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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 32/c/01/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 30 June 2021 (Annex 1);
- the reply from the General Secretariat of the Council dated 2 July 2021 (Annex 2);
- the confirmatory application dated 9 July 2021 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 30 June 2021 - 13:00 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:
Address: DELETED

Telephone:
Mobile: DELETED
Fax:

Requested document(s): Document ST 13593 2018 INIT containing the opinion of the Legal Service of the Council concerning the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018) 324 final)

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, 2 July 2021

DELETED

Email: **DELETED**

Ref. 21/1281-lk/vk

Request made on: 30.06.2021

Dear **DELETED**,

Thank you for your request for access to document **13593/18** of the Council of the European Union.¹

Document **13593/18**, together with its corrigendum **13593/18 COR 1**, comprises an opinion of the Council Legal Service, on the compatibility with the EU Treaties of the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

The requested opinion contains legal advice. It pertains to a decision-making process which has been concluded with the adoption of Regulation (EU) **2020/2092** of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget².

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 OJ L 433I, 22.12.2020, p.1-10.

Two cases are currently pending before the Court of Justice seeking the annulment of Regulation (EC) 2020/2092 (Cases C-156/21 Hungary vs European Parliament and Council and C-157/21 Poland vs European Parliament and Council). The legal advice contained in the requested document is of relevance for the above mentioned proceedings. In this context, public release of the full content of the requested document would negatively affect the ability of the Council's Legal Service to effectively defend the above mentioned Regulation before the Court of Justice on an equal footing with the legal representatives of the other parties to legal proceedings. Under these circumstances, disclosure of the requested document would undermine the protection of legal advice and court proceedings under Article 4(2), second indent, of Regulation (EC) No. 1049/2001.

As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies Regulation (EC) No 1049/2001 would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the requested document.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to document 13593/18 and to its Corrigendum 13593/18 COR 1. However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have **partial access**, consisting of :

- paragraphs 1 to 8 of document 13593/18, with the exception of the second sentence of paragraph 1;
- the first correction mentioned on page 1 of the Corrigendum 13593/18 COR 1.

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.³

Yours sincerely,

Fernando FLORINDO

Enclosures: 2

³ 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.

[E-mail message sent to access@consilium.europa.eu on 9 July 2021 - 11:50]

Dear representative of the General Secretariat of the Council,

On the 30th of June 2021 I submitted a request (Ref. 21/1281-lk/vk) for access to document 13593/18 of the Council of the European Union, and its corrigendum 13593/18 COR 1, which comprise an opinion of the Council Legal Service, on the compatibility with the EU Treaties of the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

The Council responded to my request on the 2nd of July 2021, granting partial access to the requested document. More specifically, partial access was granted to paragraphs 1 to 8 of the requested document, with the exception of the second sentence of paragraph 1, while access to the remainder of the document was refused. Additionally, access was granted to the first correction mentioned on page 1 of the Corrigendum 13593/18 COR 1. The basis for the refusal to grant full access to the requested document was Article 4(2), second indent, of Regulation (EC) No. 1049/2001, since, according to the Council, the legal advice contained in the requested document is of relevance for the pending proceedings before the Court of Justice seeking the annulment of Regulation (EC) 2020/2092 (Cases C-156/21 Hungary vs European Parliament and Council and C-157/21 Poland vs European Parliament and Council).

With this letter I wish to express my objections to the legal opinion that forms the basis of the Council decision and, pursuant to Article 7(2) of Regulation (EC) No 1049/2001 ask the Council to review this decision within 15 working days of receiving the Council's reply.

Reasoning of the confirmatory application

The General Secretariat of the Council bases its refusal on the following arguments:

[...] “The requested opinion contains legal advice. It pertains to a decision-making process which has been concluded with the adoption of Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. Two cases are currently pending before the Court of Justice seeking the annulment of Regulation (EC) 2020/2092 (Cases C-156/21 Hungary vs European Parliament and Council and C-157/21 Poland vs European Parliament and Council). The legal advice contained in the requested document is of relevance for the above mentioned proceedings. In this context, public release of the full content of the requested document would negatively affect the ability of the Council’s Legal Service to effectively defend the above mentioned Regulation before the Court of Justice on an equal footing with the legal representatives of the other parties to legal proceedings. Under these circumstances, disclosure of the requested document would undermine the protection of legal advice and court proceedings under Article 4(2), second indent, of Regulation (EC) No. 1049/2001[...]”.

According to Article 1 of Regulation No 1049/2001, the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions (see judgment of 4 September 2018, ClientEarth v Commission, C 57/16 P, EU:C:2018:660, paragraph 76 and the case-law cited). Additionally, Article 4 of Regulation No 1049/2001 introduces a system of exceptions in that regard, meaning that the right of access is subject to certain limits based on reasons of public or private interest (judgments of 16 July 2015, ClientEarth v Commission, C 612/13 P, EU:C:2015:486, paragraph 57, and of 4 September 2018, ClientEarth v Commission, C 57/16 P, EU:C:2018:660, paragraph 77). As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see judgment of 4 September 2018, ClientEarth v Commission, C 57/16 P, EU:C:2018:660, paragraph 78 and the case-law cited).

In that respect, it should be underlined that if an EU institution, office, body or agency dealing with a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of the interest being so undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, judgment of 4 September 2018, ClientEarth v Commission, C 57/16 P, EU:C:2018:660, paragraph 51 and the case-law cited).

Taking the above into consideration, as well as the judgement of the General Court of April 21st 2021 in case T 252/19, Laurent Pech v Council of the European Union (ECLI:EU:T:2021:203), I hereby submit a confirmatory application for access to the requested document and argue that the Council, by refusing to grant full access thereto, has erred in the application of Article 4(2) of Regulation No 1049/2001 in that it:

- misinterpreted and misapplied the second indent of Article 4(2) of Regulation No 1049/2001 and the case-law of the EU Courts by failing to take into account the provisions of primary EU law and the principle that EU legislative documents are subject to the principle of the widest possible access, while relying on vague and subjective notions not provided for in EU law to justify non-disclosure;
- failed to properly assess the public interest in disclosure.

It should be borne in mind that, according to the case-law of the Court of Justice, as regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the institution concerned when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision (see, to that effect, judgments of 1 July 2008, Sweden and Turco v Council, C 39/05 P and C 52/05 P, EU:C:2008:374, paragraph 37, and of 3 July 2014, Council v in't Veld, C 350/12 P, EU:C:2014:2039, paragraph 95).

1. First, the institution concerned must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice.

2. Second, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

3. Third and lastly, if the institution concerned takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and to receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, judgments of 1 July 2008, *Sweden and Turco v Council*, C 39/05 P and C 52/05 P, EU:C:2008:374, paragraphs 38 to 44, and of 3 July 2014, *Council v in't Veld*, C 350/12 P, EU:C:2014:2039, paragraph 96).

Additionally, a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, should refer to an opinion of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of the reasons for such a refusal (judgment of 1 July 2008, *Sweden and Turco v Council*, C 39/05 P and C 52/05 P, EU:C:2008:374, paragraph 69). In response to my initial application, the Council has failed to substantiate either the particularly sensitive nature or the particularly wide scope of the Legal Service's Opinion, and has therefore not justified its refusal to disclose it.

As regards the existence of a risk that the Council's ability to defend its position in court proceedings might be undermined, it should be noted that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001 (judgment of 21 April 2021, *Pech v Council*, T-252/19, ECLI:EU:T:2021:203, paragraph 89).

Although two cases seeking the annulment of Regulation (EC) 2020/2092 (Cases C-156/21 Hungary vs European Parliament and Council and C-157/21 Poland vs European Parliament and Council) are currently pending before the Court of Justice, the Council has not explained how disclosure of the opinion in its entirety could compromise its defence and its freedom to adapt its line of defence in judicial proceedings, on the ground that its position has already been revealed on certain issues, and some parts of the opinion were subject to press leaks and have been made public.

As regards the assessment of the public interest in disclosure, the Council has failed to properly carry out such an assessment as it merely mentioned that: “As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies Regulation (EC) No 1049/2001 would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the requested document”. Such a statement is rather generic and cannot be considered as a proper assessment and balancing of the public interest in disclosure and the principle of transparency against the interests of the Council and the protection of legal advice and court proceedings under Article 4(2).

Taking all the above into consideration I kindly ask that the Council review its decision concerning my request for access to document 13593/18 of the Council of the European Union.

Thank you very much for processing the present confirmatory application.

Kind regards,

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