

1. a) series of four e-mails of 8 April 2016 from the Legal Service to Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), which contain the Legal Service comments on a letter concerning assurances on the treatment to be accorded by Turkey to Syrian nationals (reference Ares(2016)2655082),

b) letter concerning assurances on the treatment to be accorded by Turkey to Syrian nationals (annex to one of the e-mails)³,
2. e-mail of 11 April 2016 from the Legal Service to the cabinet of Mr Timmermans and to Directorate General for Migration and Home Affairs (DG HOME) and DG NEAR on the question of the Greek Appeal Committees (reference Ares(2016)2655468),
3. series of two e-mails of 12 April 2016 from the Legal Service to DG HOME on the question of the practice of the Greek Appeal Committees (reference Ares(2016)2655140).

The Legal Service replied to your request by the letter of 16 June 2016. In the letter, the Legal Service referred to its previous reply provided on 3 June 2016 to your request for access to documents (Gestdem 2016/1681), in which you asked for access to documents containing the legal advice relating to the summit held on 7 March 2016. Taking into account that, as explained by the Legal Service in the reply of 3 June 2016, the summit held on 7 March 2016 had been a preparatory meeting for the summit held on 18 March 2016, the documents identified and assessed in the context of case 2016/1681 also relate to the summit held on 18 March 2016.

Consequently, the Legal Service limited the temporal scope of the request in the present case to documents produced by the Legal Service after 5 April 2016 (i.e. the date when your request 2016/1681 was submitted).

In the reply of 16 June 2016, the Legal Service refused access to all documents (1) – (3), based on the exceptions provided for in Article 4(1)(a), third indent (protection of the public interest as regards international relations), Article 4(2), second indent (protection of court proceedings and legal advice) and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. You present a series of arguments supporting your request. These will be addressed in the respective parts of this decision.

I note that in point 2.3 of your confirmatory application, you argue that the *Commission has failed to inform Access Info Europe whether or not, in addition to the documents that it has generated [i.e. document (1) – (3)], it holds any documents that were received from other institutions or external actors*. Under the same point, you explain that [t]his is an important question (...) to understand which documents were held by the Commission

and hence, what analysis and perspectives were and are being taken into account in its decision making.

In the light of the above explanations, I interpret that the expression *any documents that were received from other institutions* used in your confirmatory application, refers to documents (received from third parties) containing *legal advice and/or [legal] analysis*.

This confirmatory decision is limited to such documents in so far as they are in possession of the Legal Service. As regards the documents described above, in possession of other Commission services, the corresponding part of your confirmatory application has been attributed to DG HOME, as a new (initial) request⁴. You will receive a separate reply from DG HOME in due course.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following your confirmatory application, the Commission has carried out a renewed, thorough search of the documents in its possession. Based on this renewed search, I confirm that the Legal Service is not in possession of any documents (other than those identified at the initial stage) that fall within the scope of this request.

With regard to documents (1) – (3), I regret to inform you that, as the result of our review, I have to confirm the initial decision of the Legal Service to refuse access to the documents requested, on the basis of the following exceptions provided for in Article 4 of Regulation 1049/2001:

- protection of the public interest as regards international relations provided for in Article 4(1)(a), third indent, as regards the entirety of documents (1) – (3),
- protection of court proceedings and legal advice provided for in Article 4(2), second indent, as regards the entirety of documents (1a) and (2) - (3),
- protection of the decision-making process provided for in Article 4(3), second subparagraph, as regards the entirety of documents (1) – (3).

2.1 Protection of legal advice and court proceedings

Article 4(2), second indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice*

³ The emails and the annex are registered under the same Ares reference number.

⁴ Gestdem 2016/4821

In its judgement in case T-84/03, the Court of first Instance⁵ underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests: court proceedings and legal advice⁶. Therefore, in practical terms, the provisions of the second indent of Article 4(2) encompass two separate exceptions. In the case at hand, the contents of the documents concerned is covered both by the exception protecting the legal advice and the court proceedings. Consequently, my assessment in this respect is split into two separate parts.

Protection of court proceedings

Documents (1a) and (2) – (3) contain information constituting the assessment of various legal aspects related to the EU-Turkey Statement of 18 March 2016⁷. I also would like to recall that, as underlined by the Legal Service in the initial reply, this Statement cannot be considered as an international agreement within the meaning of Article 218 of the TFEU.

In your confirmatory application you refer to the reply provided by the Legal Service at the initial stage and point out that *the advice at issue here was not given in the context of ongoing or contemplated legal proceedings*.

Further, you argue that the reference to *possible litigation* before the Court of Justice, mentioned by the Legal Service, may not be considered as warranting the refusal of access to the documents request, as *every single piece of legal advice could relate to hypothetical future court cases and this would therefore amount to a blanket ban on all legal advice*. In your view, *[s]uch an approach is at odds with the requirement that all exceptions be narrowly construed*. According to your confirmatory application, *[t]here are no indications and no reasons provided what those possible proceedings would be. It is difficult to see what proceeding would be conducted before the EU Courts, because [t]he Commission has not provided any indication in this regard*.

In this context, please note that there are three pending cases in the Court of Justice which are direct actions against the EU-Turkey Statement of 18 March 2016⁸, in which the Commission has asked for leave to intervene.

Therefore, the reasoning employed by the Legal Service in the initial reply, according to which public disclosure of documents requested could seriously undermine the Commission's position in the litigation before the Court of Justice, remains fully relevant. It needs to be emphasised that the information included in the documents (1a) and (2) – (3) will be fully used in preparation of the Commission's future written submissions in the above-mentioned cases, once it has been granted leave to intervene. Consequently, public disclosure of the documents in question would *de facto* have the effect of (partial) public release of these submissions which, as confirmed by case law of the Court of

⁵ Currently: the General Court.

⁶ Judgment of the Court of first Instance of 23 November 2004 in case T-84/03, *Turco v Council*, (ECLI:EU:T:2004:339), paragraph 65.

⁷ The statement is public: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

Justice, are covered by a general presumption of inaccessibility⁹, derived from the principles of equality of arms. Indeed, the Court of Justice ruled in the judgment referred to above, that the public release of the content of the pleadings, would result in a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended before the EU Courts.

In the light of the above, access to documents (1a) and (2) – (3) must be denied on the basis of the exception concerning the protection of the court proceedings, laid down in the second indent of Article 4(2) of Regulation 1049/2001.

Protection of legal advice

In your confirmatory application, you argue that the Commission did not provide a proper statement of reason demonstrating a link between the public release of the documents request and protection of the legal advice reflected therein. In particular, you point out that the Commission failed to *demonstrate how this would happen* [the undermining of the legal advice through the public disclosure of the documents], *preferring to make this a blanket argument for all the documents identified as falling under the scope of this part of the request.*

In this context, you refer to the contents of the documents requested, which, in your view, *include legal analysis, legal descriptions and/or advice which discusses and provides information and/or views on the competence and possibility under national, EU and /or international law to implement and/or carry out the actions and legal framework discussed (...).*

By referring to the case-law of the Court of Justice, you argue that [the] *legal advice on the competence of the EU in a particular area is something in which there is a particular public interest and hence should be provided pursuant to access to documents request.* You also point out that the legal advice relates to *the legality of some of the actions being undertaken* [under the EU-Turkey statement]. In this respect you note that according to the case-law *the risk that the disclosure of legal advice relating to a decision-making process could give rise to doubts concerning the lawfulness of the adopted acts is not sufficient to constitute a threat to the protection of legal advice*¹⁰.

Documents (1a) and (2) – (3) do not contain information that could be considered as legal advice on *competence of the EU* in the field to which the statements mentioned above relate. As already underlined, these statements may not be considered as an international agreement within the meaning of Article 218 of the TFEU.

In this context, I would like therefore to confirm the applicability of the justification and reasoning provided by the Legal Service in its initial reply of 16 June 2016.

⁸ T-192/16, T-193/16 and T-257/16

⁹ Judgment of the Court of Justice of 21 September 2010 in case C-514/07 P, *Sweden and Others v API and Commission*, (ECLI:EU:C:2010:541), paragraph: 77-78.

¹⁰ *T-529/09, para. 76 and confirmed by the Court in C350/12 P; Sweden and Turbo v Council, C-52/05 P para. 60; Sweden v MyTravel and Commission, C-506/08 para 113.*

As explained by the Legal Service, public disclosure of those documents would have a serious impact on the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice and would deprive it of an essential element in the framework of its ongoing work, in liaison with competent national authorities, on the implementation of the EU-Turkey Statement. This is all the more true since the legal issues addressed in the documents mentioned, pertaining to the interpretation of the Union's asylum acquis, are of a particularly sensitive nature at the current state of the refugee crisis.

However, I would like to bring to your attention that the operational steps and processes entailed by the implementation of the EU-Turkey Statement are described in a Communication of 16 March 2016: *Next operational steps in EU-Turkey cooperation in the field of migration*¹¹. Also the European Commission issued so far two reports on progress in the implementation of the Statement, which further describe details of the mechanisms put in place¹².

In the light of the above, access to documents (1a) and (2) – (3) must be denied on the basis of the exception concerning the protection of legal advice, laid down in the second indent of Article 4(2) of Regulation 1049/2001.

2.2 Protection of the public interest as regards international relations

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations.*

In your confirmatory application you argue that *the Commission fails to explain why or how the disclosure [of the documents requested] would harm international relations, not does it show any causal link between the sensitivity of the situation and such harm.* You

¹¹ COM(2016) 166 final, accessible at:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160316/next_operational_steps_in_eu-turkey_cooperation_in_the_field_of_migration_en.pdf

¹² Communication from the Commission to the European Parliament, the European Council and the Council - First Report on the progress made in the implementation of the EU-Turkey Statement (COM(2016) 231 final), accessible at:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf

and, Communication from the Commission to the European Parliament, the European Council and the Council - Second Report on the progress made in the implementation of the EU-Turkey Statement (COM(2016) 349 final), accessible at:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/2nd_commission_report_on_progress_made_in_the_implementation_of_the_eu-turkey_agreement_en.pdf

also point out that *the requested documents do not relate to the negotiation strategy*. That leads you to the conclusions that the Commission failed to properly state reasons of its decision refusing access to the documents requested.

Further, you argue that public disclosure of the documents requested, would not undermine the public interest as regards the protection of international relations. You support this position by referring to the case-law according to which *the risk of disclosing legal opinions taken within the EU institutions regarding the choice of the legal basis in the process of negotiations of an international agreement (...) does not in itself establish the existence of a threat to the European Union's interest in the field of international relations*.

As already mentioned under point 2.1 of this decision, statements made during the summits held on 7 and 18 March 2016, may not be considered as an international agreement within the meaning of Article 218 of the TFEU. As explained above, the EU-Turkey Statement was issued on the occasion of the summit held in Brussels on 18 March 2016.

Notwithstanding the above, the EU-Turkey Statement and its implementation by the various actors involved is of utmost political importance for the EU's international relations with Turkey. Divulgence of document (1b), as well as the legal analysis in documents (1a) and (2) – (3), containing legal advice given within the Commission, would present a concrete risk of creating tensions between the EU and Turkey and thereby undermine the EU's international relations.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent of Regulation 1049/2001 on the grounds of protecting international relations is justified, and that access to the requested documents (1) – (3) must be refused also on that basis.

2.3 Protection of the decision-making process

Article 4(3) of Regulation 1049/2001 provides that *[a]ccess 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*.

[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institutions 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.

In your confirmatory application, you refer to the Legal Service's statement that the disclosure of the documents requested would undermine the Institution's decision-making process, and argue that the Commission *should be much more concrete in explaining why that would be the case*.

As mentioned under point 2.1 of this decision, documents (1) – (3) contain information relating to punctual issues and interpretation of the scope of applicability of the provisions of various legal acts relevant for the subject matter of the EU-Turkey statement.

While the decision-making process linked to the EU-Turkey statement has been finalised, the information in the above-mentioned documents is also relevant in the context of other legislative decision-making processes, currently ongoing, relating to the same subject matter. As explained by the Legal Service in the initial reply, disclosure of documents (1) – (3), would have a negative effect on the ongoing discussion on the Commission's proposal¹³ for the decision amending Council Decision (EU) 2015/1601¹⁴, as well as on the adoption of the Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001¹⁵.

Documents (1) – (3), which were drafted for internal use, contain information relating to a matter for which some decisions have not been yet taken, as both above-mentioned processed are still ongoing. Therefore, public release of documents (1) – (3), would seriously undermine these decision-making processes, as it would reveal preliminary legal assessments relating to the policy options which are currently under consideration. The Commission services must be free to explore all possible options in preparation of a decision free from external pressure¹⁶.

There is a real risk that the substance of such preliminary views would be misconstrued and misunderstood when presented outside the context in which they were elaborated and for which they were intended. Such a risk would be particularly acute in the very likely event that information is used or publicised by organisations or entities that would have particular views as to what the outcome of the decision-making process should be. As a consequence, a requirement to disclose such internal documents would fundamentally alter the nature of the work of the Commission and its services in the ongoing processes pending in the European Parliament and the Council. Their disclosure would hamper and have a chilling effect on internal discussions that constitute an absolutely essential part of the decision-making processes and thereby severely compromise these processes.

Having regard to the above, I consider that the use of the exception under Article 4(3), first and the second subparagraphs of Regulation 1049/2001 (protection of the decision-making process) is justified, and that access to documents (1) – (3), must be refused on that basis.

¹³ COM(2016)171 final

¹⁴ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

¹⁵ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

¹⁶ Judgment of 13 November 2015, in cases T-424/14 and T-425/14, *ClientEarth v Commission*, (ECLI:EU:T:2015:848), paragraphs 94-96.

3. PARTIAL ACCESS

I have also examined the possibility of granting partial access to documents requested in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible, as documents (1) – (3) are fully covered by the exceptions provided for in Article 4(1)(a), third indent, as well as the first and the second subparagraphs of Article 4(3) of Regulation 1049/2001. Furthermore, document (1a) and (2) – (3) are also covered by the exception provided for in the second indent of Article 4(2) of Regulation 1049/2001.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(a) of Regulation 1049/2001 is absolute exception, i.e. its applicability does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you present a series of arguments which, you consider, prove the existence of the overriding public interest that warrants the release of the documents requested.

In your view, disclosure of the documents requested is *particularly critical in the present political context where across the EU there is debate on immigration in general and specifically on the agreements and arrangements that have been negotiated with Turkey. Secondly, in the context of the current humanitarian crisis both within the EU and at its borders, it is crucial for all actors in our society to be aware of the competence of the EU and the actions that can be legally conducted in order to act efficiently to address the crisis.*

Whilst I understand that there can be a public interest in obtaining access to the documents in question, I consider in this case that any possible public interest in transparency cannot outweigh the public interest in protecting the court proceedings and legal advice, as well as the decision-making process protected, respectively, by the second indent of Article 4(2) and Article 4(3) of Regulation 1049/2001.

With regard to your argument concerning the transparency of the process, I would like to refer to the judgment in the *Strack* case¹⁷, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance but that an applicant has to show why

¹⁷ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁸.

In consequence, I consider that, in this case, there is no overriding public interest that would outweigh the interest in safeguarding the protection of the court proceedings and legal advice, as well as the decision-making process protected, respectively, by the second indent of Article 4(2) and Article 4(3) of Regulation 1049/2001.

In any case, the entirety of documents (1) – (3), are fully covered by the exception provided for in the third indent of Article 4(1)(a) of Regulation 1049/2001. The interest protected by this exception has been considered by the legislator as an absolute exception and therefore its applicability does need to be weighted against any possible overriding public interest in disclosure.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Alexander ITALIANER
Secretary-General

¹⁸ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 129.