



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 12 February 2020

Mr José Ramón Canedo Arrillaga
Facultad de Derecho
Universidad de Deusto
Avenida de las Universidades, 24
48007 Bilbao
Spain

ask+request-7515-921d4c98@asktheeu.org

BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your request of 16 December 2019 registered under reference GestDem 2019/7266

Dear Mr Canedo Arrillaga,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹.

Your application concerns the following documents:

1. *WK 6866/2019;*
2. *WK 249/2016;*
3. *WK 764/2016;*
4. *WK 12044/2018.*
5. *Previous technical written contributions made by the Commission services and discussed at FREMP meetings on 4/11/2015, 26/04/2016, 01/12/2016 (mutual trust) and 15/11 and 17/12/2018 (CFSP), all of them on the accession of the EU to the ECHR.*

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L145, 31.05.2001, p. 43).

Please be informed that documents concerned by point 5 of your request correspond to those identified under numbers 2, 3 and 4.

In addition, the Legal Service observes that on 20 December 2019 it has sent you a reply to your previous request concerning documents under numbers 2 and 4 (reply reference Ares (2019)7868758), by which it refused access to them. Since you did not contest that refusal within the deadline laid down in Article 7(2) of Regulation (EC) No 1049/2001 the reply to your request became definitive. Therefore, in the absence of changes in the legal or factual situation, documents 2 and 4 are not considered for the purpose of your present request. Regarding documents under numbers 1 and 3, after a concrete assessment of them, I have come to the conclusion that they must be refused in full, as they must be protected in accordance with the exceptions provided for in Article 4(2), second indent ("*protection of legal advice*"), as well as in Article 4(1)(a), third indent ("*protection of the public interest as regards international relations*").

1. DECISIONAL FRAMEWORK AND DESCRIPTION OF THE REQUESTED DOCUMENTS

In its opinion A-2/13, the Court of Justice has declared the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) incompatible with the Treaties.

After a reflection period, the Commission has consulted the Council Working Party (FREMP) as regards the amendments to the draft Accession Agreement to be demanded by the Union in order to address the concerns raised by the Court of Justice. This consultation process, conducted on the basis of the technical written contributions from the Commission services (the requested documents), informed the adoption of supplementary negotiating directives by the Council (JAI) on 7 October 2019.

The requested documents thus deal with the amendments to the draft Accession Agreement to be demanded by the Union in the context of the forthcoming negotiations with the members of the Council of Europe. They contain the Commission services' technical written contributions in view of the discussions at the FREMP meetings.

More particularly, document 1 is a compilation of the technical written contributions previously presented by the Commission services and gives an outline of the Union's negotiation position of the draft Accession Agreement. It contains a comprehensive assessment of the legal issues raised by the Court of Justice in its opinion A-2/13, in view of the FREMP meeting of 24 / 25 June 2019. Document 3 is a contribution from the Commission services on the issue of the principle of "mutual trust".

2. REASONS FOR REFUSAL OF THE REQUESTED DOCUMENTS

2.1. Protection of legal advice

Article 4(2), second indent of Regulation (EC) No 1049/2001 states by way of exception that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...], unless there is an overriding public interest in disclosure".

At the outset, it is important to underline the high sensitivity of the legal issues raised by the Court of Justice in its opinion A-2/13 on the draft Accession Agreement of the EU to the ECHR. Some of these issues are both legally and politically complex such as the matter of the judicial protection in the area of the Common Foreign Security Policy (CFSP) assessed, among others issues, in document 1, or the principle of mutual trust, discussed in document 3.

I consider that disclosure of the requested documents would undermine the protection of legal advice, which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice². Disclosing the requested documents would make known to the public internal opinions, drafted under the responsibility of the Legal Service and intended for the Commission and, subsequently communicated to the Council, on a highly sensitive and pending matter. The legal analysis contained in the requested documents, which formed the basis for the adapted negotiation directives adopted by the JAI Council of 7 October 2019, will be relevant and subject of discussion in the framework of the negotiations that the Commission will restart with the members of the Council of Europe.

Consequently, disclosure of the requested documents, at this point in time, would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of this complex and sensitive issue. The frankness, objectivity and comprehensiveness of the legal advice would be negatively affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

In the light of the above, I consider that the requested documents must be protected under the exception relating to the protection of legal advice and cannot be disclosed.

2.2. Protection of the public interest as regards international relations

According to Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 “[t]he institutions shall refuse access to a document where disclosure would undermine the public interest as regards the protection of international relations”.

As far as the protection of international relations are concerned, the EU Courts have acknowledged that the institutions enjoy a wide discretion when considering whether access to a document may undermine that public interest³.

As already stated, the European Commission will soon reopen the negotiations with the members of the Council of Europe, following the adoption of supplementary negotiating directives by the Council on 7 October 2019.

In these circumstances, disclosure of the requested documents would negatively affect international relations by compromising the European Union's position and the best outcome of the negotiations in view of the conclusion of an Accession Agreement that fulfil the requirements of the Treaties.

In view of the foregoing, I conclude that the requested documents must be protected under the exception related to the protection of the public interest as regards international relations.

In fact, it is of the utmost importance that they remain confidential for as long as the process of adoption of the Accession Agreement to the ECHR has not been concluded.

² Judgment of the Court of Justice of 1 July 2008, Joined Cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

³ Judgment of the Court of First Instance of 25 April 2017, T-264/04, *WWF European Policy Programme v Council*, ECLI:EU:T:2007:114, paragraph 40.

3. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the requested documents. However, after careful examination, I have come to the conclusion that they are entirely covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests.

4. OVERRIDING PUBLIC INTEREST

Pursuant to Article 4(2) and Article 4(3) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest permitting the full disclosure of the requested document. In order for such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in this case it must outweigh the interests protected under Article 4(2), second indent of Regulation (EC) No 1049/2001. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused document that would outweigh the public interest in the protection of legal advice on the highly sensitive and pending issue of the accession of the EU to the ECHR.

Please note that the exception under Article 4(1)(a), third indent (*"protection of the public interest as regards international relations"*) has an absolute character and must not be balanced against an overriding public interest.

5. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/76
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Luis ROMERO REQUENA