



Council of the  
European Union

Brussels, 17 March 2020  
(OR. en)

6867/20

LIMITE

INF 42  
API 34

#### NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	5691/20; 5693/20
Subject:	Public access to documents - Confirmatory application No 02/c/01/20

Delegations will find enclosed a draft reply from the Council to confirmatory application No 02/c/01/20, approved unanimously by the Working Party by written consultation which ended on 26 February 2020.

Delegations agreed to publish the result of the vote.

It is suggested that the Council, by written procedure, approves the draft reply annexed to this document.

The annex is available in English only.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xx MARCH 2020**  
**TO CONFIRMATORY APPLICATION 02/c/01/20,**  
**made by email on 31 January 2020,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to document 13105/19 RESTREINTUE/EU RESTRICTED**

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 19 November 2019, the applicant submitted a request for access to document **13105/20 RESTREINT UE/EU RESTRICTED** of 15 October 2019 which is a note from the General Secretariat of the Council to delegations on the Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Cyprus, Greece, Lithuania and Romania.
2. In its reply dated 10 January 2020, the General Secretariat of the Council refused access to document **13105/20 RESTREINT UE/EU RESTRICTED** pursuant to Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001, so as to protect the decision-making process of the Council.
3. In the confirmatory application dated 31 January 2020 and registered on the same day, the applicant asks the Council to reconsider this position. The applicant is of the view that:

A. It has not been demonstrated that the disclosure "would actually and seriously undermine any decision-making process in a non-hypothetical way". In the applicant's opinion, the disclosure "would actually reinforce and strengthen" the decision-making process "by showing to the public that the rules governing the process in question were observed and applied".

B. "The overriding public interest in this decision-making process regarding the creation of an EU Public prosecutor office and in the appointment of the Chief prosecutor has been highlighted in the media, both in Romania and all over the EU".

4. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001, whether full public access can be granted to the requested document and has come to the conclusions set out below.

## **I. THE CONTEXT**

5. Each Member State of the European Union should nominate three candidates for the position of European Prosecutor pursuant to Article 16 of Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).
6. Those three candidates should be active members of the public prosecution service or judiciary of the relevant Member State. Their independence should be beyond doubt and they should possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States. They should also have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters.

7. The review of the candidates' applications with regard to the requirements set out in Article 14(2) of Regulation (EU) 2017/1939, the hearing of candidates and the assessment of their qualifications is done by a selection panel comprised of 12 persons appointed by the Council for a period of four years who, at the time of their appointment, are former members of the Court of Justice of the European Union, the European Court of Auditors, former national members of Eurojust, members of the national supreme courts, high-level prosecutors or lawyers of recognized competence.
8. Based on its findings during the review and hearing, the selection panel formulates an opinion on the candidates' qualifications to perform the duties of European Prosecutors and expressly states whether or not a candidate fulfills the conditions in Article 16(2) of Regulation (EU) 2017/1939. The selection panel provides reasons for its opinion and ranks candidates according to their qualifications and experience as stipulated in section VII. of the Operating rules of the selection panel, Annex to Council implementing decision (EU) 2018/1696. The ranking is not binding on the Council. The reasoned opinion drafted by the selection panel is transmitted to the Council by its Chair.
9. After having received the reasoned opinion of the selection panel as stipulated in section I. of the Operating rules of the selection panel, Annex to Council implementing decision (EU) 2018/1696, the Council selects and appoint one of the candidates to be the European Prosecutor of the Member State in question. If the selection panel finds that a candidate does not fulfill the conditions required for the performance of the duties of a European Prosecutor, its opinion is binding on the Council.
10. Section IV. of the Operating rules of the selection panel, Annex to Council implementing decision (EU) 2018/1696, clearly stipulates that "the deliberations of the panel shall be confidential and shall take place *in camera*".
11. The above provisions rule out that the assessment carried out by the selection panel are carried out in public or addressed to the public; on the contrary, they make clear that the selection panel's reasoned opinions as well as the rankings are intended exclusively for the Council.

12. As regards the handling of requests for access submitted under Regulation 1049/2001 by a member of a public, the Council considers that the legal framework established by Council Implementing Decision (EU) 2018/1696 has to be duly taken into account when interpreting the relevant provisions of Regulation 1049/2001 and assessing whether access to the selection panel's reasoned opinions and rankings can be given.

## **II. REQUESTED DOCUMENT 13105/20 RESTREINT UE/EU RESTRICTED**

13. Document **13105/20 RESTREINT UE/EU RESTRICTED** of 15 October 2019 is a note from the General Secretariat of the Council to delegations on the Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Cyprus, Greece, Lithuania and Romania. It contains the opinions of the selection panel on the suitability of the candidates proposed by the Member States to perform the duties of European Prosecutors of the EPPO.
14. The opinions contained in the document **13105/20 RESTREINT UE/EU RESTRICTED** consist of an assessment of the candidates' legal and professional experience with the emphasis on their relevant experience in investigating and prosecuting financial crime and others crimes affecting the financial interests of the European Union, their knowledge and understanding of the functioning of the EPPO and of the role of the European Prosecutor therein, their ability to work in an international environment as well as to confront themselves with legal systems different from their own, their presentation style and determination to address the challenges the European Public Prosecutor's Office could face, in particular in its setting up phase. The opinions are based on the hearings of the candidates nominated by Cyprus, Greece, Lithuania and Romania as well as the review of the presented CVs and motivation letters.

### III. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) No 1049/2001

15. The Council has reassessed the factual and legal situation and considers that the requested document falls within the remit of the exceptions relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001), the protection of commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001), and disclosure of the requested document would seriously undermine the decision-making process leading to the appointment of the European Prosecutors (Article 4(3) of Regulation (EC) No 1049/2001).

#### 1. The protection of the privacy and the integrity of the individuals concerned

16. The Council considers that the requested opinions contain personal data of the candidates for the appointment of the European Prosecutors. In particular, the Council considers that the notion of personal data manifestly covers both the factual elements concerning the candidates' professional experience and qualifications and the selection panel's assessment of the candidate's competences.
17. According to Article 3(1) of Regulation 2018/1725, personal data is in broad terms "any information relating to an identified or identifiable natural person". Moreover, the Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. In particular, it has stressed that professional data or information provided as part of a professional activity may well be characterised as personal data;<sup>1</sup> it has pointed out that objection or agreement to disclosure is not a constituent part of the concept;<sup>2</sup> it has further stressed that the fact that certain information has already been made public does not exclude its characterisation as personal data;<sup>3</sup> finally, names and forenames, even when alone, qualify as personal data.<sup>4</sup>

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<sup>1</sup> Judgment in *Commission v Bavarian Lager* (C-28/08, ECLI:EU:C:2010:378, paragraphs 66 to 70).

<sup>2</sup> Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 33).

<sup>3</sup> Judgment in *Satakunnan and SATAMEDIA* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

<sup>4</sup> Judgment in *Commission v Bavarian Lager* (C-28/08 P, ECLI:EU:C:2010:378, paragraph 68.)

18. In light of the above, the Council considers that the requested document contains personal data and therefore falls within the remit of the exception provided for by Article 4(1)(b) of Regulation (EC) No 1049/2001.
19. According to established case law, where an application is made seeking access to personal data within the meaning of Article 2(1) of Regulation 2018/1725, the provisions of that Regulation become applicable in their entirety.<sup>5</sup> More specifically, according to Article 9(1)(a) of Regulation 2018/1725 personal data may be transferred to recipients established in the Union only if two cumulative conditions are met: (1) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and (2) the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

*The necessity and proportionality of the transfer*

20. It is up to the applicant to show whether the transfer of the requested personal data is necessary, that is to say, whether it is the most appropriate measure to achieve the objective pursued by the applicant and if it is proportional to that objective.<sup>6</sup>
21. In this regard the applicant argues that having access to the opinion would allow to show to the public that the rules governing the appointment process in question were observed and applied. Moreover, the applicant refers to the broad media attention the establishment of the European Public Prosecutors Office and the appointment of the Chief European Public Prosecutor have received so far.
22. The Council does not consider that the applicant's arguments are sufficient to establish the necessity of the transfer of the requested personal data.

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<sup>5</sup> Ibidem, paragraph 63 regarding the predecessor Regulation (EC) No 45/2001.

<sup>6</sup> Judgment in *Dennekamp v European Parliament* (T-115/13, ECLI:EU:T:2015:497, paragraphs 59, 77 and ff.).

23. To start with, as far as the applicant generally refers to the principles of transparency and openness of the EU Institutions, it should be stressed that Regulation 1049/2001 only provides a right of public access to the extent that none of the exceptions provided by said Regulation applies. The automatic prevalence of the principle of transparency over data protection has been expressly ruled out by the Court.
24. As regards the objective to ensure that the rules governing the appointment process are observed and applied, the Council stresses that these are exactly the objectives that have led to the establishment of the selection panel in the first place and have inspired the Operating rules of the selection panel, which foresee *inter alia* the confidentiality of its activities (see above).
25. Moreover, the Council further stresses that if transparency is crucial to allow the citizen to hold accountable the political decision-makers and therefore to strengthen the democratic legitimacy of the EU Institutions having a representative nature, it plays a very different role in relation to the European Public Prosecutors Office. The legitimacy of the European Prosecutors is first and foremost assured by their independence, objectivity and professional competence and not by the control of the public opinion.
26. In this context, the disclosure of personal data requested by the applicant would, for the reasons that will be set out in section III.3 below, risk compromising the effective selection of suitable candidates to the post of European Prosecutors and therefore undermine, rather than pursue, the objective of ensuring the public's trust in the European Public Prosecutors Office.
27. Moreover, the scope of the data transfer requested by the applicant is not proportionate in relation to the objective pursued. On the one hand, the applicant has not shown why the considerable transfer of personal data would be the only appropriate measure to achieve the objective pursued. On the other hand, if the objective is to allow public control on the competence and qualifications of European Prosecutors, the Council fails to see why it would be necessary to transfer the data of those candidates who may subsequently not be appointed as European Prosecutors.



*The prejudice to a legitimate interest of the candidates*

28. The Council considers that disclosure of the requested personal data would inevitably cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.
29. This conclusion is straightforward where the opinions include negative assessments. The demanding professional requirements associated with the post of European Prosecutors attracts individuals of considerable seniority who already hold prominent positions. The reputation of individuals in such positions would inevitably suffer a greater damage should negative assessments concerning them be made public. Such a reputational damage could even have an effect on potential career prospects, both at the national and at an international level, even if the opinion of the selection panel is on the suitability of the candidate to perform the functions of a European Prosecutors. In this respect, it is to be reminded that the criteria of evaluation identified by the selection panel in its reports are broad and go well beyond the knowledge of EU law.
30. As regards positive assessments, it should be stressed that such opinions provide an assessment of the individual qualities of the candidate on the basis of which the selection panel has reached the conclusion that the candidate in question is suitable to perform the functions applied for. It cannot be excluded that, even if positive, an opinion may contain remarks or observations; point out certain less solid elements in the candidate's qualifications or profile. It is clear that, if disclosed, elements like those could affect the interests of the person already appointed as European Prosecutors.
31. Moreover, disclosing the positive assessments on persons who are later appointed the European Prosecutors may lead to an inevitable comparison of the qualities of those Prosecutors which would be harmful to the persons concerned but also to their activity as members of the European Public Prosecutors Office.

32. In light of these considerations, the Council deems that the disclosure of the requested personal data would cause prejudice to a legitimate interest of the candidates and that, on balance, those interests prevail on the objectives pursued by the applicant. The requested opinion should therefore be refused.

## **2. The protection of the candidates' commercial interests**

33. The Council further considers that the disclosure of the requested document would undermine the protection of the candidates' commercial interests, in the event that they carry out or intend to carry out paid work after the selection procedure is over or after their term as European Prosecutor has finished. The risk that the commercial interests of the candidates is undermined becomes greater where the opinion to be disclosed is unfavourable to the appointment of the candidates but this cannot be excluded in case of positive opinions either, in light of the arguments developed in points 29 to 31 above.
34. All the information contained in the report, whether positive or negative, will be relevant for any other position both in the public or the private sector for which the candidates would eventually be considered since, overall, it shows the capabilities of the candidates as legal professionals. Therefore, it cannot be denied that, in particular, the disclosure of an unfavourable opinion could have a negative impact on the candidates' chances to succeed in other competitions.
- ## **3. The protection of the decision-making process**
35. The Council also considers that disclosure of the requested document would seriously undermine the decision-making process leading to the appointment of European Prosecutor (Article 4(3) of Regulation (EC) No 1049/2001).

36. To start with, the publication of the selection panel's opinion and ranking would affect the confidentiality of the procedure for the assessment of the candidature. In this regard, it has to be recalled that the principle of the secrecy of the proceeding of assessment bodies is widely acknowledged in EU law and finds its justification in the need to guaranteeing the independence of the assessment bodies and the objectivity of their proceedings, by protecting them from all external interference and pressures.<sup>7</sup>
37. In this concrete case, the principle of confidentiality has been expressly enshrined in the Operating rules of the selection panel which set out specific provisions concerning the modalities of the selection panel's work and a specific regime of circulation and access to documents (see points 8-11 above). Moreover, after having received this opinion of the selection panel, the Council shall select and appoint one of the candidates to be the European Prosecutor of a given Member State. These rules need to be reconciled with the provision of Regulation (EC) No 1049/2001.
38. According to well-established case law, when a potential conflict exists between the provisions of Regulation (EC) No 1049/2001 and a specific set of rules regulating the regime of circulation and access to documents in the framework of a specific procedure, the conflict has to be solved by interpreting the exception provided in Regulation (EC) No 1049/2001 in line with the special regime. This ensures that the procedure to which such a regime is associated operates correctly and guarantees that its objectives are not jeopardised.
39. Typically, such a normative coordination is carried out by the recognition of a general presumption. Such a presumption is based on the fact that access to a document involved in the specific procedure would be incompatible with the proper conduct of that procedure and aims at ensuring the integrity of the conduct by limiting the intervention of third parties.

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<sup>7</sup> See for instance in the domain of selection of personnel and Staff Regulations, judgment in *Gonzalo de Mendoza Asenti v European Commission* (Case F 127/11, ECLI:EU/F/2014:14, paragraph 93).

40. In the present situation, there is no doubt that the disclosure of the requested document would undermine the Council's decision-making process, since the selection panel's opinion informs this process and allows the Council to select and appoint the European Prosecutors.. It follows that, in line with a well known case law,<sup>8</sup> the Council can in the present case effectively invoke a general presumption according to which the disclosure of the opinions and the rankings of the selection panel would, as a matter of principle, seriously undermine the Council's decision-making process.
41. The Council notes that even if the existence of a general presumption was put in question, the serious risk for the decision-making process leading to the appointment of the European Prosecutors results from specific circumstances.
42. In particular, there are justified considerations regarding possible prejudice to the candidates' reputation and commercial interests that could have broader systemic implications for the correct functioning of the selection procedure for European Prosecutors. Disclosure of opinions, even if favorable, could dissuade future qualified candidates from applying in fear of the negative impact of the selection panel's opinions in their reputation. This "chilling effect" is linked to the fact that potential candidates are usually individuals of particularly high seniority and visibility at the national level who could be deterred from participating in the selection procedure if their reputation could be at risk. It cannot be excluded that even very positive opinions may contain remarks or observations or point out less solid elements in the candidates' qualifications or profile. If disclosed, that assessment could become a topic of a public debate and cast a shadow on the profile of the candidates. Depending on the type of observations made in the positive opinion, the image of knowledge, expertise or effectiveness of a candidate may be undermined or put in question in such a public debate.
43. Furthermore, disclosure of the requested opinions and rankings would affect the working methods of the selection panel. In particular, the panel could become more restrained and more guarded when drafting its written opinions. Such a development would however be unfortunate since it would greatly reduce the usefulness of the panel's opinions and rankings.

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<sup>8</sup> See in particular judgment in *Alexandrou. v Commission* (T-515/14 P and T-516/14 P, ECLI:EU:T:2015:844, paragraphs 88 and following as well as the case law cited).

44. Moreover, disclosure of the opinions of the Panel would inevitably attract the attention of the public and possibly of the media on the assessment of the candidates. This in turn could lead to a politicisation of the issue and the adoption of postured positions with the effect of significantly reducing the marge of manoeuvre of the subsequent procedure in the Council for the appointment. In the framework of a political discussion on the appointments, the much respected opinion of the selection panel could be put into discussion in light of considerations of political nature that would ultimately affect the quality of the selection of European Prosecutors.
45. Finally, the decision-making for the appointment of European Prosecutors is still ongoing. Reassessing its reply dated 10 January 2020, the Council underlines that although the opinion requested has already been delivered, the actual decision-making procedure for the appointment of European Prosecutors in the Council has not yet been concluded. If the requested opinion were disclosed to the public at this stage, such disclosure would seriously undermine the decision-making procedure leading to the appointment of European Prosecutors for the reasons set out above.
46. Therefore, the Council considers that disclosure of the requested opinion would undermine the decision-making process leading to the appointment of the European Prosecutors and therefore has to be refused in line with Article 4(3) of Regulation (EC) No 1049/2001.

#### **IV. THE OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

47. When an Institution finds that one of the interests protected by the exception provided for in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 would be undermined by disclosure, it has to verify whether an overriding public interest exists that would nonetheless justify disclosure.
48. In the present case, the applicant considers that, in view of the media coverage related to the decision-making process regarding the creation of the EPPO and the appointment of the European Chief Prosecutor, both in Romania and all over the European Union, the overriding public interest that would justify the disclosure exists indeed.

49. The Council acknowledges that transparency plays a crucial role in the correct functioning of the EU democratic system as it clearly results from the Treaties, secondary legislation and the relevant case law.
50. However, in the present case the Council considers that when it comes to the publication of individual opinions on the suitability of candidates for the posts of the European Prosecutors, on balance, the public interest in having access to those opinions does not override the interests of the protection of the decision-making.
51. The Council would like to conclude by underlining that the arguments raised by the applicant requires to strike a delicate balance between opposing interests. Various alternatives are available and the Institutions shall be recognised a wide margin of appreciation in defining, in the full respect of the law of the Union, the solution that is deemed to better serve the interests at stake.

**V. PARTIAL ACCESS PURSUANT TO ARTICLE 4(6) OF REGULATION (EC)  
NO 1049/2001**

52. The Council has carefully reassessed the possibility to grant partial access to document **13105/20 RESTREINT UE/EU RESTRICTED** pursuant to Article 4(6) of Regulation (EC) No 1049/2001.
53. The information contained in this document relate to and is covered by the exceptions under Article 4(1)(b), 4(2), first indent and 4(3) of Regulation (EC) No 1049/2001 and cannot be severed into individual parts which are not covered by these exceptions.
54. Following this assessment, the Council confirms that no partial access to the requested document is possible.

## **VI. CONCLUSION**

55. For the above-mentioned reasons, the Council concludes that pursuant to Article 4(1)(b), 4(2), first indent and 4(3) of Regulation (EC) No 1049/2001, no access can be granted to document **13105/20 RESTREINT UE/EU RESTRICTED.**
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