



**Council of the European Union**

General Secretariat

Directorate-General Communication and Information - COMM

Directorate Information and Outreach

Information Services Unit / Transparency

*Head of Unit*

Brussels, 1 August 2022

Mr Davide Giovannelli

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Ref. 22/1327-mj/vk

Request made on: 17.06.2022

Deadline extension: 08.07.2022

Dear Mr Giovannelli,

Thank you for your request for access to document 10360/22<sup>1</sup>. This document dated 16 June 2022 is an opinion of the Council Legal Service on the “Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) - Interpretative declaration concerning the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU (competence of the Court of Justice in CFSP matters) - Compatibility with the Treaties”.

The opinion analyses the compatibility with the Treaties of a draft interpretative declaration prepared by the Commission concerning the jurisdiction of the Court of Justice in the area of CFSP. This opinion is highly relevant for the ongoing accession negotiations of the European Union to the ECHR, notably in relation to the articulation between the jurisdiction of the European Court of Human Rights and the jurisdiction of the Court of Justice of the European Union (Court of Justice) in the area of Common Foreign and Security Policy (CFSP). This matter is extremely sensitive for the EU in the ongoing accession negotiations to the ECHR as shown by the Court of Justice Opinion 2/13 of 18 December 2014<sup>2</sup>.

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<sup>1</sup> The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

<sup>2</sup> Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454

The requested document deals with matters which if disclosed would reveal to the public the Union's internal reflections regarding the approach to be taken on a difficult subject in the ongoing accession negotiations to the ECHR. Disclosure of such reflections is liable to prejudice the EU's negotiating position in these negotiations by revealing to the counterparts the limits and objectives of the EU's negotiation mandate. This would put the EU in a weaker position compared to the other party, which would be counterproductive for the progress of those negotiations. This risk is reasonably foreseeable and not purely hypothetical taking into account the state of play of the accession negotiations which are currently at a crucial stage. As such, disclosure of the requested opinion would be detrimental to the EU's international relations protected under Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 and must be refused.

It should be recalled that, in accordance with established case-law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a particular regime as compared to the other exceptions included in Article 4. On the one hand, *"the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*<sup>3</sup>. On the other hand, once the Council has come to the conclusion that the disclosure of a particular document would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*<sup>4</sup>.

Therefore, while the Council enjoys a wide discretion in assessing the probable impact of the disclosure of documents that come within the remit of the exception related to the protection of international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest related to the protection of international relations<sup>5</sup>.

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<sup>3</sup> Judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; Judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32; and Judgment of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

<sup>4</sup> Ibid and judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and judgment of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

<sup>5</sup> Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, ECLI:EU:T:2020:210, paragraph 61 and the case-law cited

In the view of the foregoing, the General Secretariat of the Council is unable to grant you access to the requested document.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Fernando FLORINDO