



Council of the European Union
General Secretariat

Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 7 March 2023

Ms Clothilde Goujard

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Ref. 23/0288 and 23/0289-mw/ns

Request made on: 30.01.2023

Deadline extension: 20.02.2023

Dear Ms Goujard,

Thank you for your request for access to documents of the Council of the European Union.¹

Please note that we are responding to both of your requests, registered under the references 23/0288 and 23/0289, as they concern the same documents, to which should be added document WK 4366/2022.

You request access to “All working papers and other documents containing positions, comments and text proposals of member states on the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence (2022/0066(COD) between September 1, 2022 and January 30, 2023. This shall include, but is not limited to, tables with comments and drafting suggestions by member states.”

We have identified the following documents as falling in the scope of your requests:
ST 14277/22, WK17827/2022, WK 1034/2023, WK 1062/2023, WK 1062/2023 REV1 and WK 4366/2022.

Please find attached document WK 4366/2022.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

I regret to inform you that access to documents ST 14277/22, WK17827/2022, WK 1034/2023, WK 1062/2023 and WK 1062/2023 REV1 cannot be given for the reasons set out below.

Document ST 14277/22 contains an opinion of the Council Legal Service (CLS) which was issued on 31 October 2022, in the context of by the Council preparatory bodies of the Commission's proposal.

In the requested document, the CLS examines a wide range of key issues, concerning notably the appropriateness of the legal basis, the scope of Article 83 TFEU as well as the compatibility of the proposal with the principle of non-discrimination.

From the outset, it should be noted that the requested document contains sensitive legal advice. Indeed, the CLS advice directly relates to the legality of several important provisions of the directive, furthermore, it also contains elements of analysis which are broad and go beyond the scope of the procedure in the context of which it was issued, since the requested document also relate more generally to the scope of Article 83 TFEU.

In the same vein, the issues addressed in the requested document are highly contentious and of critical importance for the Proposal. Indeed, since the issues in question concern the field of criminal law and victims' rights, as well as matters with high political relevance in the Member States, the General Secretariat of the Council (GSC) takes the view that the risk risks of litigation in this dossier is very high. Should this risk materialize, full disclosure of the legal advice, which specifically addresses issues that would come under the Union's jurisdiction scrutiny, would undoubtedly undermine the ability of the Council's to effectively defend itself in such proceedings.

Therefore, full disclosure of the requested document would risk undermining the Council's ability to receive frank, objective and comprehensive legal advice from its Legal Service. Indeed, 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 characterized by a high risk of litigation, which in turn, could affect the way in which legal advice is drafted.

For the reasons sets out above, full access to the requested document is refused on the ground of Article 4(2) second indent of Regulation (EC) No 1049/2001 (protection of legal advice and court proceedings).

In addition, it should be noted that the requested document was issued in the context of a procedure which is still ongoing. In light of the reasons sets out above, the overall political sensitivity of the dossier and of the issues touched upon in the requested document, full disclosure would undermine the ability of the Council to reach a compromise on this file. Consequently, full access to the requested document must also be refused on the ground of Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

As regards the existence of an overriding public interest in disclosing the requested document in relation to the protection of legal advice and the decision-making process under Article 4(2) and (3) of Regulation (EC) No 1049/2001 respectively, the GSC considers that, in any case, on balance, the principle of transparency which underlies that Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the requested document

In the view of the foregoing, full access to document ST 14277/22 is refused on the grounds of Article 4(2) second indent (protection of legal advice and court proceedings) and Article 4(3) first subparagraph (protection of an ongoing decision-making process) of Regulation (EC) No 1049/2001.

However, the GSC has decided, in accordance with Article 4(6) of Regulation (EC) No 1049/2001 to grant you partial access to the first paragraph of document ST 14277/22.

Document WK 17827/2022 of 21 December 2022 is a note from the Presidency to Delegations. It contains a proposal from the Presidency for a redraft of Articles 1-15 of the proposal.

Document WK 1034/2023 of 24 January 2023 is a note from the Presidency to Delegations. It contains a proposal from the Presidency for a redraft of Articles 1-15 of the proposal.

Document WK 1062/2023 of 25 January 2023 and WK 1062/2023 REV1 of 26 January 2023 are notes from the General Secretariat of the Council to Delegations. They contain comments submitted by Member States following the COPEN meeting on 13 January 2023.

These documents are issued in the context of a procedure which is still ongoing, as said above. The competent Council Working Party (COPEN) is currently in the middle of an ongoing decision-making process and delegations are in the process of adjusting their initial positions at technical level on this proposal.

The requested documents cover issues of criminal law which, at EU level, have never been discussed previously, and are thus novel, particularly in an area of law which has seen limited adoption of common rules and thus with very divergent national criminal law systems, approaches and cultures.

The text is particularly sensitive and complex for delegations, both from a political and a legal point of view. This was clearly shown by the fact that 8 months have been required to complete the first reading, due to the high number of comments and requests of amendments, but also the many questions that have been raised by delegations.

Moreover, disclosure of the documents which are being considered – in particular those issued from December 2022 – at this stage of the discussions would damage the mutual confidence which governs the work of the Council working groups. It would create a serious risk of a strong and negative impact on negotiations, including in terms of their pace, as the plan of the Presidency is to reach a general approach by June this year, in order to be able to start negotiations with the European Parliament as soon as possible. This also having regard to the perspective of the future negotiations with the European Parliament, which are expected to be difficult and complex.

Full disclosure to the public of the Council's compromise proposals and comments contained in the requested documents at this stage would therefore affect the negotiating process. Full disclosure of the documents would therefore seriously undermine the decision-making process of the Council.

As a consequence, access to documents WK 17827/2022, WK 1034/2023, WK 1062/2023 and WK 1062/2023 REV1 cannot be given on the grounds of Article 4(3) first subparagraph (protection of an ongoing decision-making process) of Regulation (EC) No 1049/2001.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance, the General Secretariat could not identify any evidence suggesting an overriding public interest in full disclosure of the documents in question.

We have also looked into the possibility of releasing parts of the documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access at this stage.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosures