

**REPLY ADOPTED BY THE COUNCIL ON 22 February 2021  
TO CONFIRMATORY APPLICATION 02/c/01/21,  
made by email on 11 January 2021 and registered on 12 January 2021,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001 and  
Regulation (EC) No 1367/2006**

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, 31.5.2001, p. 43), under Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13) and under Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusions:

1. By initial application submitted on 4 December 2020 and registered on 7 December 2020, the applicant introduced a request for public access to document ST 13593 2018 INIT dated 25 October 2018. The requested document is an opinion of the Council Legal Service on 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.
2. On 6 January 2021, the General Secretariat of the Council replied to this application granting partial access to paragraphs 1 to 8, with the exception of the second sentence of paragraph 1, of the requested document. Full access has been refused pursuant to the exception laid down in Article 4(2), second indent (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001.
3. On 11 January 2021, the applicant introduced a confirmatory application requesting the Council to reconsider this position.

4. In his confirmatory application, the applicant contends that since the text of the opinion has been leaked in the press through an article published on 25 November 2020, the Council should make publicly available the document in its public register. In addition, whereas the applicant acknowledges that *"two national governments (...) have already formally indicated the lodging of an annulment action against the EU conditionality regulation – which is now known as Regulation 2020/2092"*, he argues that *"there is no longer a risk of litigation"* since *"the two parties litigating the legality of Regulation 2020/2092 are in possession of the full text of document 13593/18"* and the representatives and elected officials from the Polish and Hungarian governments have already relied on document 13593/18 to publicly criticise the legality of the conditionality mechanism. The applicant also underscores that even if the disclosure of the requested document is subject to court proceedings in case T-252/19<sup>1</sup>, the written and oral phase of this procedure has been concluded and the requested document has been made available to the General Court in the context of those proceedings.
5. Furthermore, the applicant contends that the General Secretariat of the Council has not sufficiently demonstrated that it correctly performed the balance of interests test and failed to consider the existence of an overriding public interest in disclosure. In that respect, the applicant points out that the requested document *"has been relied upon by the two governments which are subject to ongoing Article 7(1) TEU procedure (...) in order to prevent the adoption of a regulation which inter alia aims to prevent and sanction breaches of the rule of law"*. Thus, for the applicant, *"there is obvious overriding public interest in disclosing the document which is being used by those undermining the rule of law to the detriment of an informed debate since citizens and their elected representatives lack access to the same document"*.

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<sup>1</sup> Case T-252/19, *Pech v Council* (action brought on 15 April 2019)

The applicant also argues that the requested document has been drawn-up in the context of an ordinary legislative procedure concerning "*a subject matter linked to the EU's foundational values and their potential systemic violation by national governments in breach of their EU membership undertakings and obligations*" and pertains to an instrument essential to prevent breaches of the rule of law which can harm the financial interests of the EU, the importance of which has been underlined by the European Council in particular in its conclusions of 21 July 2021. In that regard, the applicant also points out that, in view of the decision of the Court of Justice in case C-64/16<sup>2</sup> "*the rule of law must be understood, including by the Council, as one of crucial values on which the whole EU legal order is based and without which there cannot inter alia mutual trust between the Member States*". The applicant also claims that, in performing the balance of interests test, the General Secretariat of the Council has not properly considered the obligations stemming from EU primary law and in particular, Article 10 TEU, Article 15 TFEU and Article 42 of the EU Charter of Fundamental Rights. Finally, the applicant contends that the General Secretariat of the Council failed to take into account that Regulation 2020/2092 has been adopted, whereas the requested opinion pertains to the draft regulation as it was initially proposed by the Commission.

6. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in light of the applicant's arguments, whether public access can be provided to the requested document.

## **I. Context of the requested document**

7. Document **ST 13593 2018 INIT** comprises an opinion of the Council Legal Service which analyses 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 (hereinafter the "rule of law conditionality proposal").

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<sup>2</sup> Judgment of the Court of Justice of 27 February 2018 in Case C-64/16 (request for a preliminary ruling from the Supremo Tribunal Administrativo — Portugal — Associação Sindical dos Juizes Portugueses v Tribunal de Contas)

8. The aim of this proposal, adopted by the Commission on 2 May 2018 as a part of the Multiannual Financial Framework 2021-2027 (MFF), was to establish a legal framework for the protection of the financial interests of the Union in accordance with the principles of sound financial management from generalized deficiencies in the Member States as regards the rule of law affecting in particular the proper functioning of public authorities.
9. The European Parliament adopted its first reading position on 4 April 2019. The discussions on the rule of law conditionality proposal within the Council and its preparatory bodies have been arduous and marked by strong divisions among Member States. Several Member States made it clear, including at the highest political level, that their agreement on the MFF – which requires unanimity in the Council and the consent of the European Parliament – and the Next Generation EU would depend on the outcome of discussions on the rule of law conditionality proposal. The divergences and oppositions expressed in the political negotiations within the Council specifically concerned points pertaining to the legality of this proposal.
10. On 30 September 2020, Coreper adopted a mandate for the initiation of interinstitutional discussions with the European Parliament on the draft legislative act<sup>3</sup>. The Council and the European Parliament entered into negotiations in October 2020 with a view to reaching an early second reading agreement. Five round of trilogue negotiations were conducted on this file. The negotiations were successfully concluded on 5 November 2020 with the European Parliament and Council reaching a provisional agreement on a compromise text<sup>4</sup>.
11. Due to persisting difficulties and the broader repercussions for the overall adoption of the MFF and the Next Generation EU, the matter was discussed again in the European Council, which in its conclusions of 10-11 December 2020<sup>5</sup> provided clarifications with a view to finding a mutually satisfactory solution and addressing the concerns expressed with regard to the draft Regulation on a general regime of conditionality for the protection of the Union budget, without prejudice to the rights of Member States under Article 263 TFEU.

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<sup>3</sup> Document ST 11322/20

<sup>4</sup> Document ST 12616/20

<sup>5</sup> Document EUCO 22/20

12. The Council adopted its position at first reading on 14 December 2020<sup>6</sup>. In that respect, Hungary made a statement according to which "*The full implementation in good faith of the European Council conclusions and the related statements by the Commission on the interpretation and application of the regulation on a general regime of conditionality for the protection of the Union budget pertains to Hungary's vital national interests and is a precondition of Hungary's consent to any legislative act related to the multiannual financial framework for the years 2021 to 2027, including Next Generation EU*". Hungary also stated that serious legal concerns remain as to the conformity of the draft Regulation with EU law and that it reserves its right under Article 263 TFEU<sup>7</sup>.
13. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget was adopted on 16 December 2020 and published in the Official Journal on 22 December 2020.

## **II. The exception under Article 4(2) second indent of Regulation (EC) No 1049/2001**

14. The Council has assessed the request for access in full compliance with the primary EU law, the provisions of Regulation No 1049/2001 and the relevant case-law on access to documents, including the principle of the wider access afforded to documents drawn up in the context of legislative activities.
15. Whereas a higher standard of transparency applies when the institutions act in the context of their legislative capacity, this cannot, however, result in denying the institutions the possibility of justifying a refusal to grant access to documents related to a legislative file on the basis of the exceptions set out in Article 4 of Regulation No 1049/2001, given, in particular, that those exceptions do not exclude the legislative process from their scope.

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<sup>6</sup> Document ST 14018/20

<sup>7</sup> Document ST 14020/20

16. Under article 4(2) second indent of Regulation (EC) No 1049/2001 : "*The institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice*". In its leading judgment in the *Turco* case, the Court of Justice confirmed the possibility for an institution to refuse, on that ground, 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<sup>8</sup>. The case-law has also recognised the particularly sensitive nature of legal advice provided by the legal service of an institution and concerning issues that could be the subject of litigation<sup>9</sup>. The Council considers that this exception applies to the present case.
17. The requested document is drawn up by the Council's Legal Service for internal use and relates to aspects of the rule of law conditionality proposal which are particularly contentious and were subject to complex and difficult discussions within the Council and between the institutions.

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<sup>8</sup> See judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, paragraph 69.

<sup>9</sup> See judgment of 15 September 2016, *Herbert Smith Freehills LLP v Council*, T-710/14, paragraphs 70 and 71.

See judgment of 15 September 2016, *Philip Morris Ltd v Commission*, T-796/14, paragraphs 67-70.

See also judgment of 9 June 2010, *Éditions Odile Jacob SAS v. Commission*, T-237/0, paragraph 160. In its judgment, the General Court found that the risk of undermining the protection of legal advice laid down in the second indent of Article 4(2) is reasonably foreseeable and not purely hypothetical when disclosure of the advice would put an institution (in that case, the Commission) in the difficult position where its Legal Service might find itself having to defend a position before the Court which was not as the position it argued for internally in its role as adviser. According to the General Court, "*the risk of such a conflict arising would be liable to have a considerable effect on both the freedom of the Legal Service to express its view and its ability effectively to defend before the judicature of the European Union, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position and the internal decision-making process of that institution. The Commission (...) must have the freedom to defend a legal position which differs from that initially adopted by its Legal Service*". The ruling of the General Court was subsequently upheld by the Court of Justice.

See also, by analogy, order of 14 May 2019, *Hungary v European Parliament*, C- 650/18, EU:C:2019:438, paragraph 16.

18. The risk that, the recently adopted Regulation 2020/2092 will be subject to litigation is far from being abstract or remote. On the contrary the eventuality of litigation is certain as it is shown by a number of factors. It is well known that several Member States have strongly denounced the rule of law conditionality proposal and have openly contested its legality, linking also this discussion to the overall negotiations on the MFF and Next Generation EU. What is more, as widely reported in the press<sup>10</sup>, a number of Member States have openly threatened to bring litigation contesting the legality of Regulation 2020/2092. This is a fact which is not unknown by the applicant that has expressly recognised in the confirmatory application that *"two national governments (...) have already formally indicated the lodging of an annulment action against the EU conditionality regulation (...) which is the subject matter of document 13593/18"*. In addition, even if the adopted mechanism provides for some safeguards, it remains possible that the final beneficiaries of EU funds could see their economic interests affected, which would very likely result in a substantial amount of litigation in front of national and European Courts where the points raised in the opinion will be discussed. The rule of law conditionality Regulation therefore represents one of the most controversial and contested pieces of EU legislation.

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<sup>10</sup> Among abundant publications in the press, reference can be made, as an example, to an article entitled "EU leaders back deal to end budget blockade by Hungary and Poland" published in Politico on 10 December 2020 reporting that : *"In the text of their summit conclusions, leaders asked the European Commission to refrain from implementing the rule-of-law mechanism pending any challenge in the Court of Justice of the European Union. Poland and Hungary confirmed on Thursday they would mount such a challenge"*. In addition, in an article entitled "Hungary will seek to annul rule-of-law conditionality regulation in EU court - minister" published in Reuters on 11 December 2020 the Hungarian Justice Minister Judit Varga is directly cited for stating that : *"No one should have any doubts the Hungarian government will attack this (in EU's court) as we believe there are rule of law problems with the text of the regulation itself, and I am sure the EU court will remedy these"*.

19. Furthermore, the Council points out that not only there is an imminent risk of litigation, but also that the legal issues covered by the opinion will be at the core of the court proceedings contesting the legality of Regulation 2020/2092. The opinion discusses the compatibility of the proposal with Article 7 TEU, the genuine character of the proposed budgetary conditionality, the appropriateness of its legal basis as well as the legality of the procedure for the adoption of measures under the mechanism. The opinion of the Legal Service is frank and comprehensive and the arguments and conclusions developed therein clearly point out certain legal difficulties also revealing which parts of the relevant provisions were most difficult and controversial from a legal perspective. Inevitably, the questions which are analysed in the requested document will form part of the judicial review. Disclosure of legal advice concerning those aspects would negatively affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts on an equal footing with the legal representatives of the other parties to legal proceedings.
20. Insofar as the applicant claims that the parties likely to introduce litigation against Regulation 2020/2092 are in fact Member States that are already fully aware of the content of document 13593/18, it is underlined that one thing is to have knowledge of the legal opinion contained therein, quite another to be able to rely on it in court proceedings. A legal opinion covered by the obligation of professional secrecy may not be used in court in the same way as a document to which the institution from which it emanates has granted public access<sup>11</sup>.

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<sup>11</sup> See judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, paragraph 66 and order of 14 May 2019, *Hungary v European Parliament*, C- 650/18, paragraph 8.



21. As regards the applicant's claim that disclosure of the requested document would not further undermine the ability of the Council to defend its position in court proceedings since the requested document has been made available in the press, the Council points out that this consideration does not constitute a sufficient ground to conclude that this document was officially released by the Council. In fact, this document has not been released to the public in application of Regulation (EC) No 1049/2001 and any leak of its content was unlawful. Accordingly, the Council considers that an unauthorised leak does not prevent the institution from processing applications for public access to documents, as provided for in Articles 7 and following of Regulation (EC) No 1049/2001 and in Annex II to the Council's Rules of Procedure, and should not prejudice this procedure. An opposite approach would have the pernicious effect of encouraging leaks as a way to push institutions to make public the relevant documents and in so doing it would undermine the public interests protected by Regulation (EC) No 1049/2001 and the purpose itself of the Regulation. For the same reason, the Council does not comment on leaks and on whether they correspond to the original content and also takes measures to discourage and put an end to any unauthorised disclosure. In that respect, the Council also highlights that the very first page of the requested document emphasises that the document contains legal advice which has not been made public by the Council and warns against any unauthorised release of its content. In any case, the Council considers that it is unacceptable for leaks to be used as a means to overturn the applicable legal framework on access to documents.
22. It may be added that the legal advice contained in the requested opinion touches upon issues (such as, for instance, the lawfulness of budgetary conditionalities or the recourse to the voting system proposed for the Council's implementing acts) that have a systemic nature and are of a broad scope, that goes beyond the context of the legislative process in question.

23. In light of the above, in this particular case, there is a real risk that full disclosure of the requested opinion would compromise equality of arms in court proceedings and would run counter the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice. 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. Moreover it could deter the members of the Legal Service from expressing opinions on legal issues with the requested clarity in particular as regards files characterised by a high risk of litigation, which in turn, could affect the way in which legal advice is drafted. This could also lead to opting for merely oral advice in such cases, to the detriment of its quality and contribution to the decision-making process.
24. The Council therefore concludes that full disclosure of the requested document would undermine the interests protected pursuant to Article 4(2), second indent, of Regulation No 1049/2001.

### **III. Partial access pursuant to Article 4(6) of Regulation 1049/2001**

25. In its previous decisions, the Council considered that disclosure of certain parts of the requested legal opinion did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to document ST 13593 2018 INIT and notably to paragraphs 1 to 8, with the exception of the second sentence of paragraph 1, which contain an introduction as well as an account of the legal and factual background of the Legal Service's opinion.
26. The Council has now examined whether extended partial access could be granted to the document in question.
27. In light of its examination, the Council concludes that all the parts of the requested document which have not been disclosed in its first reply are covered by the invoked exceptions in their entirety and that no additional partial access can be granted.

### **IV. Assessment of the public interest in disclosure**

28. The Council has thoroughly examined whether there is an overriding public interest in disclosure, taking into account the arguments provided by the applicant and the need to ensure transparency and public participation in the legislative process.
29. In that regard, the Council fully acknowledges the public interest in following the Council's discussions on legislative proposals and having access to documents drafted in the framework of a legislative procedure, as openness contributes to the strengthening of democracy by allowing citizens to scrutinise the choices of the legislators. It is in that view that it has decided to grant partial access to the requested document.

30. However, the Council also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of court proceedings and legal advice. Whereas the applicant correctly points out that the right of access to documents is indeed enshrined in EU primary law, the right of defence and of fair judicial proceedings is also a fundamental value which lies at the very core of the European construction. Thus, the Council is called upon to carefully balance the public interest in having access to the requested document against the need to protect the interests under the exceptions of Regulation 1049/2001, including the interest of an institution to seek advice from its legal counsellors and the protection of equality of arms in view of an imminent litigation risk. In that regard, the Council also recalls the nature and purpose of the requested document, which is a technical legal assessment. The Council is of the view that as regards such documents public scrutiny is relevant but should have a less bearing than as regards documents which contain positions of the political decision-makers, which are, as such, accountable to citizens.
31. The Council also notes that the arguments put forward by the applicant in the confirmatory application are based on general considerations that cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant full access, as developed in paragraphs 17 to 24 above. This is particularly so as regards the applicant's argument related to the subject matter of the legislative act discussed in the requested document, which pertains to a mechanism for the protection of the Union budget in the case of breaches of the principles of the rule of law. This argument is of a very general nature and does not demonstrate how, in view of the specific circumstances of the case at hand and given the extremely high litigation risk, transparency would take precedence over the rights of defence of the Council and its interest in seeking and receiving legal advice from its legal counsellors. Instead, such a general argument amounts to generally depriving the institutions from the possibility of refusing access to a document when it discusses important matters, which is an interpretation that neither results from the wording of the second indent of Article 4 (2) of Regulation 1049/2001, nor from the way this provision is interpreted in the case-law.

32. What is more, the Council considers that the refusal fully to disclose the particular opinion concerned by the access to document request does not amount to denying citizens the possibility to obtain information about the legislative decision-making process in question. Indeed, the legislative act at stake has been discussed on several occasions in the Council's public meetings and an important number of documents containing information relevant to this file is available in the Council's register of public documents. It shall also be stressed that the refusal to grant full access to the requested legal opinion has not prevented the public debate on the legislative act and on the very specific legal issues that are addressed in the opinion, as it is clearly shown by the abundant production of contributions on the topic and the vivacity of the public debate on those issues.
33. In light of the above, the Council concludes, on account of the particularly sensitive nature of the legal advice in question which covers issues that are subject to an imminent risk of litigation, as well as of the need of preserving the equality of arms in court proceedings, that in the specific case at hand, the public interest invoked by the applicant does not outweigh the need to preserve the interests protected under Article 4(2), of Regulation No 1049/2001.

## **V. Conclusion**

34. For the abovementioned reasons, the Council concludes that public access to document ST 13593 2018 INIT, with the exception of paragraphs from 1 to 8 not including the second sentence of paragraph 1, which were already made public, has to be refused pursuant to the second indent of Article 4(2) (protection of court proceedings and legal advice) of Regulation No 1049/2001.
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