



Council of the European Union

General Secretariat

Directorate-General Communication and Information - COMM

The Director-General

Brussels, 28 April 2021

SGS 21/1706

Mr Nikolaj Nielsen

Email: ask+request-9020-bb48f912@asktheeu.org

Subject: Your Confirmatory Application 09/c/01/21

Dear Mr Nielsen,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 12 March 2021, which was registered by our service on the same day.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court¹ or to make a complaint to the Ombudsman.² The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,

Reijo KEMPPINEN

Enclosure: 3

¹ For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

² Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

**REPLY ADOPTED BY THE COUNCIL ON 27 April 2021
TO CONFIRMATORY APPLICATION 09/c/01/21,
made by email on 12 March 2021,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents dealing with "return sponsorships"**

The Council has considered this confirmatory application 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 documents (OJ L 145 of 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 6 February 2021 the applicant introduced an initial application for access to "all legislative files marked "Limite" dealing in any shape or form with issues linked to "return sponsorships", all agendas, accompanying papers, non-papers, summary records, compromise texts, notes to delegations dealing in any shape or form with "return sponsorships", legal opinions dealing in any shape or form with "return sponsorships", "indicative votes"/votes on preparatory acts dealing in any shape or form with "return sponsorships", most recent 4-column positional document of the New Pact on Migration and Asylum and the identity of Member States taking positions in preparatory bodies dealing in any shape or form with "return sponsorships" ".
2. On 5 March 2021, the General Secretariat replied to this application by identifying seven documents corresponding to the request. Access was granted to document **6088/21** as well as **13045/20** from which only personal data have been removed. Access to documents **13261/20**, **14276/20**, **WK 13579/20 INIT + REV 1** and **5755/21** was refused based on Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 protecting the ongoing decision-making process of the Council.

3. On 12 March 2021, the applicant introduced a confirmatory application against the General Secretariat's refusal of access as mentioned above. The applicant considers the refusal to be "*a disproportionate restriction on citizens' right to the widest possible access to legislative documents*".
4. The Council has carefully considered the confirmatory application. Having thoroughly scrutinized the requested document and after carrying out renewed consultations, it has reassessed whether, in full consideration of the principles underlying Regulation (EC) No 1049/2001, in particular the aim of ensuring the widest possible public access to documents, full public access can be provided at this stage.
5. In that regard, the Council has carefully scrutinized the content of the requested documents, having due regard to the current state of play on negotiations related to these issues. In light of this examination, the Council came to the conclusion that, at this stage, documents **13261/20**, **14276/20** and **5755/21** can indeed be divulged in their entirety. However, as a result of the same examination, it came to the conclusion that refusal of access to documents **WK 13579/20** and **WK 13579/20 REV 1** shall be uphold.

THE CONTEXT

6. On 23 September 2020, the European Commission presented a New Pact on Migration and Asylum, accompanied by several legislative proposals. Return sponsorship is one of the solidarity contributions outlined in the proposed Asylum and Migration Management Regulation. In addition, it is also a measure to increase coordination and cooperation in the area of returns of migrants, especially to the benefit of Member States under migratory pressure and of Member States in a situation of crisis.
7. The discussions of return sponsorship in the Integration, Migration and Expulsion (IMEX Expulsion) Working Party as well as the Asylum Working Party meetings showed that further clarifications on the proposed concept of return sponsorship and its practical implementation were needed.

8. On the basis of the discussions held among Member States and further clarifications provided by the European Commission, the Presidency issued the outcomes of discussions held in November 2020 and January 2021 IMEX Expulsion Working Party meetings to contribute to Member States' understanding of the new concept of return sponsorship as proposed by the Commission and its possible *modus operandi* at the national and European levels.
9. The discussions are highly sensitive from a political point of view as regards the establishment of positions in the Member States, which requires the involvement and coordination between a large number of domestic actors. On the substance, the representatives of the Member States meanwhile continue to clarify some issues and when the key elements of the discussion will be clarified, the Council will formally build on the European Commission's proposal in the framework of the legislative process foreseen by the Treaties.

THE ASSESSMENT OF THE REMAINING REQUESTED DOCUMENTS UNDER REGULATION (EC) No 1049/2001

a) The exception relating to the protection of the public interest as regards international relations (Article 4(1)(a) of Regulation No 1049/2001)

10. According to the 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 different regime than the other exceptions included in Article 4.
11. 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'*¹.

¹ Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 34; *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32, and *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

12. On the other hand, once the Council has come to the conclusion that release 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'*.²
13. Therefore, while the Council enjoys a wide discretion in assessing the probable impact of the release of documents on 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 interest³.
14. In practice, in its answer to a confirmative application, the institution must provide the applicant with plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU's international relations and whether, in the institution's broad discretion in applying the exceptions in Article 4(1) of Regulation No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical. However, in the description of the document for the purpose of its answer, the institution cannot reveal its content in further detail as doing so may disregard the scope of the interest protected by that provision⁴.
15. In the present case, documents **WK 13579/20** and **WK 13579/20 REV 1** of 25 and 27 November 2020 are working documents from the General Secretariat of the Council to delegations on the "Commission's proposal for return sponsorship - Questions from the Member States". The first document consists in a compilation of the questions submitted by the Member States related to Commission's proposal on return sponsorship while the second document contained the questions of three additional Member States.

² *Ibid* and Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

³ 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.

⁴ See, to that effect, judgments *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 106; of 7 February 2018, *Access Info Europe v Commission*, T-851/16, T:2018:69, paragraphs 54 and 122, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 51 and 113-114.

16. However, those two documents contain, among others, sensitive information on cooperation on readmission with specific third countries. Based on their content, the requested documents come within the remit of the exception of protection of the public interest as regards international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001). Indeed, in formulating their preliminary questions, representatives of the Member States within the preparatory working groups release indirectly the current concerns and issues those Member States are dealing and/or are confronted with in their relations with third countries. As such, the release of these information would undermine the international relations not only of these Member States, but also the Union as such to which they belong.
17. Besides, the Council points out that the success of international negotiations and cooperation in the domain of readmission depends to a large extent on the existence of a climate of mutual trust between all parties involved. Given that the cooperation is ongoing and having due regard to the fact that the readmission is a very sensitive issue for third countries, it would be counter-productive if concrete sensitive information in an area that concerns and is deemed important by all Member States, may be made publicly available.
18. This is particularly so during the current period when the ability of the Union to engage with third countries is key to address migration challenges and where political and diplomatic efforts are being devoted to mitigate their effects. Disclosure under such circumstances of parts of the remaining requested documents containing information of that kind would therefore involve a concrete risk of undermining international relations, as it has been acknowledged by the General Court in the framework of the so-called “EU-Turkey Statement” addressing similar migration issues⁵.

⁵ Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 42-57, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 42-46, 51.

b) The exception relating to the protection of the decision-making process (Article 4(3) of Regulation No 1049/2001)

19. As a preliminary point, the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the documents requested was likely to undermine specifically and actually the protection of the institution's decision-making process, and that the likelihood of that interest being undermined was reasonably foreseeable and not purely hypothetical⁶.
20. According to the case-law, the decision-making process is 'seriously' undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 where, inter alia, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question⁷.
21. As underlined by the General Court⁸, that case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the institution's decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could reasonably be foreseen that the decision-making process would be undermined if the documents were disclosed⁹.
22. At this stage, the topic of return sponsorships is currently under discussion essentially at a preparatory level. The reflections and questions in the documents are neither exhaustive nor final and do not necessarily reflect the final position the representatives of the Member States may later take within the framework of COREPER (see Article 240(1) TFEU) and, subsequently, the Council of Ministers in the appropriate configuration (see Article 16(6) TEU and Article 236 TFEU).

⁶ Judgment of 7 June 2011, Toland v Parliament, T-471/08, EU:T:2011:252, paragraph 70 and the case-law cited.

⁷ Judgments of 18 December 2008, Muñiz v Commission, T-144/05, EU:T:2008:596, paragraph 75; of 7 June 2011, Toland v Parliament, T-471/08, EU:T:2011:252, paragraph 71, and of 9 September 2014, MasterCard and Others v Commission, T-516/11, EU:T:2014:759, paragraph 62.

⁸ Judgment of 22 March 2018, De Capitani / Parliament, T-540/15, EU:T:2018:167, paragraph 65.

⁹ Judgment of 7 June 2011, Toland v Parliament, T-471/08, EU:T:2011:252, paragraphs 78 and 79.

23. The Council takes the view that disclosure of the remaining requested documents at this stage of the decision-making process is likely to put into question the final choices made by Member States and would create unnecessary uncertainty on their intentions.
24. Indeed, those documents include free and frank discussions between technical representatives of the Member States on the basis that were not meant to become public at this stage of the negotiations. Release would seriously undermine the mutual trust and confidence that enable the working groups to perform effectively and thus undermine the workability of the working groups. Moreover, any disclosure at this stage when a decision has not yet been taken would seriously affect the outcome of those preliminary exchanges.
25. Release to the public of the information contained in documents **WK 13579/20** and **WK 13579/20 REV 1** at a moment when delegations are seeking to find the appropriate balance of the various interests involved, would severely affect the negotiating process and substantially diminish the chances of the discussions to take place in a sound and effective manner in the framework of COREPER and subsequently the Council of Ministers. Thus, it would impede the ability of the institution to reach an agreement in order to be able to formulate its position which will be communicated to the European Parliament pursuant to the legislative procedure foreseen in the Treaties.
26. As a result, disclosure of the remaining two requested documents at this early stage would therefore seriously undermine the decision making-process of the Council.
27. Against this background, the Council must find a balance between the legitimate need for transparency and the legitimate need of ensuring that as an institution composed with representatives of the Member States the Council remains in a position to ensure that staffs of its Members can carry out preliminary consultations in order to be able to identify beforehand preliminary issues and concerns and to brush up on the preliminary discussion. This preparatory work is not endorsed as such by the Council and is not submitted as such to the COREPER nor to one of the configurations of the Council of Ministers. However, this informal preparatory work at a lower level is necessary to enable the representatives of the Member States, in the framework of the COREPER as foreseen in Article 240(1) TFEU and subsequently the Council of Ministers, to enter formally into detailed and in-depth discussions on the legislative proposal at issue. The Council equally considers that the legitimate public interest in release of the information does not outweigh in this particular case the equally legitimate need to protect smooth run of the ongoing decision-making process.

28. The Council has to strike a difficult balance between the need to protect the decision making process and the legitimate interest in transparency, taking into account all relevant aspects and the context in which the documents were drafted. The Council has particularly taken into consideration the public interest in transparency for documents that relate to legislative procedures. The Council wishes to underline that it fully acknowledges that the principle of transparency is particularly pressing in relation to decision-making processes of a legislative nature, since openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize the information which has formed the basis of a legislative act.
29. It is in light of those considerations that the Council already granted public access to documents 6088/21 and 13045/20 covered by the applicant's request already at the initial stage (see in that regard paragraph 2 above) and to documents 13261/20, 14276/20 and 5755/21 at this stage. Thus, by doing so it showed its openness and the importance due to transparency. Therefore, the refusal to disclose documents WK 13579/20 and WK 13579/20 REV 1, on the grounds that will be set out above, does not amount to denying citizens the possibility to obtain information about the legislative decision-making process in question.
30. On the one hand, following its specific assessment of the content and context of documents WK 13579/20 and WK 13579/20 REV 1, the Council concluded that there are objective reasons that show that there is a reasonably foreseeable risk that disclosure would seriously undermine the decision-making process. Indeed, at this stage, the questions gathered within those two documents have been raised to seek clarification on the proper understanding of the whole set of measures or are worded in an exploratory way. If access were granted to such documents, the preparation of the COREPER and the Council of Ministers will be substantially impeded as it is not materially and timely possible, in the framework of COREPER and Council of Ministers, to enter into a workshop-like discussion such as the technical one currently ongoing within the preparatory groups.

31. On the other hand, the applicant's argument of a disproportionate restriction on citizens' right to the widest possible access to legislative documents, as exposed in the confirmatory application, is of a very general nature. The applicant's argument do not provide any indication specifically pertaining to the documents and the ongoing decision-making process at issue and is only supported by general considerations that cannot provide an appropriate basis for establishing that, in the present case, an overriding public interest prevails over the reasons the refusal to grant access.
32. The Council therefore must confirm the refusal of access to documents WK 13579/20 and WK 13579/20 REV 1, pursuant to Article 4(1)(a), third indent and Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

Partial access pursuant to Article 4(6) of Regulation (EC) no 1049/2001

33. The Council has furthermore considered the possibility of giving partial access to documents **WK 13579/20** and **WK 13579/20 REV 1** pursuant to Article 4(6) of the Regulation (EC) No 1049/2001. It has come to the conclusion that no partial access can be given, as the exceptions to the right of access applies to their entire content.

CONCLUSIONS

34. For the above-mentioned reasons, the Council considers that access can be given to documents **13261/20, 14276/20** and **5755/21**.
35. The Council also considers that access to documents **WK 13579/20** and **WK 13579/20 REV 1** has to be refused in full pursuant to Article 4(3), first subparagraph of Regulation (EC) 1049/2001 (protection of the public interest with regard to the decision-making) as well as in part pursuant to Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 (protection of the public interest with regard to international relations).
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