Confirmatory application

On 20 March, European Democracy Consulting was notified of the European Parliament's decision to deny its application seeking public access to a note from the Secretary-General on the final reports on the funding of European political parties and foundations, for the financial year 2021 (PE 741.042/BUR and annexes). This application was registered as request 2023-0104.

European Democracy Consulting hereby lodges a confirmatory application in order to be granted access to this document in full.

The European Parliament based its rejection on three grounds: the protection of the purpose of audits, the protection of the institution's ongoing decision-making processes, and the protection of legal advice.

The last two grounds are identical to those used by the European Parliament to deny full access to several documents requested by European Democracy Consulting in its requests 2022-542, 2022-824, 2022-1366, 2022-1444, and 2022-1477.

European Democracy Consulting is therefore challenging the reasoning used by the European Parliament in all of these requests, and asks that all related documents be made available in full.

The protection of the institution's ongoing decision-making processes

Position of the European Parliament

For request 2023-0104, as noted by the European Parliament, "the requested document is drawn up for internal use of the Institution [and] the requested document and its annexes form part of an administrative procedure for the granting of the funding of political parties, which has not been finalised yet." This also applies to the requested document of request 2022-1477.

However, this does not apply to the documents requested in requests 2022-542, 2022-824, 2022-1366, and 2022-1444. For these requests, the documents not provided in full were no longer part of a process that had not been finalised, but were within the period during which documents related to budget implementation must be retained – that is, according to the footnote used by the European Parliament quoting Regulation (EU, Euratom) 2018/1046 (the "Financial Regulation"), five years after discharge.[1]

In its reply to request 2023-0104, the Parliament argues that "if the suggested allocations for the funding of political parties and foundations were disclosed when the amounts to be granted can still

1 "Five years after discharge, see article 75 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union […] OJL 193, 30.7.2018, p. 1."

be challenged, the applicants would feel pressured to amend their submissions in order to obtain more favourable amounts. This would make challenges to the suggested allocation much more likely, significantly delaying the procedure and jeopardising the fair allocation of public money in support of public participation in European democracy."

Likewise, for request 2022-1477, the European Parliament had argued that disclosing the suggested funding allocations "could create pressure on the applicants to take much stronger positions with regard to the funding which it is suggested to allocate to them", which "would make challenges to the suggested distribution much more likely".

Similarly, for all four previous requests, the European Parliament had argued that, if appraisals were disclosed during the five-year retention period, "the decisions taken by the Bureau in view of such opinions could be criticised or challenged, creating undue pressure on future decisions".

Position of European Democracy Consulting

European Democracy Consulting believes that it precisely transparency, flowing from the availability of information before decisions are finalised, that provides a basis for public participation in European democracy. To only release information once decisions are finalised is to willingly prevent even the possibility of discussion beyond institutional actors.

This is reflected in paragraph 59 of the Judgment of the Court of Justice of 1 July 2008, *Sweden & Turco v Council of the European Union*, which states that:

> "it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole."

Additionally, the European Parliament's fear that providing figures before processes are finalised or providing appraisals before retention periods are over is addressed in paragraphs 62 through 64 of the same judgment:

> "it must be pointed out that that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. As is apparent from paragraph 42 of this judgment, that exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice." (par. 62)
>
> "However, in that regard, the Council relied […] on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined." (par. 63)
>
> "As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service

> were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it." (par. 64)

Therefore, the European Parliament's view that providing figures or appraisals could create undue pressure is not sufficient to justify the refusal to disclose this information.

Likewise, not only is the argument that releasing figures before the end of an administrative process could lead applicants to more strongly defend the funding they believe they are entitled to only a hypothetical one, but it is also merely a part of this administrative process and cannot be used as a justification to prevent access to this information to the general public.

Finally, we note that Article 75 of the Financial Regulation, beyond mandating authorising officers to keep original supporting documents relating to budget implementation for a period of at least five years[2], does not, in and of itself, require the redaction of information, beyond personal data. On the opposite, the requirement to keep those documents would seem to support the possibility of their access.

The protection of legal advice

Position of the European Parliament

The European Parliament notes that, according to settled case law, the exception contained in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 applies to advice relating to a legal issue[3] in cases where public access to that advice would undermine the institution's ability to benefit from frank, objective and comprehensive advice.[4]

As a justification, the European Parliament indicates:

> "Those assessments must contain frank opinions [...] which, if disclosed, could be used to challenge the position ultimately taken by the Bureau. For that reason, the disclosure of such advice could incentivise the authors of similar documents to exclude potentially harmful elements from future legal analysis, limiting the Bureau's ability to rely on comprehensive legal advice."

Similarly, in responding to previous requests, the European Parliament had regularly mentioned that the public disclosure of its assessments "could be used to undermine the institution's public position, which would in turn create a clear incentive to omit potentially damaging elements from future assessments".

In particular, the European Parliament had relied on paragraph 42 of *Sweden & Turco v Council of the European Union:*

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2 "Such documents shall be kept for at least five years from the date on which the European Parliament gives discharge for the financial year to which the documents relate."

3 Judgment of the General Court of 15 September 2016, Herbert Smith Freehills LLP v European Commission T-755/14, ECLI:EU:T:2016:482, paragraph 47.

4 Judgment of the Court of Justice of 1 July 2008, Sweden & Turco v Council of the European Union, joined cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, paragraph 42.

> "the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice."

Position of European Democracy Consulting

European Democracy Consulting notes that paragraph 43 of the same judgment states 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."

In its justifications, the European Parliament merely states that the disclosure of the opinions in question "could be used to challenge" the position of the Bureau, and that this "could incentivise the authors of similar documents to exclude potentially harmful elements from future legal analysis".

While, according to paragraph 50 of *Sweden & Turco*, it is, in principle, open to the Parliament "to base its decisions […] on general presumptions which apply to certain categories of documents […]", it is also incumbent on the Parliament "to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose."

In the cases at hand, the European Parliament has indeed not indicated a reasonably foreseeable risk applicable to this kind of documents that can be relied on, and instead only noted a purely hypothetical risk.

Even for requests 2022-1366 and 2022-1444, where the European Parliament provided a longer justification – noting that the area of political party funding is "extremely sensitive" and "often gives rise to disputes" – continues to rely on the same generic argument; that is, that "the disclosure of legal advice [...] would allow interested parties to use such advice to criticise future funding decisions of the Bureau".

This hypothetical and generic argument would apply indistinctively to any and all forms of legal advice, and therefore go against the decision of the Court in *Sweden & Turco v Council of the European Union*.

The protection of the purpose of audits

Position of the European Parliament

As indicated by the European Parliament in its letter responding to request 2023-0104, the third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that access to a document is to be refused where its disclosure would undermine the purpose of audits. It is the first time, in all the applications listed, that the European Parliament relies on this indent.

As a justification, the European Parliament indicates:

> "As the Bureau's decision is not final and is still subject to challenges, public disclosure of the requested document, which forms the basis of that decision, would lead to an increased external and internal pressure on the involved political parties and foundations to criticise the provisional allocations made by the Bureau. Multiple challenges could be brought on each point of the

> financial audit, even more so in order to influence public perceptions in view of the European elections of 2024. As a result, public trust in the accuracy and the objectivity of the final decision on eligible costs and reimbursable expenditure would be compromised and the correct allocation of public funds, including the recovery of ineligible amounts, would be significantly delayed."

Position of European Democracy Consulting

Once again, the European Parliament relies on the argument that disclosing information would lead to increased pressure on applicants to criticise the decisions made and, therefore, to more strongly defend the funding they believe they are entitled to. Such criticism, the European Parliament argues, could compromise public trust in the final decision and in the correct allocation of public funds.

By contrast, European Democracy Consulting is convinced that it is precisely the open nature of the discussion on the allocation of public funds that is conducive to increased trust in public decision-making and spending.

This is in line with the second subparagraph of Article 1 of the Treaty on European Union, quoted by recital 1 of Regulation 1049/2001, which "enshrines the concept of openness", with decisions "taken as openly as possible and as closely as possible to the citizen". Recital 2 adds that "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."

As quoted above, this principle is supported by the Court of Justice in *Sweden & Turco*, which states that:

> "it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens" (par. 59)

Therefore, the European Parliament's view that providing figures could create undue pressure is not sufficient to justify the refusal to disclose this information.

Presence of an overriding public interest

Article 4(2) of Regulation (EC) No 1049/2001 provides for specific cases where the institution shall refuse access to a document "unless there is an overriding public interest in disclosure."

In its *Sweden & Turco* decision, the Court of Justice adds that "it is incumbent on the institution to [...] ascertain, if it takes the view that disclosure would undermine the protection of legal advice, 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."

In its responses to requests 2022-1366, 2022-1444, 2022-1477 and 2023-0104, the European Parliament has stated that it had "examined the possible existence of an overriding public interest",

but that European Democracy Consulting "[had] not mentioned any such interest in [its applications] and [that] Parliament [had] not found evidence of the existence of such a public interest that would outweigh the protection of legal advice and the protection of the institution's ongoing decision-making processes."

Based on the arguments listed above, European Democracy Consulting does not believe that the protection of the institution's ongoing decision-making processes, the protection of legal advice, or the protection of the purpose of audits, as used by the European Parliament, are sufficient to justify the Parliament's refusal to disclose the requested documents in full.

In the alternative, however, European Democracy Consulting does believe that the specific role of European political parties constitutes an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 and that the documents in question should, in any event, have been disclosed in full, in accordance with that principle.

Role of European political parties in European representative democracy

Article 10(4) of the Treaty on European Union – the so-called "party article" – states that "political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union." This treaty role is confirmed by Article 12(2) of the Charter of Fundamental Right of the European Union.

Regulation (EU, EURATOM) No 1141/2014 on the statute and funding of European political parties and European political foundations, in its recital 3, confirms that European citizens should be enabled to use the relevant rights stated by the Charter "in order to participate fully in the democratic life of the Union".

In recital 33, the same Regulation states that:

> "in order to strengthen the scrutiny and the democratic accountability of European political parties and European political foundations, information considered to be of substantial public interest, relating in particular to their […] financial statements, donors and donations, contributions and grants received from the general budget of the European Union, as well as information relating to decisions taken by the Authority and the Authorising Officer of the European Parliament on registration, funding and sanctions, should be published. Establishing a regulatory framework to ensure that this information is publicly available is the most effective means […] of upholding open, transparent and democratic legislative processes, thereby strengthening the trust of citizens and voters in European representative democracy […]."

As such, not only is transparency not likely to compromise public trust, especially ahead of the 2024 elections, but it is precisely the basis on which rests European representative democracy.

Role of European public funding for European political parties

In line with Regulation No 1141/2014, European political parties may currently receive up to 90% of their reimbursable costs from the general budget of the European Union. Research by European Democracy Consulting confirms that, in practice, European political parties indeed derive between 80% and 90% of their income from European public funding.

In its resolution of 11 November 2021 on the application of Regulation No 1141/2014, paragraph 37, the European Parliament has advocated raising this ceiling to 95%.

In its proposal for a Regulation on the statute and funding of European political parties and European political foundations (recast) of 25 November 2021, the European Commission has likewise proposed to raise this ceiling to 95%, and to 100% for the year of the elections to the European Parliament.

As a result, European political parties are extremely dependent on European public funding, and are likely to further increase their dependency. This very high level of dependency makes all issues relating to European party's public funding from the general budget of the European Union a direct concern to European citizens, who both support the cost of these parties and are represented by them in the EU's legislature.

Impact of the European Parliament's decisions on transparency

While for the documents relating to requests 2022-1477 and 2023-0104, the European Parliament leaves open the possibility that parts of these documents could be made available within a short time-frame, they will not, given previous requests, be made available in full before the end of "the period during which documents related to budget implementation must be retained".

In practice, this means that appraisals made by the European Parliament in the year N-1 concerning the funding of European political parties for the financial year N would not be made available until five years after the discharge of the budget of the European Union for the year N. According to the European Parliament's own information, this discharge usually takes place in May of the year N+2 – or in October N+2, should the discharge be postponed.

As a result, appraisals made by the European Parliament in November 2022 concerning the funding of European political parties will not be made available to the general public before at least May 2030, or seven and a half years later.

As of April 2023, the latest funding decision obtained in full by European Democracy Consulting dates back to 3 December 2014 – or 8 years and 4 months ago.

European Democracy Consulting argues that under no understanding of the protection of the institutions' legal advice or decision-making process can this delay properly allow citizens to "participate fully in the democratic life of the Union" or reflect decisions taken "as openly as possible and as closely as possible to the citizen".

Given European political parties' treaty-mandated role in the political life of the Union, as well as their extreme financial dependence on European taxpayers' money via the general budget of the Union, there is a clear and imperative overriding public interest in informing citizens of all aspects of the funding of their representative political parties – not eight years after decisions are made, but as soon as relevant discussions take place.