



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 9352/13

Subject : Public access to documents

- Confirmatory application made by Mr David Hallonsten (No 11/c/01/13)

Delegations will find enclosed a draft reply from the Council to confirmatory application No 11/c/01/13 made by Mr David Hallonsten, approved by the Working Party on Information on 4 June 2013.

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

DK, EE, FI and SE: *"Denmark, Estonia, Finland and Sweden cannot concur with the reasoning in the draft reply. The fact that the legal advice is relevant in on-going deliberations is not in itself enough to prove that disclosure would undermine the decision-making process of the Institution. Moreover, Denmark, Estonia, Finland and Sweden cannot concur with the interpretation of the judgment in case C-39/05 P and C-52/05 P, Sweden and Turco vs. Council."*

NL: *"The Netherlands can agree that parts of the legal advice are of a particularly sensitive nature and that disclosure of these parts would undermine the protection of legal advice and the decision-making process. However, the Netherlands also finds that the possibility of extending partial release to the requested document has not been thoroughly examined and takes the view that at least further partial access should be granted to the requested document. There seem to be undisclosed parts in the document that are not covered by the exceptions stated in the draft reply."*

SI: *"Slovenia can agree that parts of the legal advice are of a particularly sensitive nature and that disclosure of these parts would undermine the protection of legal advice and the decision-making process. However, Slovenia also finds that the possibility of extending partial release to the requested document has not been thoroughly examined and takes the view that at least further partial access should be granted to the requested document."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Estonian, Dutch, Slovenian, Finnish and Swedish delegations voting against,
- decide to publish the result of the vote and the statements reproduced above.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 11/c/01/13
made by e-mail on 7 May 2013,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 8384/03

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 referred to as "Regulation 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 8384/03 which is an opinion of the Council Legal Service relating to the proposal for a Council Regulation amending the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities.
2. Document 8384/03, except for its page 1, contains a legal analysis of the applicability of general principles of Union law to reform measures concerning the employment conditions of Community officials and in particular concerning the pension scheme of Union officials.
3. In its reply dated 7 May 2013, the General Secretariat of the Council refused public access to this document pursuant to the second indent of Article 4(2) (protection of legal advice) and to the second subparagraph of Article 4(3) (protection of the Council's decision-making process) of Regulation (EC) No 1049/2001. However, in accordance with Article 4(6) of that Regulation access was granted to page 1 of the document.
4. In the confirmatory application dated 7 May 2013, the applicant asks the Council to reconsider this position, however without submitting any specific arguments in support of the application.

5. The Council has therefore considered the confirmatory application and it has concluded as indicated below.

I. Assessment of the requested document

6. Except for its page 1, the requested document contains legal advice. As indicated above, it examines the applicability of general principles of Union law to reform measures concerning the employment conditions of Community officials and in particular concerning the pension scheme of Union officials.

7. The Council has assessed the request for access in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and the aim of ensuring the widest possible public access to documents.

8. Regulation (EC) No 1049/2001 equally provides, in its Article 4, for exceptions to the right of public access to documents in cases where such public access would undermine, *inter alia*, the protection of the legal advice (second indent of Article 4(2)) and the institution's decision-making process (second subparagraph of Article 4(3)), unless there is an overriding public interest in disclosure. These two exceptions are engaged in this case.

II. The exception relating to the protection of legal advice

9. The requested legal advice deals with a number of sensitive legal aspects of a series of reform measures relating to the pension scheme of European officials envisaged during the 2004 reform of the Staff Regulations. It is however particularly broad in scope. Since it analyses the application of general principles of Union law in this field, its ideas are relevant not only with respect to the 2004 reform of the Union's pension system, but to wider issues relating to the Staff Regulations, including the current ongoing proposals for reform. If the legal advice were released, it would thus risk being invoked in the context of these current ongoing proposals to the reform of the Staff Regulations.

10. The above-mentioned current proposals to reform the Staff Regulations are being addressed a particularly delicate decision-making process giving raise to complicated discussions both within the Council and between the European Parliament, the Council and the Commission. If the legal advice was to be made public, it could be invoked in the current context and have a negative impact on the capacity of institutions to find agreement on the file. In addition, as demonstrated following the 2004 reform of the Staff Regulations, the outcome of any current reform of the Staff Regulations is likely to be subject to a great number of challenges before Union Courts. If the legal advice in question was made public this could therefore affect the principle of equality of arms in such future proceedings.
11. The legal advice in question is therefore particularly sensitive in nature.
12. Furthermore, with specific regard to access to legal advice, it is to be recalled that in the *Turco* case¹ the Court of Justice held that, while the institutions cannot rely on a general need for confidentiality in respect legal advice relating to legislative matters, it 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, the Council concludes that its non-disclosure is justified both on account of its particularly sensitive nature and its broad scope. In addition, the possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar sensitive written opinions from its Legal Service.
13. The Council therefore confirms that disclosure of the requested document would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation (EC) No 1049/2001.

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.

III. The exception relating to the protection of the Institution's decision making process

14. As explained above, the requested legal advice remains both legally and politically delicate and relevant to the currently ongoing reform of the Staff Regulations. The decision-making process is particularly delicate and the legal advice plays an important and sensitive role in that process where political and legal considerations are particularly linked. The release of the advice therefore risks having a particularly negative impact on the ongoing deliberations.
15. It follows that disclosure of the requested document would seriously undermine the decision-making process pursuant to Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

IV. Assessment of the public interest in disclosure

16. As noted above, the applicant has not invoked any specific public interest in the disclosure of the document. Nevertheless, the Council has thoroughly examined the document and balanced the protection of legal advice and the protection of the Council's decision-making procedure in the specific context against the general public interest in ensuring transparency and public participation.
17. In the light of its examination, the Council concluded that on account of the particularly sensitive nature and the broad scope of the legal advice in question, as well as the unusually complex character of the Council's ongoing discussions on the similar issues in the current legislative procedure aimed at the reform of the Staff Regulations, on balance, the principle of transparency which underlies Regulation (EC) No 1049/2001 does not prevail over 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), second subparagraph of Regulation 1049/2001.

Conclusion

18. For the above-mentioned reasons, the Council concluded that full public access to document 8384/03, with the exception of its page 1, has to be refused pursuant to the second indent of Article 4(2) (protection of the legal advice) and to the second sub-paragraph of Article 4(3) (protection of the Council's decision-making process).
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