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#### NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	7264/20; 7265/20; 8033/20
Subject:	Public access to documents - Confirmatory application No 10/c/01/20

Delegations will find in Annex the Council's draft reply on the above-mentioned confirmatory application, as agreed by the Working Party on Information, following the written consultation launched on 15 May 2020 which ended on 20 May 2020.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx**  
**TO CONFIRMATORY APPLICATION 10/c/01/20,**  
**made by email on 8 April 2020,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to documents**  
**COREU 0035/18, CFSP 0009/14, 0026/18, 0027/18 and 0020/19.**

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 "Regulation 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 27 February 2020 the applicant introduced an initial application for access to "any notification or information received by the Council from an EU Member State pursuant to
  - Articles 4, 5, 6, 8, 12, 15 or 16 of Regulation 208/2014<sup>1</sup>, as amended
  - Articles 4, 5, 6, 8, 12, 15 or 16 and Regulation 269/2014<sup>2</sup>, as amended
  - Articles 2, 7, 8 or 9 of Regulation 692/2014<sup>3</sup>, as amended
  - Articles 3, 4, 6, 8 or 9 of Regulation 833/2014<sup>4</sup>, as amended."<sup>5</sup>

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<sup>1</sup> Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine

<sup>2</sup> Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

<sup>3</sup> Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol

<sup>4</sup> Règlement (UE) n ° 833/2014 du Conseil du 31 juillet 2014 concernant des mesures restrictives eu égard aux actions de la Russie déstabilisant la situation en Ukraine

<sup>5</sup> The four Regulations were subject to several amendments (see the consolidated version <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02014R0208-20200306&from=EN>).

2. The abovementioned Regulations concern restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and destabilizing the situation in the Region.
3. In its reply dated 19 March 2020, the General Secretariat of the Council (GSC) informed the applicant that it had identified five COREU documents corresponding to his request: **0035/18, CFSP 0009/14, 0026/18, 0027/18 and 0020/19**. Access to these documents was refused in their entirety, since the GSC considered that, in the light of its internal consultations with the policy directorate responsible for this topic, their disclosure would undermine public interest with regard to public security and international relations.
4. On 8 April 2020, the applicant introduced a confirmatory application, arguing in substance that the GSC's refusal was not sufficiently motivated, that:
  - the risk of undermining public interest must be reasonably foreseeable and not purely hypothetical
  - the institution had the obligation to weigh the particular interest in making the document publicly accessible
  - the public interest was proven by the relevance of his academic research, focused on a comparative exercise among national laws and respective multilevel governance structures with respect to the collaboration in the implementation of the abovementioned Regulations.
5. The Council has carefully considered the confirmatory application. Having thoroughly scrutinized the requested documents in the light of the arguments brought forward by the applicant and after carrying out new consultations with the competent services of its GSC and the Member States that originated these documents, it has re-assessed 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, public access can be provided at this stage.
6. Following this examination and taking into account the time elapsed since the documents' production, the Council came to the conclusion that full public access can now be granted at this stage to **COREUs CFSP 0009/14, 0026/18, 0027/18 and 0020/19**.

7. The Council notes that this positive decision is based on an individual analysis of the content of the requested documents and the specific circumstances of the present case. It does under no circumstance constitute a precedent for the future, since each application shall be assessed and judged on its own merit, pursuant to the established practice of the Council.
8. As regards **COREU 0035/18**, the exceptions concerning the protection of the public interest as regards international relations invoked by the GSC in its reply to the applicant are fully applicable (Article 4(1)(a) of Regulation (EC) No 1049/2001). Moreover, upon re-examination the requested document also 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).

### **1. The protection of public interests under Article 4(1)(a) of Regulation (EC) No 1049/2001**

#### *The nature of the exception in general*

9. At the outset, the General Secretariat recalls that, in accordance 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 particular regime as compared to the other exceptions included in Article 4.
10. 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>6</sup>
11. 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*

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<sup>6</sup> Judgement in *Sison v Council* (C-266/05, ECLI:EU:C:2007:75, paragraph 34).

*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>7</sup>*

12. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, but is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interest and grant access nonetheless.
13. In contrast to the assumption of the applicant, it also results from the above that the Council has no choice but to refuse access to a document that falls within the scope of the abovementioned exception, the public disclosure of which would undermine the public interest protected by it.

*Assessment of the harm to the protected interests that would ensue from the disclosure of the requested document*

14. Document **COREU 0035/18** contains information of a sensitive nature concerning an authorized derogation applied by one Member State to the provisions foreseen in Article 4 of Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine<sup>8</sup>. The Regulation is targeting persons identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine.
15. The abovementioned document describes the reasons why the competent authorities of that Member State authorised an exception to the freezing of funds of an individual whose name was in the sanctions' list.

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<sup>7</sup> Judgement in *Sison v Council* (C-266/05, ECLI:EU:C:2007:75, paragraph 46).

<sup>8</sup> (OJ L 066 of 6.3.2014). This Regulation was subject to several amendments (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02014R0208-20200306&from=EN>).

16. Having due regard to the outcome of consultations with the national authorities concerned, it remains the Council's view that, if released to the wide public, this sensitive information shared in compliance with the abovementioned Regulation by a Member State would reveal some sensitive elements of its *modus operandi* in this context and could be purposely misused by third parties and hostile entities to circumvent the legislation in force, weakening/neutralizing the impact of the sanctions' list concerned.
17. Therefore, disclosure of the document would foreseeably risk undermining the protected public interests provided for in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.
18. In the light of the above, and having regard to the delicate political environment in the Region concerned, both at the local and international level, the disclosure to the public of the information contained in **COREU 0035/18** would undermine the protection of the public interest as regards international relations. As a consequence, access to it must be refused.

## **2. The protection of the privacy and the integrity of the individuals concerned**

19. The Council considers that the requested document **COREU 0035/18** contains personal data beyond the mere fact of being listed under the sanctions regime established by Council Regulation (EU) No 208/2014.
20. 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>9</sup> it has pointed out that objection or agreement to disclosure is not a constituent part of the concept;<sup>10</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>11</sup>

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<sup>9</sup> Judgment in *Commission v Bavarian Lager* (C-28/08, ECLI:EU:C:2010:378, paragraphs 66 to 70).

<sup>10</sup> Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 33).

<sup>11</sup> Judgment in *Satakunnan and SATAMEDIA* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

21. 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.
22. 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>12</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*

23. 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>13</sup>
24. In this regard the applicant invokes the public interest to conduct academic research, focused on a comparative exercise among national laws and respective multilevel governance structures with respect to the collaboration in the implementation of the relevant sanctions Regulations.
25. 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>12</sup> Ibidem, paragraph 63 regarding the predecessor Regulation (EC) No 45/2001.

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

26. To start with, 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.
27. In addition, the disclosure of personal data contained in the document would make known to the general public for who, in which amount and for which purpose certain frozen funds or economic resources were released or made available. Releasing this sensitive personal data which would cause considerable harm to the person(s) concerned.
28. 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 transfer of sensitive personal data would be the only appropriate measure to achieve the objective pursued. On the other hand, if the objective is to conduct academic research, the Council fails to see why it would be necessary to transfer personal data relating to persons whose frozen funds or economic resources were by way of derogation released or made available pursuant to Article 4 of Council Regulation (EU) No 208/2014.

*The prejudice to a legitimate interest of the person(s) concerned*

29. The Council considers that disclosure of the requested personal data would inevitably cause harm to the reputation of the person(s) and therefore would prejudice their legitimate interests.
30. Beyond the fact of being subject to sanctions under Council Regulation (EU) No 208/2014, disclosure of the identity, the amount and the reason certain funds were released or made available pursuant to Article 4 of this Regulation would inevitably cause damage to the reputation of the person(s) concerned. Disclosing this sensitive personal data would make known to the general public that the person(s) concerned needed to apply for an authorisation in order to get access to certain frozen funds or economic resources.



31. 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 person(s) concerned and that, on balance, those interests prevail on the objectives pursued by the applicant. The requested document should therefore be refused.

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

32. The Council has thoroughly re-examined **COREU 0035/18** in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001, but has concluded that its whole content is an inseparable whole. Therefore, no partial access is possible.

**CONCLUSION**

33. The Council therefore considers that:

- a. public access to documents **COREUs CFSP 0009/14, 0026/18, 0027/18** and **0020/19** can be granted in their entirety;
- b. document **COREU 0035/18** must be refused in its entirety.

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