



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 March 2012

6972/12

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NOTE

from : General Secretariat of the Council
to : Delegations

No. prev. doc.: 6971/12

Subject : Public access to documents
- Confirmatory application No 05/c/01/12

Delegations will find enclosed a draft reply from the Council, approved by the Working Party on Information by written consultation which ended on 26 March 2012, to confirmatory application No 05/c/01/12.

The Danish, Estonian, Dutch, Slovenian, Finnish and Swedish delegations indicated that they would vote against the draft reply and made the following common statement:

"DK, EE, NL, SI, FI and SE cannot concur with the interpretation of the judgment in the Turco-case (C-39/05 and C-52/05 P) in the draft reply nor with the arguments concerning the effect of the Lisbon Treaty on the importance of openness in legislative procedures. Furthermore, DK, EE, NL, SI, FI and SE stress the importance of workable deadlines by the Council Secretariat when using the written procedure to give time for a proper examination by Member States".

It is suggested that the Council, by written procedure, record its agreement on the draft reply annexed to this document.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 05/c/01/12,
made by e-mail on 27 February 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 15452/11

The Council has considered this confirmatory application under 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 (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 15452/11 which contains an opinion of the Council's Legal Service on the Union's competence to adopt measures on spatial planning provided for in Article 10 and Annex VII of the Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC, including on the subsidiarity principle in that regard.
2. In its reply dated 17 February 2012, the General Secretariat refused full public access to the document pursuant to Article 4(2), second indent (protection of legal advice) and the protection of an ongoing decision-making process under the first subparagraph of Article 4(3) of Regulation 1049/2001. Pursuant to Article 4(6) of that Regulation, partial access was granted to points 1 to 2 of document 15452/11.

3. In confirmatory application of 27 February 2012, the applicant argues that the reply of the General Secretariat did not substantiate why the legal advice in the requested document would be particularly sensitive or wide in scope as required in the Court's *Turco* judgment. The applicant maintains that the question of the legal basis and the scope of the Union's competence in the area covered by the Commission proposal are matters of public concern, knowledge of which is necessary to enable citizens to participate in the decision-making process. Regarding the question of the conformity of the proposed measures with the subsidiarity principle, the applicant argues that the period of eight weeks open for national parliaments for sending reasoned opinion has elapsed, and consequently, the legal advice on that issue has lost some of its relevance. Finally, the applicant claims that the reply by the General Secretariat does not take account of the amendments to the Treaties, notably the new Articles 10(3) and 16(8) TEU, as well as Article 15(2) TFEU. Nor does it reflect, according to the applicant, the principles upheld by the General Court in the *Access Info Europe* judgment.
4. The Council has examined the above-mentioned document in the light of the applicant's arguments and has come to the following conclusion.
5. The requested document contains legal advice, except for its points 1 to 2.
6. First of all, the Council recalls that Article 15(3) TFEU provides the legal basis for the adoption of secondary legislation laying down the conditions, principles and limits governing the right of access to documents of the Union's institutions, bodies, offices and agencies. It is also recalled that the purpose of Regulation 1049/2001, implementing the predecessor of Article 15(3) TFEU (ex Article 255 TEC), is to ensure the widest possible access to documents for citizens. It remains, however, that the second indent of Article 4(2) and the first subparagraph of Article 4(3) of that Regulation provide for exceptions to the right of public access to documents in cases where such public access would undermine, respectively, the protection of legal advice and the institution's decision-making process, unless there is an overriding public interest in disclosure.

7. The requested document relates to an ongoing decision-making process on a proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC. It contains legal advice by the Council Legal Service on the Union's competence to adopt measures regarding spatial planning, such as those foreseen in Article 10 and Annexes VII to IX of the proposal based on the legal basis proposed by the Commission, Article 194(2) TFEU. In addition, the Council Legal Service examines the respect of the principle of subsidiarity in this regard.
8. The legal advice contained in the requested document has the following characteristics:
- first, the question analysed by the Legal Service, notably the delimitation of the scope of Article 194(2) TFEU of other Treaty provisions is a new and sensitive issue, since a legal basis on a Union policy on energy was introduced by the Treaty of Lisbon. As a result, the limits of the power of the Union legislator under this Article, notably in respect of the adoption of measures of spatial planning, are not yet well defined, nor has the Court had the occasion to date to address the question of the scope of the said Treaty Article;
 - second, given the contentious nature of the debate within the Council, there is a strong likelihood that the Directive, if adopted, will be challenged before the Courts of the European Union on the specific grounds analysed by the Council Legal Service in its legal opinion - issues which have not yet been addressed by the Court;
 - third, the Council Legal Service gives an analysis of the compliance of the proposed measures with the principle of subsidiarity. This issue has also proven contentious and certain national parliaments have given opinions contesting the compatibility of the proposal with the principle of subsidiarity;
 - fourth, both issues examined in the legal opinion are of a general, horizontal nature, which are likely to be invoked in other, future decision-making procedures involving the question of compliance with the subsidiarity principle or the delineation of Article 194(2) TFEU on energy policy.

9. While in the *Turco* case¹, the Court of Justice held that that the institutions cannot rely on a general need for confidentiality in respect legal advice relating to legislative matters, it has also recognised the possibility for an institution to refuse public access to a specific legal opinion given in the context of a legislative process, "*being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question*".² In view of the particular characteristics of the legal opinion in question (as discussed in point 8 above) the Council considers that it must be protected against disclosure, both on account of its particularly sensitive nature and its horizontal scope. Divulgence of such a document would undermine the protection of legal advice, since 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, since it could find itself in a situation where it would need to defend a decision it has taken against a - potentially critical - advice given by its Legal Service. Moreover, disclosure of the legal advice would also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Courts of the European Union, a scenario that may reasonably occur in view of the contentiousness of the above issues. 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.
10. In addition, the Council's ongoing decision-making procedure is in critical stage where the Presidency attempts to secure agreement within the Council on a compromise package in view of the upcoming negotiations with the European Parliament in first reading. In this regard, there is a risk that the divulgation to the public of the requested legal opinion would interfere with the preparation in the Council of these negotiations in serene conditions, which requires a certain degree of discretion on the part of the Council, similarly as in the case of the European Parliament.

¹ Cases C-39/05 P and C-52/05 P, *Sweden and Turco vs Council*, [2008] ECR I-4723, § 57.

² *Ibid.*, § 69. Emphasis added.

11. In the confirmatory application, the applicant argues that the issues addressed by the Council Legal Service in the requested document, notably the question of legal basis and the Union's competence in the area covered by the Commission proposal, are precisely the sort of issues which citizens must know in order to fully exercise their democratic rights. The Council cannot subscribe to the applicant's argument, which would apply to a significant proportion of legal advice, and which would empty of its *effet utile* the exception set out in Article 4(2), second indent of the Regulation, which requires the institutions to refuse access to a document where disclosure would undermine the protection of legal advice.

12. As regards the applicant's argument on the principle of subsidiarity, the Council would point out that despite the expiry of the eight-week period in which national parliaments may send reasoned opinions, non-compliance with the principle of subsidiarity may be invoked upon adoption of the Directive in a legal action brought for the annulment of that act, for example by a Member State on behalf of its national parliament (cf. Article 8 of Protocol on the application of the principles of subsidiarity and proportionality). For these reasons, given that certain national parliaments have in deed raised concerns regarding compliance with the principle of subsidiarity, the Council cannot concur with the Applicant that the legal advice relating to the question of compliance with the principle of subsidiarity would no longer have the same significance as before the expiry of the eight-week period. In deed, if disclosed to the public, the Council Legal Service could find itself in a situation where the position it has taken during the legislative procedure on this issue would be invoked against it in court proceedings.

13. Furthermore, the applicant invokes Article 10(3) TEU, which lays down the citizens' right to participate in the democratic life of the Union as well as the principle according to which decisions are to be taken "*as openly as possible and as closely as possible to the citizen*". While the Council agrees that Article 10(3) TEU may serve as a reference in the interpretation of the acts taken by the institutions implementing those democratic principles, it points out that this provision cannot be given a meaning which would *de facto* modify the provisions of Regulation 1049/2001. As regards the applicant's reference to Article 16(8) TEU and Article 15(2) TEU stipulating the publicity of the Council's meeting when deliberating and voting on draft legislative act, the Council notes that that the requested legal opinion has not been submitted to the Council for the preparation of the latter's deliberation or voting on the draft Directive.

14. As regards the applicant's arguments regarding the applicability on Article 4(3) of Regulation 1049/2001 based on the General Court's judgment in *Access Info Europe vs. Council*³, the Council would like to point out that in the said judgment, the General Court did not exclude the possibility of invoking the exception relating to the protection of the institution's decision-making procedure in an ongoing legislative procedure, provided that the institution established to the requisite legal and factual standard that disclosure of the requested documents would seriously undermine its decision-making process (cf. §§ 66 and 69 of the said judgment). The Council has demonstrated in points 8 and 10 above that this is the case at present.
15. Finally, the Council also examined the existence of an overriding public interest in disclosure. For this purpose, it balanced the protection of legal advice and the protection of its ongoing decision-making procedure against the public interest invoked by the applicant, including the advantages stemming from citizens' participation in the democratic process, as it follows from Article 10(3) TEU. In the light of this examination, it concluded that public access may also be granted, in accordance with Article 4(6) of Regulation 1049/2001, to points 3, 5, 6-13 and 25 of the requested document. However, on account of the particularly sensitive nature and the horizontal scope of the remaining parts of the legal opinion in question, as well as the sensitive character of the Council's discussions on these issues in the ongoing legislative procedure, the Council believes that in the specific case at hand, the public interests invoked by the applicant would not outweigh, as regards the remaining parts of the requested document, the protection of legal advice under Article 4(2), second indent and the protection of the Council's decision-making procedure under Article 4(3), first subparagraph of Regulation 1049/2001.

³ Case T-233/09 *Access Info Europe vs. Council* (not yet reported).