



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 April 2011

8273/11

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NOTE

from : The General Secretariat
to : Delegations

No. prev. doc.: 8272/11

Subject : Public access to documents
- Confirmatory application No 09/c/01/11

Delegations will find enclosed a draft reply from the Council, approved by the Working Party on Information at its meeting on 15 April 2011 ¹, to the confirmatory application No 09/c/01/11. The Danish, Dutch, Finnish and Swedish delegations made the following common statement:

"Denmark, the Netherlands, Finland and Sweden are of the opinion that the requested document should be released in full. Disclosing the document would not undermine the protection of legal advice, since the document does not contain particularly sensitive information. Moreover, we cannot agree with the interpretation of the Turco case-law in the draft reply."

¹ The Danish, Dutch, Finnish and Swedish delegation voted against the draft reply. A majority of delegations agreed to publish the result of the vote.

It is suggested that the Council, by written procedure:

- record its agreement on the draft reply annexed to this document, with the Danish, Dutch, Finnish and Swedish delegations voting against;
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 09/c/01/11,
made by e-mail on 25 March 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 7325/11

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 7325/11 which contains an opinion of the Council's Legal Service setting out its views on the question of whether the legislator may use the option described in point (b) of the second subparagraph of Article 5(4) of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (hereafter: "the Comitology Regulation").
2. In its reply dated 24 March 2011, the General Secretariat refused full public access to the document pursuant to Article 4(2), second indent (protection of legal advice) of the Regulation. Pursuant to Article 4(6) of the Regulation, partial access was granted to points 1 to 3 of document 7325/11.
3. In his confirmatory application dated 25 March 2011, the applicant argues, referring to the *Turco* case-law, that there is an overriding public interest in favour of the disclosure of the document in question, notably the principles of openness, transparency, democracy and civil participation in the decision-making process.

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 3.
6. To begin with, two characteristics should be underlined as regards the nature of the legal advice in question. First, that legal advice is not related to a specific legislative procedure or other decision-making process. Instead, it contains a summary of the Legal Service's views expressed on the occasion of the entry into force of the Comitology Regulation on 1 March 2011. Second, the views expressed in the document are prone to apply in any legislative or non-legislative decision-making procedure where the Council could consider to avail itself of the option described in point (b) of the second subparagraph of Article 5(4) of the Comitology Regulation. The legal advice in question is therefore of a general, horizontal nature.
7. As regards the legal situation, it is the purpose of Regulation (EC) No 1049/2001 to ensure the widest possible access to documents for citizens. It remains, however, that the second indent of Article 4(2) of that Regulation provides for an exception to the right of public access to documents in cases where such public access would undermine the protection of legal advice, unless there is an overriding public interest in disclosure.
8. In the context of this exception for the protection of legal advice, the applicant has invoked the *Turco*-judgement of the European Court of Justice² in favour of disclosure. It is true that the Court has stated in this judgement that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's Legal Service relating to a legislative process³. Nevertheless the Council disagrees with the applicant. It should be underlined that the *Turco* case-law is not applicable to the present case since the requested document is not related to a legislative process.

² C-39/05 P and C-52/05 P, Sweden, *Turco v. Council*, [2008] ECR I-4723

³ *Ibidem*, point 68

9. Moreover, there is a particular public interest in the protection of the legal advice in question. As has been pointed out above, the document is of a general and horizontal nature. Its content would likely be transferred to a particularly large number of future legislative procedures involving comitology-related questions. This poses the risk of a distorted application of the legal advice in question, regardless of the specific circumstances of the particular case in question.
10. In the light of those factual and legal circumstances, the Council considers that divulgation of the requested document would undermine the protection of legal advice. If internal legal advice by the Legal Service of general application without any link to a specific decision-making process were to be released, it could be used in future decision making-procedures where the Council could take a view that differs from the opinion which its Legal Service had submitted earlier. The Council could be led to take into account the risk of similar future disclosures and to decide to refrain from requesting written advice of broad scope from its Legal Service. As a consequence, the Council would refrain from asking written advice from its Legal Service when it is legally and politically particularly useful to him, such as in the present case where a legal act of horizontal importance, the Comitology Regulation, had just entered into force. Ultimately, disclosure would undermine the Council's interest in requesting and receiving frank, objective and comprehensive written legal advice from its Legal Service, thereby depriving the Council of an essential means to assure the compliance of its acts with the law of the Union.
11. In addition, disclosure of the Legal Service's internal advice would seriously affect the Legal Service's capacity to present and defend, in the future, the Council's position in Union courts since that position may be different from the one that it has recommended earlier in its general advice. The Legal Service would risk to be exposed to external influences and would be deprived of equality of arms vis-à-vis the legal representatives of the other parties who could use his own, earlier advice against him. Finally, the risk that internal legal advice of broad scope be disclosed to the public, threatens to affect the way in which the Legal Service drafts its legal advice and hence to prejudice the possibility of the Legal Service to express its views in an independent, frank and objective way.

12. As regards the existence of an overriding public interest in releasing the document, the Council took into account the public interest in openness, transparency, democracy and civil participation advanced by the Applicant.
13. The Council has carefully weighed the public interest in disclosure of the requested document against the public interest in the protection of legal advice. It concluded that its interest in the protection of its legal advice under Article 4(2), second indent of Regulation (EC) No 2001/1049 is not overridden by a public interest in disclosure of the document in question. The possibility to provide general legal guidance in an independent, frank and objective way is one of the essential functions of the Council's Legal Service.
14. The Council does not see at stake any other specific public issue that would outweigh its interest in the protection of the legal advice in question.
15. The Council therefore decided that, with the exception of points 1 to 3 of document 7325/11 which are already publicly accessible, public access to the remaining parts of that document must be refused under Article 4(2), second indent, of Regulation 1049/2001 (protection of legal advice).
