Brussels, 29 April 2022

By e-mail

Mr Titus Statler
160 avenue Jules Bordet, boîte 16
1140 Brussels
Belgium

ask-request-10809-e7d29d59@asktheeu.org

Subject: Request for access to documents

Ref.: Your email of 9 March 2022 registered on 11 March 2022 under reference GestDem 2022/1404

Dear Mr Statler,

I refer to your above-mentioned application for access to documents in accordance with 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.¹

Your request concerns the “analysis by the Commission Legal Service of the draft directive on combating violence against women and domestic violence”.

1. IDENTIFICATION OF DOCUMENTS

After examination of the Legal Service’s files, the following documents have been identified as matching the terms of your request:

1. Note to the file of the Legal Service of 28 January 2022 concerning the draft proposal for a Directive (reference Ares(2022)732920). This note was later sent to the European Commission’s President’s Cabinet.


3. Attached to document 2 is a draft version of the draft proposal for a Directive containing the Legal Service’s comments in the form of track-changes.

2. **ASSESSMENT OF THE DOCUMENTS**

Having carefully examined the documents requested, I have come to the conclusion that they must be refused since they are covered by the exceptions provided for in Article 4(2), second indent (“protection of legal advice”) and second subparagraph of Article 4(3) (“protection of the decision-making process”) of Regulation (EC) No 1049/2001.

3. **FRAMEWORK AND REASONS FOR REFUSAL**

On 8 March 2022 the European Commission adopted the proposal for a Directive on combating violence against women and domestic violence (“the draft proposal for a Directive”)\(^2\). After its adoption, the Commission’s proposal was sent to the European Parliament and to the Council in view of its adoption under the ordinary legislative procedure, which it is at a very initial stage of discussions\(^3\).

Document 1 is a note to the file drafted by the Legal Service before the launching by DG JUST of the inter service consultation (ISC) regarding the draft proposal for a Directive. This note was intended for internal reflections within the Legal Service and with the Commission President’s Cabinet and contains internal and preliminary considerations on the main issues concerning the draft proposal.

Document 2 is the reply of the Legal Service to ISC launched by DG JUST on the draft proposal. Document 3, attached to document 2, contains the draft proposal for a Directive with the Legal Service’s comments in the form of *track-changes*. Both documents contain a legal assessment of different issues concerning the draft proposal and, in particular, the question of the choice of the legal basis, the scope of the proposal, some specific sensitive questions regarding the draft proposal and its relationship with the Istanbul Convention\(^4\) and with the existing EU acquis such as the Victims’ Rights directive\(^5\), among others.

3.1. **Protection of legal advice**

Article 4(2), second indent, of Regulation (EC) No 1049/2001 states by way of exception that “*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice, unless there is an overriding public interest in disclosure*”.

I consider that disclosure of the documents requested would undermine the protection of legal advice, which, as recognised by the Court of Justice, represents an exception that must be construed as aiming to protect an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice\(^6\). Their disclosure would make known to the public legal assessments of a preliminary nature intended for internal discussions within the Legal Service and with the members of the European Commission President’s Cabinet as well as with the Commission’s service responsible for the draft proposal at stake.

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\(^4\) Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 21).


Indeed, this proposal is a major EU piece of legislation, highly sensitive both at political and legal level, that aims to effectively combat violence against women and domestic violence throughout the EU. It addresses very sensitive issues relating to criminal matters, some of them very innovative such as the harmonisation of criminal offences and sanctions in the area of cyber violence, and establishes obligations on Member States to implement the directive in the future.

In the light of the foregoing, I consider that disclosing the internal legal assessment contained in the refused documents would clearly have, in a foreseeable manner, a serious impact on the Commission’s interest in seeking and receiving legal advice and on the Legal Service’s capacity to assist the Commission and its services in the assessment of highly sensitive matters. The frankness, objectivity and comprehensiveness of the legal advice would be seriously affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in its work.

Consequently, I consider that the documents requested are covered by the exception provided for under Article 4(2), second indent, of Regulation (EC) No 1049/2001 (“protection of legal advice”) and cannot be disclosed at this point in time.

3.2 Protection of the decision-making process

In accordance with Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 “access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”.

Although on 8 March 2020 the Commission adopted the proposal for a Directive on combating violence against women and domestic violence, the discussions between the co-legislators for its adoption are in their first stage. The legislative procedure at hand raises many difficult and sensitive questions and, depending on the negotiations on the particular issues, the Commission may indeed have to adapt its position.

I consider that disclosure to the public of the documents requested, at this point in time, would negatively affect the institutions’ pending decision-making process as well as the best outcome of the legislative process itself. In this regard, it must be noted that this legislative initiative is among President von der Leyen priorities, as acknowledged in the Gender Equality Strategy 2020-2025. Furthermore, putting in the public domain the assessment and considerations of the Commission’s Legal Service, before the final adoption of the proposal for a Directive, would severely affect the capacity of the Commission to take decisions after frank and unbiased internal discussions free from external interferences, thus seriously affecting its decision-making process. I consider that the likelihood of the interest in the protection of the decision-making process being compromised is not hypothetical, but a real and concrete one.

Consequently, I conclude that the documents requested need to be protected under the second paragraph of Article 4(3) of Regulation (EC) No 1049/2001, and this until the final adoption of the legislative act.

4. **Possibility of granting partial access**

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, after careful examination, I have come to the conclusion that they are entirely covered by the exceptions invoked so that a partial disclosure cannot presently be granted without harming the protected interests.

5. **Overriding public interest**

Pursuant to Article 4(2) and (3) of Regulation (EC) No 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in this case, it must outweigh the interests protected under Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the documents requested that would outweigh the public interest in the protection of legal advice as well as the institutions’ decision-making process.

6. **Means of redress**

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[signed electronically]

Daniel CALLEJA CRESPO