has repeatedly stressed that the legal basis of a measure depends on its aims and content (and occasionally also context). The exclusion of generalisation is thus inherent in the second step of the legal basis analysis. The Council maintains that there is a risk nonetheless. Two scenarios exist. Either, the Opinion lends itself to generalisation despite the inherent individual nature of the analysis. If that were the case, it would hardly be acceptable for the Council to rely on the flaws of its own documents to refuse access thereto. Either, the Opinion does not incorrectly invite such generalisation. Unless it is the Council's position that the existence of errors in the public's capacity of understanding may simply be presumed, the risk mentioned by the Council is then

¹ C-350/12 P *Council v in 't Velt*, ECLI:EU:C:2014:2039, para. 96

negligible. In any event, refusal of access would be a disproportionate response to the risk alleged. The Council could simply supplement the Opinion with a clarificatory statement.

Second, the Council argues that “the legal issues addressed in this document remain contentious.” Again, this statement should be put in context. In its judgment in *Commission v Council*, the Court answered the question whether Article 207 TFEU or Article 114 TFEU constituted the appropriate legal basis for the Council Decision concerning the signature of the Convention.² The Court indeed did not respond to all pleas raised. The success of the Commission’s first plea meant that the Court was not required to address the second plea on the Union’s exclusive external competences. The scope of these competences no doubt remains contentious and sensitive. However, the Opinion concerns the issue of legal basis. The Court not only ruled that Article 207 TFEU was an appropriate legal basis, but also explained why 114 TFEU was not. Thus, the subject-matter of the Opinion ceased to be contentious.

Third, the Council advances three abstract arguments: “The disclosure of such a document would therefore undermine the protection of legal advice under the second indent of Article 4 (2) of Regulation (EC) No 1049/2001. It would disclose to the public an internal opinion from the Legal Service addressed to the members of the Council. The possibility that the legal opinion in question is made public may lead the Council to exercise caution when seeking similar written advice from its Legal Service. In addition, the disclosure of the legal opinion could also affect the ability of the legal service to effectively defend the decisions taken by the Council before the courts of the Union. Finally, the Legal Service could be subject to external pressures that could affect the way in which legal advice is formulated and thus compromise the ability of the legal service to express its views without being subject to outside influences.”

These are all generic arguments. They do not explain why disclosure would “specifically and actually” undermine the Council’s interest in legal advice. The Council offers no concrete explanations, nor detailed evidence. All it does, is point to general considerations. An internal note mentioned that “the onus put on the Council to demonstrate a reasonably foreseeable and not purely hypothetical risk almost amounts to requiring it to provide evidence of a risk which logically has not yet materialised.”³ It is somewhat disappointing that the Council has noted certain requirements, but chooses not to follow them.

One argument in particular is also highly problematic in substance. The Council argues that “[t]he possibility that the legal opinion in question is made public may lead the Council to exercise caution when seeking similar written advice from its Legal Service.” A number of published documents relating to confirmatory applications further clarify this argument by adding the following: “since it could find itself in the situation of having to defend a decision against a - potentially critical - legal advice.”⁴ The Council thus admits that it would be tempted to refrain from seeking legal advice when that advice is made public, simply because such publicity could reveal that the Council acted against that advice.

² C-137/12 *Commission v Council* ECLI:EU:C:2013:675.

³ Document 11788/14 p.6.

⁴ See for example Document 8288/19 p.6.

Yet it is precisely when the Council acts against the advice of its legal service that openness is crucial. The essential objective of the Regulation is to make the Council (and other Union institutions) "more accountable to the citizen in a democratic system."⁵ It is true that the Council is not bound by the advice of its legal service. However accomplished its opinions, the Council Legal Service is not the Court. Disregarding a legal opinion does not equal disregarding the law. But if the Council chooses not to follow the advice of its legal service, let it not hide behind the veil of a too wide interpretation of Article 4(2) of the Regulation. Accountability does not mean covering up certain controversies that arise in the decision-making process. It means explaining why, despite these controversies, the measure in question should be adopted.

There is also a graver point to be made. It concerns the Council's reaction to disclosure. The Council makes clear that it would be tempted to seek less legal advice if such advice became public. This line of argumentation suggests, no doubt unfoundedly, that the Council attaches greater importance to the avoidance of public scrutiny than to the lawfulness of the measures it intends to adopt. It would be surprising for the Council to further pursue a line of argumentation so profoundly incompatible with a Union founded on the rule of law. Disregarding legal advice is unwelcome, but not unlawful. Considering ceasing to seek it in order to avoid awkward confrontations, however, is worrying indeed.

As to the denied existence of an overriding public interest justifying disclosure

The previous analysis sets out why the Council should not have taken the view that disclosure of the Opinion would undermine the protection of legal advice. Unless these arguments are rejected, there is no need to proceed to the overriding public interest test. As to this test, two remarks suffice.

First, the Council failed to appropriately ascertain whether an overriding public interest existed. It merely stated that this was not the case.

Second, it seems useful to remind the Council of the great importance of public access to documents in view of the principles of democracy and legitimacy. Concerns regarding these principles are especially pressing here. The Opinion addresses the fundamental question whether a specific matter falls within exclusive or shared Union competence. The principle of conferral is a cornerstone of the EU legal order. It is always important to ascertain whether Union and Member States stay within the limits of their competences. But it is in the area of exclusive competence that the consequences of these limits are the most significant. If there is any doubt as to the application of these limits, the public's interest to be informed thereof is a great one indeed.

It is for these reasons that I encourage the Council to reconsider and review its decision.

With kind regards,

██████████

⁵ Recital 2 of the Regulation.