

REPLY ADOPTED BY THE COUNCIL ON 11 JUNE 2021
TO CONFIRMATORY APPLICATION 16/c/01/21,
made by email on 29 April 2021,
and registered on the same day,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 15435/04 and 8445/17

The Council has considered the 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) (hereafter referred to as "Regulation (EC) No 1049/2001") and 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 conclusion:

1. On 12 March 2021, the applicant requested access to documents **15435/04** and **8445/17** (together hereafter the "requested documents").
2. Document **15435/04** of 30 November 2004 contains a contribution of the Council Legal Service to the proceedings of the Environment Working Party on the Commission's Proposal for a Regulation of the European Parliament and of the Council on the application of provisions of the Aarhus Convention on Access to information, Public participation in Decision-making and Access to Justice in environmental matters to EC institutions and bodies (COM (2003) 622).
3. Document **8445/17** of 25 April 2017 contains an opinion of the Council Legal Service to the Working Party on International Environment Issues on the findings of the Aarhus Convention Compliance Committee - preparation for the MoP ("Meeting of the Parties") and next steps.

4. On 19 April 2021, the General Secretariat of the Council (GSC) replied to this application granting partial access to documents 15435/04 and 8445/17. In particular, the GSC granted access to paragraphs 1 to 8 of document 15435/04; and paragraphs 1 to 10, with the exception of the two last sentences of paragraph 1, the first part of paragraph 11, paragraph 12, paragraphs 14 to 18 and paragraph 21 of document 8445/17 pursuant to Article 4(6) of Regulation (EC) No. 1049/2001. Access was refused to other parts of the requested documents as the GSC took the view that their disclosure would undermine the decision-making process pursuant to Article 4(3) second indent of Regulation (EC) No 1049/2001, and the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. Additionally, the GSC indicated in its reply that, on balance, the principle of transparency underlying Regulation (EC) No 1049/2001 did not prevail over the abovementioned interests so as to justify the full disclosure of the documents.
5. On 29 April 2021, the applicant made a confirmatory application. First, the applicant argued that the legal advice "*could not be withheld simply because the EU act in question might later be subject to a revision process*", and that this argument was "*too broad and hypothetical*". Second, the applicant claimed that not disclosing the documents "*would seem disproportionate that the Council has not disclosed the Opinion during the following 15 years*". On this point, the applicant added also that "*this practice seems to run counter to Article 12(2) of Regulation 1049/2001*". Third, the applicant argued that the issues analysed in the requested documents were not complex as "*the legal questions involved are well-known and broadly debated in civil society*". Four, the applicant denied that the disclosure of the documents might lead third party to influence or exert pressure on the policy choices to be made by the institutions. Last, the applicant claimed that "*[i]t is difficult to see how a legislative document that relates to access to information and public participation could be sensitive*".
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 documents.

I. Context of the requested documents

7. As mentioned above, **document 15435/04** captures in writing the statement made by the Council Legal Service during the meeting of the Environmental Working Party of 19 November 2004 on the proposal submitted for the adoption of Regulation (EC) No 1367/2006. **Document 8445/17** contains the findings and recommendations of the Aarhus Convention Committee ("ACCC") in Case ACCC/C/2008/32 and analyses the next legal steps forward in light of those findings.
8. On 25 June 1998, the European Community signed the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters ("Aarhus Convention"). The European Community concluded the Aarhus Convention on 17 February 2005.¹
9. 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 ("Regulation (EC) No 1367/2006") entered into force on 28 September 2006 and into application on 28 June 2007. The objective of this regulation is to contribute to the implementation of the obligations arising under Aarhus Convention.²
10. On 17 March 2017, the ACCC adopted its findings and recommendations with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union with the Aarhus Convention.

¹ Council Decision 2005/370/EC (OJ) L 124 17.5.2005, p.1.

² Article 1(1) of Regulation (EC) No 1367/2006.

11. At the sixth session of the ACCC (11-13 September 2017), the meeting of the Parties to the Aarhus Convention decided by consensus to postpone the decision-making on the compliance by the European Union with its obligations under the Aarhus Convention to the next ordinary session of the Meeting of the Parties to be held in 2021.³ The report of the sixth session of the ACCC notes the following: "*The European Union recalled its willingness to continue exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review (....) (the Budva Declaration). [T]he meeting of the Parties requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly*".⁴
12. On 14 October 2020, the European Commission adopted a legislative proposal amending the Regulation (EC) No 1367/2006 to address the findings and recommendation issued by the ACCC in 2017.⁵
13. On 17 December 2020, the Council adopted its General Approach on the Commission's proposal.⁶
14. On 12 February 2021, the ACCC issued its advice on the Commission's proposal.⁷
15. As part of the legislative procedure, on 9 April 2021, the European Economic and Social Committee issued their opinion on the Commission's proposal.⁸

³ ACCC/M/2017/3.

⁴ ACCC/M/2017/3.

⁵ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on amending 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, COM/2020/642 final.

⁶ See publicly available documents on these discussions: ST 11853/20 INIT, ST 13937/20 INIT, ST 14208/20 INIT and ST 14157/20 INIT.

⁷ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3.

⁸ Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council on amending 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 C 123, 9.4.2021, p. 66–71.

17. On 4 May 2021, the Committee on the Environment, Public Health and Food Safety (ENVI Committee) adopted a report on the Commission's proposals proposing several amendments.⁹ A few days later, on 20 May 2021, the Plenary of the European Parliament adopted the report prepared by the ENVI Committee. Informal trilogues on the Commission's proposal will start soon.

II. The exception relating to the institution's decision-making process

18. At the outset, it is recalled that Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 provides that: *"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.
19. Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 provides that: *"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"*.
20. It has been established by case-law that a higher standard of transparency applies when the institutions act in 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 exception set out in Article 4(3) of Regulation (EC) No 1049/2001, given, in particular, that this exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of that provisions, access to a specific document related to a legislative process or parts thereof in duly justified cases.¹⁰

⁹ Report on the proposal for a regulation of the European Parliament and of the Council Amending 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 (COM(2020)0642 – C9-0321/2020 – 2020/0289(COD)).

¹⁰ Judgment of the General Court of 22 March 2018, *Emilio De Capitani, v. European Parliament*, T-540/15, paragraph 67; judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 76; and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 73.

21. The requested documents have been drawn up by the Council Legal Service for the internal use of the Council in the sense of Article 4(3), first and second subparagraph of Regulation (EC) No 1049/2001 and relate to a matter whose decision-making process is still currently ongoing.
22. Document 15435/04 was issued in the context of the legislative procedure leading to the adoption of Regulation (EC) No 1367/2006. However the content of this document goes beyond Regulation (EC) No 1367/2006. The same is true as regards document 8445/17, which was drafted after the ACCC adopted its findings and recommendations on the European Union's compliance with the Aarhus Convention. The line of reasoning reflected on the requested documents is relevant for an ongoing legislative procedure, namely, the legislative proposal amending Regulation (EC) No 1367/2006 which the European Commission adopted on 14 October 2020.
23. As mentioned in the explanatory memorandum of the proposal, its objective is "*to improve the implementation of the Aarhus Convention following the adoption of the Lisbon Treaty and to address the concerns expressed by the Aarhus Convention Compliance Committee regarding the EU's compliance with its internal obligations under the Convention*".
24. The line of reasoning reflected in document 15435/04 is therefore still relevant for the ongoing legislative process initiated by the adoption of the European Commission's legislative proposal amending Regulation (EC) No 1367/2006, as it assesses aspects which are still relevant in the discussion on the Proposal. More particularly, this document is relevant in the context of one of the changes suggested by the European Commission in its 2020 legislative proposal, i.e. the review of the administrative review mechanism created by Regulation (EC) No 1367/2006 to enable NGOs to request review of administrative acts of "general scope".
25. Document 8445/17 is also relevant for the same ongoing legislative procedure. As mentioned above, this document contains an assessment of the findings and the recommendations made by the ACCC on European Union's compliance with the Aarhus convention and the preparation of the next session of the Meeting of the Parties which most likely will take place in 2021. However, the assessment goes beyond the preparation of this meeting; it discusses certain aspects which are at the core of the ongoing reform of Regulation (EC) No 1367/2006, some of which were referred to in the preceding paragraph.

26. As mentioned above, the Commission's proposal to amend Regulation (EC) No 1367/2006 is currently at the stage of informal trilogues. While the Council adopted its General Approach in December 2020,¹¹ the European Parliament has just voted (and approved with no amendments) on the report prepared by the relevant committee in the European Parliament (ENVI Committee).
27. In such context, full disclosure of the requested documents at this stage of the legislative procedure of the amendment of Regulation (EC) No 1367/2006 entails a serious risk of undermining the position of the Council in the informal trilogues, and would limit the necessary margin of manoeuvre in these discussions. This would, in turn, run counter to the efficiency of the ongoing decision-making process. At this point in time, where discussions are taking part in informal trilogues, disclosure of the requested documents would also undermine the mutual trust and confidence that enable the European Parliament, the Council and the Commission to reach an agreement at this stage of the legislative process.
28. Indeed, even if the Council has adopted a General Approach on the text, there are still diverging political positions among its members. In this context, the requested documents, in particular document 8445/17, have been right from the start at the heart of the discussion and are critical to it. The pressure that would ensue from their disclosure would make it more difficult for members of the Council to accept compromise solutions or to pursue certain options and therefore would affect the possibility of reaching a final agreement on the position at the stage of informal trilogues. Moreover, the analysis of the Council Legal Service, which is intended for an internal audience within the Council, is frank and discusses in detail various legal issues. Under these circumstances, full disclosure of the legal advice would make known to the institutional interlocutors involved in the legislative procedure the Council's internal reflections and concerns and would therefore limit its options during interinstitutional exchanges.
29. Therefore, there is a concrete and serious risk that full disclosure of the requested document would have a concrete and substantial negative impact on the Council's decision-making process.

¹¹ Please see publicly available documents on these discussions: ST 11853/20 INIT, ST 13937/20 INIT, ST 14208/20 INIT and ST 14157/20 INIT.

31. Besides, this topic is of a transversal nature as it touches upon issues that may affect the choices that the Commission will make regarding future legislative proposals in the context of the European Green Deal currently in the making. As explained in the Commission Communication "Improving access to justice in environmental matters in the EU and its Member States",¹² the Commission has committed itself in the European Green Deal to revise Regulation (EC) No 1367/2006 and to work with the Member States to improve access to justice in environmental matters at national level. In connection to this, the Commission has identified as a priority area the inclusion of provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters.
32. On this basis, contrary to the applicant's assertion in the confirmatory application, the legal advice contained in documents 15435/04 and 8445/17 addressed certain points which go beyond the matters covered by the current provisions of Regulation (EC) No 1367/2006. Documents 15435/04 and 8445/17 concern the ongoing legislative process to amend Regulation (EC) No 1367/2006, as this legislative process constitutes the continuation of the discussions which started with the entry into force of the Aarhus Convention, the adoption of Regulation (EC) No 1367/2006 and the findings and recommendations issued by the ACCC in 2017.
33. In this context, the disclosure of documents 15435/04 and 8445/17 would specifically and concretely undermine the process initiated by the adoption of the Commission's legislative proposal amending Regulation (EC) No 1367/2006, and this risk is foreseeable and not purely hypothetical.¹³
34. The Applicant in its confirmatory application argues that the "practice" of disclosing document 15435/04 *"during the following 15 years [from the adoption of Regulation (EC) No. 1367/2006] (...) seems to run counter to Article 12(2) of Regulation 1049/2001"*.
35. This article provides that "[i]n particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, **subject to Articles 4 and 9**, be made directly accessible" (emphasis added).

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on Improving access to justice in environmental matters in the EU and its Member States (COM(2020) 643 final).

¹³ Judgment of the General Court of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 29.

36. As the Court stated,¹⁴ whilst documents drawn up or received in the course of procedures for the adoption of acts, which are legally binding in or for the Member States should be made directly accessible, Article 12(2) of Regulation (EC) No 1049/2001 adds, however, that this is so only subject to Articles 4 and 9 of this Regulation. Therefore, the disclosure of such documents should be refused when it falls under the exceptions provided for under Article 4 of Regulation (EC) No 1049/2001.
37. Finally, if the analysis carried out by the Council Legal Service had to be fully disclosed, certain of the arguments developed therein could give rise to external interference. After the Commission presented its proposal amending Regulation (EC) No 1367/2006, several NGOs have actively run campaigns urging the institutions *"to amend EU access to justice law and comply with international law"*¹⁵ and *"to close the loopholes identified [in the Commission proposal] and ensure an internal review mechanism that is finally fit for purpose"*.¹⁶ These NGOs consider that the ongoing revision of the Aarhus Regulation as proposed by the Commission last year is *"still not strong enough to ensure compliance with international law"*.¹⁷ The reality of this external pressure is therefore certain and there is a reasonable risk that the decisions to be taken would be substantially affected as a result of that pressure.
38. For the above reasons, the Council maintains that the disclosure of the documents 8445/17 and 15435/04 would adversely affect deliberations within the Council and would hence undermine the decision-making process pursuant to Article 4(3), first and second subparagraphs, of Regulation (EC) No 1049/2001.

¹⁴ Judgment of the Court of 1 February 2007, *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 41.

¹⁵ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

¹⁶ ClientEarth, "The Aarhus Regulation Amendment: Cause for cautious celebration". Link: <https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-aarhus-regulation-amendment-cause-for-cautious-celebration/>. Also, EEB, ClientEarth and Justice and Environment, "Call to strengthen Commission proposal to amend Aarhus Regulation", link: <https://mk0eeborgicuytuf7e.kinstacdn.com/wp-content/uploads/2020/12/Letter-to-Environmental-Ministers-regarding-the-Commission-s-Aarhus-proposal.pdf>

¹⁷ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

III. The exception relating to the protection of legal advice

39. 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 (...) legal advice*".
40. The requested documents fall within the scope of this provision.
41. The Council recognises that, in the present case, the legal advice relates to a legislative procedure for which a particularly high standard of transparency applies as above-mentioned. In that regard, it has been established in the case-law that an opinion of the Legal Service of a Union institution issued in the context of a legislative process should in principle be disclosed, unless it has a particularly sensitive nature or a particularly wide scope that goes beyond the context of the legislative process in question.¹⁸
42. In the Council's view this condition is met in the present case.
43. First, several issues analysed in the requested documents are both highly controversial. The arguments and conclusions developed in the requested documents explore certain options to implement the legal obligations stemming from the Aarhus Convention, while at the same time suggest possible solutions to meet the identified legal concerns, although they were issued before the Commission adopted the 2020 proposal. This is so, as explained above, because the ongoing legislative process for the amendment of Regulation (EC) No 1367/2006 constitutes the continuation of the discussions which started with the adoption of the Aarhus Convention, the adoption of Regulation (EC) No 1367/2006 and the findings and recommendations issued by the ACCC in 2017.
44. These points are central to the ongoing political debate on the Commission's proposal. As abovementioned, full disclosure of the Council Legal Service opinions at this stage would further diminish the possibility to reach an agreement on the file in a context where, on the one hand, the European Parliament, the Council and the Commission are discussing the proposal on the amendment of Regulation (EC) No 1367/2006 in informal trilogues and the members of the Council have not reached a final position on the Commission's proposal and, furthermore, on the specific legal issues examined in the requested documents.

¹⁸ Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69.

45. Second, the content of the requested documents themselves is particularly sensitive. Document 15435/04 examines the proposal adopted by the Commission on the application of the provisions of the Aarhus Convention to EU institutions and bodies, and its compatibility with primary law. Document 8445/17 assesses the findings and the recommendations of the ACCC.
46. The ACCC concluded that the European Union *"fails to comply with article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Convention, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs"*.¹⁹ Following the adoption of those findings, the Meeting of the Parties decided to postpone the decision-making on the non-compliance of the European Union with the Aarhus Convention to the next ordinary session of the Meeting of the Parties to be held in 2021. As a result of these findings and recommendations, the Commission adopted a proposal to amend Regulation (EC) No 1367/2006.
47. The requested documents examine the obligations under the Aarhus Convention, its current application to EU institutions and bodies via Regulation (EC) No 1367/2006, the findings and recommendations of the ACCC and the Commission's proposal amending Regulation (EC) No 1367/2006. Against this background, the Meeting of the Parties of the Aarhus Convention will most likely meet in 2021 to follow up on the ACCC findings concerning the alleged non-compliance by the EU with its obligations.
48. Thus, the requested documents address an issue which has been raised in a novel and unusual context. It is the first time that the ACCC addressed to the European Union findings and recommendations regarding its compliance with Article 9(3) and (4) of the Aarhus Convention and questions the system of legal remedies provided for by European Union Treaties. Consequently, it is the first time that the Council Legal Service takes a position on the issues discussed in the requested documents, which are similarly not settled in the case-law. Those issues, which concerns EU's system of legal remedies, are of a systemic nature which confers on the legal advice a wide scope going beyond the legislative file in question.

¹⁹ Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, paragraph 122.

50. Third, contrary to the applicant's assertions, the issues discussed in the requested documents are of a complex nature. The requested documents contain an elaborate analysis, including questions relating to primary law, without the assistance of clear and settled case-law from the Court of Justice.
51. Furthermore, another element adding complexity to the matter is the role played by Article 9(3) of the Aarhus Convention, which the ACCC has found that the European Union fails to comply with.²⁰ The Court has held that this article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals²¹ and thus, lacks the clarity and precision required in order to be properly relied on before the EU judicature for assessing the legality of Union legal acts.²² However, even though such article, according to the case-law of the Court of Justice, cannot be used as a parameter for the judicial review of Union acts, the Union has been found to be in a situation of non-compliance by an international body. This situation is unusual to say the least.
52. Fourth, the content of the requested documents is of a transversal nature. In the current system of legal remedies, NGOs cannot directly challenge certain acts but can challenge the outcome of a review procedure under Regulation (EC) No 1367/2006. This issue therefore concerns the system of internal review as established under this regulation in relation to the system of legal remedies as provided for under Article 263 of the Treaty of Functioning of the European Union ("TFEU").²³
53. Given that the Commission's proposal introduces the possibility to request review of administrative acts of "general scope", the same transversal question will be posed in the context of those acts.

²⁰ See paragraph 123 of Findings and Recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union.

²¹ See judgment of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 45; and judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraph 50.

²² See judgment of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5, C-404/12 P and C-405/12 paragraphs 52-53; and judgment of 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4, paragraphs 60 and 61.

²³ See judgment of 12 September 2019, *TestBiotech and others v Commission*, C-82/17 P, EU:C:2019:719, paragraphs 38 to 40; and judgment of 4 April 2019, *ClientEarth v Commission*, T-108/17, EU:T:2019:215, paragraphs 24-31.

55. Last, there is a significant risk that, should the legislative process result in the adoption of a legal act, the legality of the resulting text is challenged before the EU Courts. This is borne out by the fact that a large number of cases have been brought before the Court of Justice in which the compatibility of the current system with the Aarhus Convention has been questioned.²⁴ Also, as shown above, certain environmental NGOs which have challenged the current framework before EU Courts²⁵ have expressed their opposition to the Commission's proposal and urged the institutions "*to amend EU access to justice law and comply with international law*"²⁶ and "*to close the loopholes identified [in the Commission proposal] and ensure an internal review mechanism that is finally fit for purpose*".²⁷
56. On this basis, there is a high likelihood that the envisaged measure, once it has been adopted, will be contested before the EU Courts. In such a case, the legal issues covered by the requested documents will be at the core of the court proceedings. There is therefore a concrete risk that the issues addressed in the requested documents will be subject to litigation.

²⁴ See, among others, order of 14 January 2021, *Sabo and Others v Parliament and Council*, C-297/20 P, EU:C:2021:24; judgment of 3 December 2020, *Région de Bruxelles-Capitale v Commission*, C-352/19 P, EU:C:2020:978; judgment of 14 January 2021, *Stichting Varkens in Nood and Others*, C-826/18, EU:C:2021:7; judgment of 12 September 2019, *TestBioTech and Others v Commission*, C-82/17 P, EU:C:2019:719; judgment of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, C-404/12 P and C-405/12, ECLI:EU:C:2015:5; and judgement of 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4.

²⁵ Judgment of 27 January 2021, *ClientEarth v EIB*, T-9/19, EU:T:2021:42; judgment of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486; judgment of 13 September 2013, *ClientEarth v Commission*, T-111/11, EU:T:2013:482; order of 17 July 2015, *EEB v Commission*, T-685/14, EU:T:2015:560; order of 17 July 2015, *EEB v Commission*, T-565/14, EU:T:2015:559; order of 28 November 2005, *EEB and Others v Commission*, T-94/04, EU:T:2005:425.

²⁶ The Good Lobby, "Aarhus convention - The EU urged to stop violating international rules", Link to the document: <https://www.thegoodlobby.eu/2021/04/14/the-legal-community-urges-the-eu-to-stop-violating-international-rules-on-access-to-justice-in-environmental-matters/>

²⁷ ClientEarth, "The Aarhus Regulation Amendment: Cause for cautious celebration". Link: <https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-aarhus-regulation-amendment-cause-for-cautious-celebration/>. Also, EEB, ClientEarth and Justice and Environment, "Call to strengthen Commission proposal to amend Aarhus Regulation", link: <https://mk0eeborgicuytuf7e.kinstacdn.com/wp-content/uploads/2020/12/Letter-to-Environmental-Ministers-regarding-the-Commission-s-Aarhus-proposal.pdf>.

57. The opinion of the Legal Service contained in those documents is frank and comprehensive and the arguments and conclusions developed therein reveal which parts of the Commission's legislative proposal amending Regulation (EC) No 1367/2006 are most difficult and controversial from a legal perspective. 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. In that regard, the Council also notes that the case-law has 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.²⁸
58. In light of the above, in that particular case, full disclosure of the requested documents would compromise 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 in a preliminary phase of the negotiations of the Commission's proposal may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover it could expose to external pressure the Council Legal Service, which in turn, could affect the way in which legal advice is drafted and hence prejudice the possibility to express views free from external influences. Indeed, disclosure in such context would run counter the ability of the Council Legal Service to continue offering a honest and frank opinion, ultimately undermining the decision-making autonomy of Council.
59. Under the circumstances, the Council concludes that full disclosure of the requested documents would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation (EC) No 1049/2001.

²⁸

See judgment of 15 September 2016, *Herbert Smith Freehills LLP v Council*, T-710/14, EU:T:2016:494, paragraphs 70 and 71. See judgment of 15 September 2016, *Philip Morris Ltd v Commission*, T-796/14, EU:T:2016:483, paragraphs 67-70. See also judgment of 9 June 2010, *Éditions Odile Jacob SAS v. Commission*, T-237/05, EU:T:2010:224, 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.

IV. The exception related to international relations

60. Based on their content, the Council also considers, in addition to the findings of the GSC, that the requested documents come within the remit of the exception of protection of the public interest as regards international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001).
61. At the outset, in accordance to the established case-law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a particular regime as compared to the other exceptions included in Article 4.
62. On the one hand, *"the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*.²⁹
63. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*.³⁰

²⁹ Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32; and judgment of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

³⁰ Ibid and judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and judgment of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

64. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless.³¹
65. In practice, in its answer to a confirmative application, the institution must provide the applicant with plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU's international relations and whether, in the institution's broad discretion in applying the exceptions in Article 4(1) of Regulation (EC) No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical. However, in the description of the document for the purpose of its answer, the institution cannot reveal its content in further detail as doing so may disregard the scope of the interest protected by that provision.³²
66. Having thoroughly examined the content of the requested documents and taking into account the state of play on the matter, the Council considers that access to documents further to the disclosed sections would undermine the protection of international relations pursuant to Article 4(1) of Regulation (EC) No 1049/2001.
67. Indeed, as mentioned above, the Meeting of the Parties decided at the sixth session of the ACCC by consensus to postpone the decision-making on the compliance by the European Union with its international obligations under the Aarhus Convention "*to the next ordinary sessions of the Meeting of the Parties to be held in 2021*". It is expected that this meeting of the contracting parties to that Convention takes place in 2021. On that occasion, the Meeting of the Parties may decide to declare that the European Union has complied (or not) with its obligations under the Aarhus Convention. During this meeting, the Meeting of the Parties will take into account the amendment to Regulation (EC) No 1367/2006 proposed by Commission, among other elements.

³¹ Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.

³² See, to that effect, judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 106; of 7 February 2018, *Access Info Europe v Commission*, T-851/16, T:2018:69, paragraphs 54 and 122, and judgment of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 51 and 113-114.

69. Against this background, the requested documents examine, among other, the obligations under the Aarhus Convention, which constitutes an international agreement whose contracting parties are not limited to the EU Member States. While document 15435/04 assesses the application of the provisions of the Aarhus Convention to EU institutions and bodies, and its compatibility with primary law, document 8445/17 assesses the findings and recommendations made in 2017 by ACCC, acting as international body set up by the Convention, regarding the alleged non-compliance of the EU with the Aarhus Convention and prepares the next Meeting of the Parties in which those findings might be discussed. The disclosure of the requested documents would therefore reveal an assessment of the Council Legal Service confirming or refuting the existence of legally feasible ways for the European Union to address the alleged non-compliance with the Aarhus Convention.
70. As stated above, in this response, the Council cannot reveal the direction recommended by this assessment, as doing so disregards the exception covered by the third indent of Article 4(1) (a) of Regulation (EC) No 1049/2001. However, it is clear that, if the assessment confirms the legal feasibility of solutions that the European Union could implement to address the alleged non-compliance with the Aarhus Convention, disclosure of the requested documents would risk upsetting the discussions in the framework of the Meeting of the Parties that might take place in 2021. This would therefore affect the ability of the EU to defend its position within the international framework set up by that Convention. In that regard, the EU Court³³ has recognized that the release of documents may be refused when its disclosure might weaken the position of the EU within a dispute settlement mechanism like an arbitration but, also, more generally speaking, a review of compliance that may end up in a dispute settlement mechanism.³⁴

³³ See, by analogy, order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 135.

³⁴ Decision I/7 adopted at the first Meeting of the Parties to the Aarhus Convention in 2004 “for the review of compliance by the Parties with their obligations under the Convention.”. Section XII (namely paras. 37) sets out the possible “Consideration by the Meeting of the Parties”: “37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures: (a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention; (b) Make recommendations to the Party concerned; (c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; (d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public; (e) Issue declarations of non-compliance; (f) Issue cautions; (g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; (h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.(emphasis added)”

71. The Council therefore concludes that full disclosure of the requested documents would undermine the protection of international relations pursuant to the third indent of Article 4 (1) (a) of Regulation (EC) No 1049/2001.

V. Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001

72. In accordance with Article 4 (6) of Regulation (EC) No 1049/2001: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*".
73. In its initial decision, the GSC considered that disclosure of certain parts of the requested documents did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to documents 15435/04 and 8445/17 and notably to paragraphs 1 to 8 of document 15435/04 and paragraphs 1 to 10, with the exception of the two last sentences of paragraph 1, the first part of paragraph 11, paragraph 12, paragraphs 14 to 18 and paragraph 21 of document 8445/17.
74. The Council has now examined whether extended partial access could be granted to the document in question.
75. In light of its examination, the Council concludes that some parts of document 8445/17 which have not been disclosed in its first reply, albeit the fact that they provide legal advice, could now be released. These parts are paragraphs 22-25 and subparagraph (1) of paragraph 44 of document 8445/17. In this assessment, the Council has specifically taken into consideration the developments of the debates of the Council's preparatory bodies on the proposal.
76. Therefore, the Council has concluded that additional partial access can be granted to paragraphs 22-25 and subparagraph (1) of paragraph 44 of document 8445/17.

VI. Assessment of the public interest in disclosure

78. As abovementioned, Article 4(1) of Regulation (EC) No 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public's interest in disclosure. On the contrary, once the Council has come to the conclusion that release would indeed undermine the public interests protected pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, this conclusion is not conditioned by any obligation – or even possibility – to take into account "*an overriding public interest in disclosure*" as is the case for Article 4(2) and (3) of the Regulation.
79. In that regard, as far as the refusal is also based on the exceptions laid down in Article 4(2), second indent (protection of legal advice), and Article 4(3), first and second subparagraphs (protection of decision-making process) of the Regulation (EC) No 1049/2001 and for the sake of completeness, the Council fully acknowledges the public interest in following the Council's discussions on legislative proposals and having access to documents related to a legislative procedure, as openness contributes to the strengthening of democracy by allowing citizens to scrutinise the choices of the legislators. It is with that in mind that it has decided to grant an extended partial access to one of the requested documents.
80. However, the Council also considers that the interest in a public debate on legislative proposals cannot automatically override the protection of the efficiency of the decision-making process and legal advice. 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 (EC) No 1049/2001, including the interest of an institution to protect the autonomy of its decision-making, to seek advice from its legal counsellors and to preserve the equality of arms in view of a reasonably foreseeable litigation risk. In that regard, the Council also recalls the nature and purpose of the requested document, which is a technical legal assessment and does not contain positions of political decision-makers.

81. The Council also notes that the arguments put forward by the applicant in the confirmatory application are based on general considerations that do not 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 above. This is particularly so as regards the applicant's argument that "*the possibility of third parties to influence policy choices is a fundamental aspect of democratic debate in any society governed by the rule of law*". This argument is of a very general nature and does not demonstrate how transparency would take precedence over the reasons invoked by the Council to refuse disclosure which pertain to the specific circumstances of the case at hand. In fact, should such a broad argument be considered sufficient, it would amount to generally depriving the institutions of the possibility of refusing access to a document when it discusses important matters. This goes against the wording of the second indent of Article 4 (2) and Article 4(3) first and second subparagraphs of Regulation (EC) No 1049/2001 and the way these provisions are interpreted in the case-law.
82. What is more, the Council considers that the refusal to fully disclose the particular opinions concerned by the request does not amount to denying citizens the possibility to obtain information about the legislative decision-making process in question. Indeed, a large number of documents containing information relevant to this file is available in the Council's register of public documents. It should also be stressed that the refusal to grant full access to the requested legal opinions has not prevented public debate on the Commission's legislative proposal, as it is clearly shown by the abundant contributions and the lively public debate on the topic.
83. In light of the above, the Council concludes, on account of the particularly sensitive nature of the legal advice as well as of the need of preserving the effectiveness of the ongoing decision-making described above, 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), second indent and 4(3) first and second subparagraphs of Regulation (EC) No 1049/2001.

VI. CONCLUSION

84. For the abovementioned reasons, the Council concludes that:

- further to the paragraphs that have already been disclosed, public access is granted to paragraphs 22-25 and subparagraph (1) of paragraph 44 of **document 8445/17**.
 - refusal to give public access to the remaining parts of **document 15435/04** and **document 8445/17** is confirmed pursuant to the second indent of Article 4(2) (protection of legal advice), Article 4(3), first and second subparagraphs (protection of the decision-making process) and Article 4(1) (a) third indent (protection of international relations) of Regulation (EC) No 1049/2001.
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