

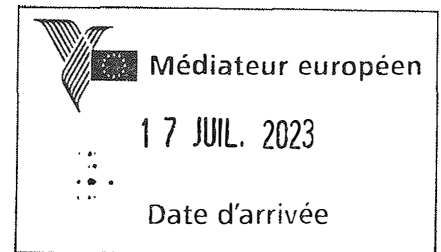
Council of the European Union

The President

Brussels,

10. 07. 2023

LT 118/23



Ms Emily O'REILLY
 The European Ombudsman
 Avenue du Président Robert Schuman, 1
 CS 30403
 67001 STRASBOURG Cedex
 FRANCE

Subject: Your letters of 4 April and 15 May 2023 concerning the complaint 1834/2022/NH – Recommendation

Madam,

Thank you for the letters from your services dated 4 April and 15 May 2023 regarding complaint 1834/2022/NH pertaining to the Council of the European Union's ("Council") refusal to give full access to an opinion of the Council Legal Service on the Proposal for a Directive on adequate minimum wages in the European Union ("the requested opinion").

In the first letter, you recommended that the Council should grant full public access to the requested opinion. In the second letter, you indicated that a Member State had, during your inquiry, brought an action for annulment of Directive (EU) 2022/2041¹ before the Court of Justice of the European Union (Case C-19/23), and that consequently the statement contained under footnote 20 of your recommendation should be disregarded. The Council notes that you have indicated that you were, nevertheless, maintaining the conclusions of your recommendation.

On 27 May 2021, the Council refused to grant full access to the requested opinion in its response to the confirmatory application submitted by the complainant. At the time, the Council had based its refusal on the protection of ongoing decision-making process as well as the protection of legal advice (Article 4(3), first subparagraph, and Article 4(2), second indent, of Regulation (EC) No 1049/2001, respectively).

¹ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275, 25.10.2022, p. 33–47 ("Directive (EU) 2022/2041").

As explained in the response to the confirmatory application, concerning the ground for refusal for the protection of ongoing decision-making process, at the time, the preparatory bodies of the Council had just started debating the Proposal that had only been recently presented by the European Commission. The Council underlined that full disclosure of the requested opinion at a premature stage, in the context of a dossier of great complexity involving a wide range of stakeholders at the national level, would be liable to entrench delegation's positions and seriously undermine the ability of the institution to reach an agreement on this file. Furthermore, if the Council was able to reach an agreement, the full disclosure of the requested opinion would have undermined the Council's position in the following inter-institutional negotiations as it would have disclosed its internal reflections and concerns to its institutional interlocutors. For these reasons, the Council had concluded that full disclosure of the requested opinion would be liable to seriously undermine this ongoing decision-making process.

Concerning the ground for refusal related to the protection of legal advice, the Council had indicated that it was the first time that its legal service had to take position on certain key issues addressed in the requested opinion, which have not yet been settled by the Union courts, and which were highly controversial and critical for the examination of the Proposal. Furthermore, the Council considered that the legal analysis contained in the requested document clearly pointed out to certain legal difficulties associated with the Proposal and addressed legal issues which were novel and unusual. Therefore, the legal advice was considered particularly sensitive in the context of the, then, ongoing discussions. In addition, the Council considered that the nature of the issues addressed was systemic which conferred to the legal advice a wide scope going beyond the legislative file in question. Finally, the Council had indicated that the risk of litigation associated with this file was important. In this regard, and as pointed out in your second letter, this risk has indeed materialised since the adoption of the reply. For these reasons, the Council had concluded that full disclosure of the requested opinion would undermine the protection of legal advice.

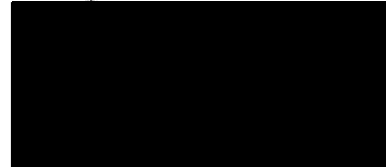
Nevertheless, the Council had decided, in line with Article 4(6) of Regulation (EC) No 1049/2001 and taking into account the increased public interest in transparency for documents that relate to a legislative process, to grant extended partial access to the requested opinion to the complainant.

Since then, following complex discussions within the Council and negotiations with the European Parliament, the Union legislator adopted Directive 2022/2041. As a result of this change of circumstances, the Council considers that the grounds put forward in the response to the complainant's confirmatory application no longer justify a partial refusal to the disclosure of the requested opinion. In this regard, the Council also took into account the recent judgment of the Court of Justice of the European Union of 8 June 2023 in Case C-408/21P (*Pech v. Council*).

Nonetheless, the fact remains that Case C-19/23, in which the validity of Directive 2022/2041 is being challenged, is currently pending before the Court. In this context, the Council has examined whether the full disclosure of the requested opinion would compromise the equality of arms in the context of these proceedings. However, upon careful examination, the Council has reached the conclusion that, taking into account the relevant pleas raised in Case C-19/23, full disclosure of the requested opinion would not be liable to undermine the ability of the Council to defend the validity of Directive 2022/2041 in these proceedings.

To conclude, in accordance with your recommendation and in light of the above-mentioned considerations, the **Council has decided to grant full access to the requested document to the complainant.** This approach illustrates the Council's commitment and willingness to follow a fair and balanced case by case approach, in line with Regulation (EC) No 1049/2001, ensuring a high level of transparency enabling citizens' participation in legislative procedures without undermining the interests that the exceptions of Article 4 of that Regulation intend to protect.

Yours faithfully,



P. NAVARRO RÍOS

Enclosures: ST 6817/21 (en)