

Ms Luisa Izuzquiza
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Our ref: CGO/LPU/CMS-2018-00005-0343b
Initial application: CGO/LPU/CMS-2018-00005-0343

Warsaw, **13** July 2018

Your application for access to Frontex documents- confirmatory application

Dear Ms Izuzquiza,

With reference to your confirmatory application of 5 June 2018, registered on 8 June - in which you confirmed your initial application of 13 May 2018 and to which Frontex replied on 22 May 2018 - where you applied for access to

all Biweekly Analytical Updates for JO EPN Triton produced for the period starting 9 October 2017 to 31 December 2017, both inclusive.

I note your arguments in your confirmatory application

First, that the above-mentioned documents were, even if heavily redacted, released while JO Triton 2017 was still ongoing.

It is therefore hard to believe that Analytical Updates were considered suitable for release then, but no longer now, when the operation has come to an end and only an internal evaluation is pending.

Second, that the Court of Justice of the European Union has held that European institutions cannot validly argue that disclosure of information would "specifically and actually" undermine public security where documents that are comparable to the requested information have already been made available to the public (Case T-167/10).

It is worth adding, in relation to the cited case law, that in the present case the already-released information is not only "comparable" to that which is being refused – it's practically identical.

Third, that Article 15 of the Treaty on the Functioning of the European Union states that "(...) the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible." Furthermore, the European Border and Coast Guard Regulation also states in its preamble that "The Agency should be as transparent as possible about its activities".

The aforementioned disclosures constitute factual examples of the actual possibility of disclosing this information without prejudice to public security, thus proving it is entirely "possible" for Frontex to be open and disclose the requested information.

I am therefore hereby calling on Frontex to:

- rectify its initial assessment that disclosure of the requested documents would undermine public security;*
- release all Biweekly Analytical Updates for JO EPN Triton produced for the period starting 9 October 2017 to 31 December 2017, both inclusive.*

With regard to your **argument I**, please be informed that the evaluation of Joint Operation Triton 2017 is still ongoing and forms an integral part of the current operation covering similar geographical areas. More specifically, as successor operations are based on the data collected from previous ventures, the release of the documents you requested would not only hamper the evaluation of JO Triton 2017, but would also inflict detriment on ongoing and future operations, eventually leading to jeopardising the effective control and surveillance of external sea borders of the European Union. This would enable their exploitation by criminal networks which, consequently, would prevent Frontex from tackling cross-border crime and the fulfilment of its mandate. Although the Biweekly Analytical Updates produced for the period starting 27 March 2017 to 2 July 2017, which were the subject of your application to which Frontex replied on 21 November 2017, were indeed released while JO Triton 2017 was still ongoing, it is not possible to always transpose previous actions into the current situation, since, as part of our case by case analysis, multilateral aspects prevailing at the time of application must be considered. In undertaking such assessments, Frontex takes a holistic approach and evaluates all factors present at the reception of initial and confirmatory applications, including documents released up to the respective application dates and security concerns prevailing at these dates. On the basis of an impartial examination, the decision on the release of documents is made. Security concerns are, due to their very nature, subject to change, simultaneously causing Frontex to constantly evaluate its practice in order to ensure an efficient performance of our mandate. Unfortunately, the change in security considerations had a detrimental effect on the status of your application. More specifically, although all Biweekly Analytical Updates follow the same format, the information contained in each relates to different period of time and conveys varied degrees of sensitivity. Hence, the updates in question should be perceived as pieces of information of individual nature, rather than grouped collectively, according to the format they follow. The documents you requested have been produced during a period in which Frontex conducted a stricter assessment of security considerations due to more advanced workings of criminal networks and their increased activity. Sensitivity of the content of the requested Biweekly Analytical Updates within the indicated time frame combined with the factors prevailing at the date of the application created a different set of circumstances Frontex must have regard to when conducting a case by case assessment. Therefore, the previous release cannot be used as an argument for the release of the documents forming part of your current application. Nevertheless, I have to inform you that due to their sensitive nature, further information regarding the reasons which forced us not to release these documents cannot be provided, as this would entail revealing exactly these pieces of information the protection of which is covered by the protection of the public interest as regards public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

As to the possibility of partial disclosure enshrined in Article 4(6) of Regulation (EC) No 1049/2001, please note that the Agency, in its service to the public, is obliged to adhere to principles of transparency as well as to the principle of sound administration. Owing to the special circumstances of the case and sensitivity of the requested materials, it was deemed that the release of short, fragmented parts of documents at issue would not be in line with the latter principle.¹ More specifically, the administrative burden necessary to identify and redact the releasable materials would be disproportionate to the public interest in the disclosure exercise itself, while the released documents would not convey any informative value due to their significantly reduced form. What is more, amidst current security concerns, even the release of very limited information on the subject matter you requested could jeopardise ongoing and future operations and therefore, the very limited parts of the documents, which could be released would be non-informative. For this reason, partial access to the documents you applied for cannot be granted.

Consequently, even though Analytical Updates for a different period could be released in the past, access to the Biweekly Analytical Updates for JO Triton for the period 9 October 2017 to 31 December 2017 has to be refused based on Article 4(1)(a) first indent of Regulation (EC) No 1049/2001² as making the requested documents available at this stage would undermine the protection of the public interest as regards public security.

With regards to your **argument II**, it is crucial to explore how the present case relates to the obligation to disclose information which does not “specifically and actually”³ undermine public security and where documents comparable to the ones at issue have already been released to the public. As previously stated, the Biweekly Analytical Updates you requested are not only used to evaluate the concluded operation but also form part of current and future operations undertaken by Frontex. Insofar as the documents at issue include analytical data on migration routes, behavioural patterns of migrants and modus operandi of criminal networks, government activities and geographical location of incidents, their release would allow criminal networks to identify strong and weak points of ongoing and future operations, and thus to draw analytical conclusions. This, in turn, would materialise as an actual threat to the protection of public security⁴, as the aforementioned networks would be able to adjust their actions accordingly, and would jeopardise the effectiveness of the ongoing and future operational activities undertaken at the external borders of the European Union. Again, owing to the particular circumstances of the scope of your current application, it is necessary that access has to be refused as the risk that the knowledge contained in those documents could be exploited by criminal networks is sufficient to establish that public security and the interests of the European Union as regards the effective functioning of the area of freedom, security and justice are jeopardised.⁵

To address your claim on transparency expressed in **argument III** of your confirmatory application, it is first necessary to point out that although the principle of transparency is intended to ensure that the

¹ Case C-353/99 P *Council of the European Union v Heidi Hautala* [2001] ECR I-9565, para 30.

² Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

³ Case T-167/10 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* [2012] EU:T:2012:651.

⁴ Case C-266/05 P *Jose Maria Sison v Council of the European Union* [2007] RC 2007 I-01233, para 66.

⁵ Case T-331/11 *Leonard Besselink v Council of the European Union* [2013] EU:T:2013:419, para 78.

administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system,⁶ this principle does not have an absolute character. Namely, Recital 11 of Regulation (EC) No 1049/2001 stresses the need to balance transparency with the aim to protect certain public and private interests, as specified in Article 4 of Regulation (EC) No 1049/2001. In line with the aforementioned provision, before a decision can be made, there is a need to conduct a balancing exercise between interests which would be favoured by the disclosure and, on the other hand, those which would be jeopardised by it.⁷ Moreover, general considerations alone cannot provide a sufficient basis for establishing that the principle of transparency is capable of prevailing over the reasons justifying the refusal to disclose the documents in question.⁸

In this particular case, the interests at issue include maintenance of security at the external borders of the European Union as well as the efficient fight against cross-border crime and terrorism. In other words, the protection of the public interest as regards public security, as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001. Having balanced this against the principle of disclosure and paying due regard to the complex and delicate nature of implementing current and future joint operations, I decided to maintain the decision expressed in the reply of 22 May 2018.

With regard to your claim that the requested documents can be released by Frontex without prejudice to public security or without undermining the protection thereof, I need to reiterate that Frontex undertakes a case-by-case evaluation of all applications it receives. Please note that the Agency is tasked with ensuring security at the external borders of the European Union including, *inter alia*, combating trafficking in human beings, smuggling of illegal goods, and contributing to the fight against terrorism. As such, it enjoys wider discretion than legislative bodies of the European Union in determining whether a disclosure of a document to the public would undermine the ability to perform its duties and, simultaneously, jeopardise the protection of the public interest as regards public security, as laid down in Article 4(1) of Regulation (EC) No 1049/2001. Furthermore, as explained in my response to your argument I, as part of each analysis, Frontex takes into account all factors present at the time of the reception of applications, including documents released up to the respective dates and security concerns prevailing at the application date. Separately, as a part of our communication strategy, Frontex fosters transparency by employing proactive mechanisms in accordance with Article 74(2) of the European Border and Coast Guard Regulation.⁹ However, the same paragraph also recalls that no operational information shall be revealed which, if made public, would jeopardise the attainment of the objective of operations. Similarly, Article 4 of Regulation (EC) No 1049/2001 also provides for exceptions for release of documents to which the Agency must equally adhere. Consequently, the decision not to release the Biweekly Analytical Updates you applied for in no way contradicts our commitment to the principles of openness and transparency, as enshrined in the European Border and Coast Guard Regulation and Regulation (EC) No 1049/2001.

⁶ Case T-211/00 *Aldo Kuijer v Council of the European Union* [2002] RC 2002 II-00485, para 52.

⁷ Case T-189/14 *Deza, a.s. v European Chemicals Agency* [2017] EU:T:2017:4, para 53.

⁸ Joined Cases C-514/11 P and C-605/11 P *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission* [2013] EU:C:2013:738, para 93-4.

⁹ Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).

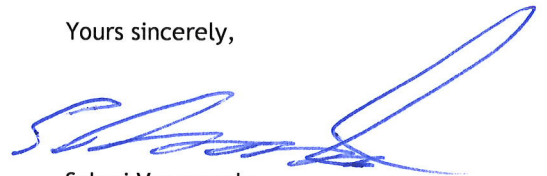
Therefore, I regret to inform you that your application to

- *rectify its initial assessment that disclosure of the requested documents would undermine public security;*
- *release all Biweekly Analytical Updates for JO EPN Triton produced for the period starting 9 October 2017 to 31 December 2017, both inclusive.*

cannot be granted.

In accordance with Article 8(1) of Regulation (EC) No 1049/2001, you are entitled to institute court proceedings and/or make a complaint to the Ombudsman, under the relevant provisions of the TFEU.

Yours sincerely,



Sakari Vuorensola

Director of Corporate Governance

