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Ref. 09/0333-mi/cf/jj

Council of the European Union
General Secretariat
Rue de la Loi, 175
B-1048 Brussels

Dear Sir,

Thank you for your reply in which the General Secretariat of the Council of the European Union only grants partial access to the content of documents 5671/09, 5671/09 ADD1, 5671/09 COR 1.

Under Art. 7(2) of the Regulation, I hereby submit a **confirmatory application** for the Council to review its position. I hereby give my consent for my confirmatory application to be made fully public in the Council's Register of documents.

The refusal to grant full access to the documents I requested pursuant to Article 4 (3) first subparagraph and Article 4 (2) second indent of the Regulation 1049/2001 is unlawful and unjustifiable.

Section 1. Regarding Documents 5671/09 and 5671/09 COR 1:

First, as the European Court of Justice ruled in the Turco case (joined cases C-39/05 P and C-52/05 P) *"**openness** (…) enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly **of particular relevance where the Council is acting in its legislative capacity**, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases."* If openness is of particular significance in the EU legislative process, it is even more important when this process[1] is to modify a Regulation that deals directly with transparency and openness of European institutions, as the Regulation 1049/2001 does.

Second, as the European Court of Justice ruled in the above-mentioned case, "*if the Council decides to refuse access to a document which it has been asked to disclose* [or to give partial access, as in this case], *it must explain, first, how access to that document could specifically and effectively undermine the*

[1] In this case it is the legislative process for the adoption of the Proposal for a Regulation of the European Parliament and of the Council regarding public Access to European Parliament, council and Commission documents (recast).

interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned." However, in the answer to my request sent by the General Secretariat:

a) There is no explanation about how full access to Documents 5671/09 and 5671/09 COR 1 could **specifically** and **effectively undermine the decision-making process**. General arguments to refuse access are not valid, according to the European Court of Justice. Arguments have to be specific: how is access to the content of a particular document specifically and effectively going to damage the decision-making process?

   It is highly questionable whether disclosing the names of delegations which proposed amendments to the Regulation 1049/2001 in the Working Party on Information would affect the decision-making process in this specific case. The General Secretariat in its letter of 2 March 2009 (Ref. 09/0333-mi/cf/jj) has not demonstrated this, nor how disclosure of this information would "seriously" affect the decision-making process, both of which are required by Regulation 1049/2001 and also by the European Court of Justice.

   The Council has frequently used the same arguments as those in its letter, even using the same sentences, when an applicant has requested access to documents of Committees and Working Parties and the Council did not wish to grant full or partial access (see, for example, its answer to the document request (08/1819-jp/jj) filed by Professor Remien or its answer to a previous request I filed (08/2152-jt-cb). It appears that damage to the decision-making process is the Council´s "joker" argument to prevent citizens from getting access to its discussions, which is even more serious when dealing with information on the legislative process.

b) The General Secretariat considers that protection of the institution´s decision-making process outweighs the possible public interest in identifying the delegations whose positions are set out in the document requested. It states that "*it is essential that delegations are able to express their views freely so that the Council can find compromise solutions and achieve progress on delicate questions*" and that "*disclosure*" of delegations´ names "*would jeopardize this process, since it could seriously narrow delegations´ room for maneuver to review their positions in the light of arguments put forward during discussion*." (Identical arguments were given by the General Secretariat in its answer to a previous request I filed – 08/2152-jt-cb)

   It should be noted that working parties do the preparatory work for the Permanent Representative Committee which in turn prepares the work for the Council. Both the Council and working parties consist of representatives of each Member State whose opinions and amendments to proposals inform and define the final position that the Council takes in every legislative process. Representatives of each Member States in working parties are chosen by

governments who have been democratically elected by European people according to election manifestos and their commitments to taking certain positions on important issues. Consequently, according to democratic principles, European governments are obliged to give explanations on their positions to their own citizens in order to maintain full accountability. In addition to acting on behalf of their States, representatives of Member States within the Council of the European Union are also active members/agents of a European institution which, in turn, should be accountable to all European citizens. The public therefore has a right to know what position all Member State delegations are taking, via the mechanism of Regulation 1049/2001.

Whilst it may be that the information on the positions that national governments take would be available at the national level, including through political statements and via requests filed under national access to information laws, it is unreasonable to expect European citizens to ask the 27 Member States individually what their position is on every subject being debated at the EU level. The burden that this would place on the citizen is a significant barrier to citizen participation. Debate about European Union issues has to take place in a European agora, not only at national level; and there can be proper debate only if every European institution is open and transparent about each Member State's position on a subject, especially in discussions during the legislative process. At the European level Member States are not only operating as sovereign states but also as members of the European Union, a supranational entity, which cannot be used by States to escape their democratic obligation of explaining their positions to their electorate. All messages conveyed by European institutions about a transparent and open Europe fail when these very institutions refuse to give information about the specific positions taken by each Member State during the decision-making process.

The arguments given in the refusal by the General Secretariat to make public the names of each delegation equate to an assertion that European citizens do not have a right to hold their governments accountable for the positions taken, compromises made, and political trading on issues of significant public importance within the Council, such as the right of access to European Union documents. This is not acceptable in a democratic entity such as the European Union.

Any European citizen who wants to have a voice and to participate in the legislative processes that would affect his/her life in the future has the right to know not only what his/her national Government has proposed but also what other countries have proposed. This is the only way to get an informed opinion on European issues, and is a necessary basis for any potential citizen-involvement in and contribution to Europe.

If during discussions on a matter one country is convinced by other country´s arguments it must be willing to defend why its position has changed. Countries must not be afraid of explaining their actions to citizens, of being held accountable. On the contrary, countries must give reasons for their initial positions on a subject and for any "about face" adjustments during discussions. Explanations on views and opinions during the legislative process do not "*narrow delegations' room for maneuver to review their positions in the light of* [others] *arguments*" but are the very

basis of democracy. It is therefore an unproven assumption that secrecy is necessary for effective decision-making. Indeed, at national level citizens know political parties' positions during the legislative process. The European Union structure should not be used to deviate from democratic principles.

Third, as the European Court of Justice ruled in the Turco case: "*Openness (…) contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights*." The reference to "all the information which has formed the basis of a legislative act" means not only what amendments were proposed during discussion but also who specifically made the proposals. This is the only way for European citizens to hold their Governments accountable on their views, opinions and positions on specific matters. This is even more important during the legislative process. The General Secretariat´s answer in its letter of 17 December 2008 infringes this principle.

None of the arguments given by the General Secretariat of the Council of the European Union reasonably explained: a) why disclosure of delegations´ names in association with their proposals and positions would seriously undermine the Council´s decision-making process in this particular case; and b) why, according to the General Secretariat, there is not an overriding public interest that might nevertheless justify disclosure of the document concerned.

Section 2. Regarding Document 5671/09 ADD 1:

The General Secretariat refuses to give full access to the Doc 5671/09 ADD 1 because the disclosure of the legal opinion contained in it would prejudice the protection of legal advice under Article 4 (2) second indent and the institution´s ongoing decision-making process under Article 4 (3) first paragraph of Regulation 1049/2001.

First, regarding the prejudice to the protection of legal advice (Art. 4 (2) second indent Regulation 1049/2001:

The Document 5671/09 ADD 1 contains an opinion of the Legal Service of the Council that relates to a legislative procedure.

The Council Legal Service was invited to several meetings of the Working Party on Information on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) to offer an opinion on a number of issues, including the impact of the judgement of the Court of Justice of 1 July 2008 in Joined Cases C-39/05 P and C-52/05 P on the Council´s practice (the "Turco Case"). This famous judgement deals with precisely the same issue that is addressed here: access to an opinion from the Council Legal Service. In the Turco judgement the ECJ clearly stated the requirements for the proper application of the exception of legal advice of article 4 (3) of Regulation 1049/2001 by the European Union institutions. This

judgement has important implications for the Council´s practice and the Council is legally bound to comply with the decision in all similar cases. However, the answer to my request of Document 5671/09 ADD 1 fails to respect the ECJ ruling in the Turco Case, and the arguments given by the General Secretariat to refuse access to the legal opinion fail to comply with the jurisprudence of the ECJ in the following ways:

1.- Duty to explain how the disclosure of the legal opinion would undermine the protection of an institution´s interest: According to the Turco Case, the Council should have explained how the disclosure of the legal opinion would undermine the protection of the Council's interest in seeking legal advice and receiving frank, objective and comprehensive advice (para.40 to 43). The ECJ made clear that "*the risk of that interest being undermined must, in order to be capable of being relied on, be **reasonably foreseeable and not purely hypothetical***".

However, the reason given by the General Secretariat is absolutely hypothetical. The General Secretariat argues that: "*If the legal advice were made public, it could lead the Council to take into account the risk of a possible disclosure in the future and decide not to request written opinions from its Legal Service. This would prejudice the Council´s ability, in general, to carry out its tasks, by depriving it of an important instrument which ensures the compatibility of its acts with Community law and hence it would undermine the Council´s interest in requesting and receiving frank, objective and comprehensive legal advice*."

Furthermore, the current practice of the Council of European Union itself, since the Turco decision was released, contradicts this hypothetical argument. As a result of the Turco case the Council´s refusal to give the requested legal opinion was annulled. Nevertheless, the ECJ decision in the Turco case did not lead the Council to decide not to request written opinion from its legal Service anymore. On the contrary, after that ECJ decision the Council has requested opinions to the Legal Services on multiple occasions, as it did in this case. The obligation that resulted from the Turco case to release legal opinions in legislative processes has not stopped or dissuaded the Council from continuing to requesting such opinions from its Legal Service in order to ensure the compatibility of its acts with Community Law.

2.- Duty to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined. According to the ECJ in the Turco case "*such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act*".

Even if the reasons given by the General Secretariat to explain how the disclosure of the legal opinion would undermine the Council´s interest were sufficient and reasonable, the General Secretariat has an additional obligation to ascertain if there is an overriding public interest and, if

there is, the document should be released in spite of potential damage to the Council´s interests. In this case it is clear that there is an overriding public interest because the documents relates to a legislative process. As the ECJ said: "*Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*." The opinion of the Legal Service contained in Document 5671/09 was provided in the context of a legislative initiative for the adoption of the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. If the ECJ finding in the Turco Case is of particular significance in the EU legislative process, it is even more relevant when this process is linked to a legislative proposal that deals directly with transparency and openness of European institutions.

3.- Duty to give detailed statement of reasons for a refusal even if there is an overriding public interest when the information is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process in question:

It is true that the ECJ also said in the Turco case "*that finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question*." But it is also true that the ECJ expressly stated:*"In such a case, it is incumbent on the institution concerned to* ***give a detailed statement of reasons for such a refusal****."* It is not enough to say that the legal opinion "*is of a particular sensitive nature, since it analyses three delicate issues raised within the context of the Council´s examination of the Commission proposal",* as the General Secretariat of the Council of the European Union said in its letter dated 2 March 2009. The Council has failed to explain why these three issues are delicate or why the legal opinion about them is of a particularly sensitive nature and has to be kept secret in the legislative process.

Moreover, one of these so-called "delicate" issues is exactly the impact of the Turco Case in the Council´s practice. It is ironic that the Council considers to be "delicate" the opinion of its Legal Service on a specific ECJ judgment which stated that openness and citizen participation in the decision making process is of particular relevance where the Council is acting in its legislative capacity, which affirmed that there is an overriding public interest in disclosing legal opinions in legislative process, and which annulled the Council´s decision to refuse to provide a legal opinion. In this case it is even more important for European citizens to get access to this legal opinion in particular because its content will be the basis for the Council´s decision on its future practice and might influence the Council´s position on a new system for access to legal opinions in the legislative process. European citizens have the right to know how ECJ decisions are interpreted and, potentially, being deprived of meaning by other European institutions. The right to know how ECJ decisions are being interpreted is particularly strong when they impact upon legislative initiatives and even more so legislative initiatives about transparency.

Second, regarding the prejudice to the protection of the Council´s ongoing decision-making process under Article 4 (3) first subparagraph of Regulation 1049/2001:

The General Secretariat of the Council of the European Union argues that ""*the disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the legality of the proposed act and would compromise the conclusion of an agreement on the dossier*". This argument is of the same nature as the arguments given to refuse full access to Documents 5671/09 and 5671/09 COR 1. Moreover, the General Secretariat failed similarly to fulfil the requirements of Regulation 1049/2001 to refuse access. So, all the legal arguments given in Section 1 of this confirmatory application are equally applicable here. In order to avoid repetition, I will only highlight some specific considerations:

1. There is no justification in the General Secretariat´s letter about how full access to Documents 5671/09 ADD 1 could **specifically** and **effectively undermine the decision-making process**. Arguments have to be specific: how is access to the specific legal opinion included in this particular document specifically and effectively going to damage the decision-making process? It is highly questionable that disclosure of legal opinion would adversely affect the efficiency of negotiations by impeding internal discussions and would compromise the conclusion of an agreement on the dossier. How would disclosure have all these effects? This is a general statement of General Secretariat which is not accompanied of any serious evidence which could justify it.
2. Even if it were considered that disclosure would undermine the decision making process, the Council should have ascertained whether there is an overriding public interest and should have explained why the public interest in getting access to the legal opinion does not override the protection of decision-making process. None of these things have been done by the General Secretariat, even though the Turco decision emphasises that there is an overriding public interest in getting access to documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives, as is explained above..
3. Openness means allowing citizens to scrutinise all the information which has formed the basis of a legislative act. Citizens have the right to know all the considerations underpinning legislative action, for effective participation in democracy, as the ECJ made clear in the Turco case. Opinions from European Institutions´ Legal Services inform institutions´ positions and are highly influential on institutions´ decisions in legislative processes. Legal opinions are among the most significant documents in the legislative process, and therefore, they should be accessible to and known by citizens.

For all these reasons, I request that my confirmatory application be given due consideration and that full access to the requested documents be granted.

Yours faithfully,

Eva Moraga