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NOTE

From: General Secretariat of the Council

To: Delegations

No. prev. doc.: 11692/22

Subject: Public access to documents
- Confirmatory application No 13/c/01/22

Delegations will find attached a draft reply to confirmatory application No 13/c/01/22
(see 11692/22).

**REPLY TO CONFIRMATORY APPLICATION 13/c/01/22,
made by email on 29 July 2022**

Following this confirmatory application, the Council has considered the possibility to grant access to the documents requested thereby, in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001¹ and Annex II to the Council's Rules of Procedure², and has come to the following conclusion:

1. Further to an initial request by the Applicant submitted on 23 May 2022 focused on the negotiations on Fisheries between the European Union and the United-Kingdom, on 7 July 2022 the General Secretariat of the Council (GSC) replied to the Applicant, granting access to the following documents:

- ST 14671/21, ST 14672/21 + ADD 1, ST 12035/21, ST 12138/21, ST 12784/21 + ADD 1 + COR 1, ST 13470/21, ST 13666/21, ST 14359/21, WK 7717/2021, WK 12338/2021 + REV 1, WK 12646/2021, 12787/2021, WK 14908/2021, ST 14409/21, ST 6330/22, ST 6475/22 + ADD 1 + ADD 2 + ADD 3 + REV 1, ST 6614/22, ST 6947/22, ST 6996/22 + REV 1, ST 7257/22, WK 4385/2022, WK 5553/2022 and WK 7486/2022.

Furthermore, pursuant to the protection of international relations laid down under Article 4(1)(a) third indent of Regulation (EC) 1049/2001, the GSC refused access to the following documents:

- ST 12343/21 + ADD 1, ST 12343/21 ADD 2, ST 12420/21, ST 13169/21 + ADD 1 + ADD 2, ST 13264/21 + REV 1, ST 12681/21, ST 13511/21 + REV 1, ST 13883/21, ST 13952/21, ST 14002/21, ST 5680/22, ST 5880/22, ST 6020/22, ST 6275/22, ST 6470/22, ST 6631/22 + REV 1; ST 7011/22 + ADD 1, ST 7046/22 + REV 1, ST 7156/22, ST 7409/22 ADD 1, ST 7418/22 + ADD 1, ST 7553/22 + REV 1 and WK 5554/2022.

¹ OJ L 145, 31.5.2001, p. 43.

² Council Decision 2009/937/EU (OJ L 325, 11.12.2009, p. 35).

2. On 29 July 2022, the Applicant submitted a confirmatory application. In essence, the Applicant contends that the requested documents constitute legislative documents and that they contain environmental information. Essentially, the Applicant claims that the GSC has misapplied the exception in Article 4(1) (a) third indent of Regulation (EC) No 1049/2001 and failed to state reasons as required by Article 296 Treaty on the Functioning of the European Union (TFEU).
3. The Council has re-assessed whether, in full consideration of the principles of transparency underlying Regulation (EC) No 1049/2001 and in light of the Applicant's argument, full or partial public access can be provided to the requested documents for which access had been refused.

GENERAL CONTEXT RELATED TO THE REQUESTED DOCUMENTS

4. Most of the requested documents concern the establishment of the EU position in the annual consultations held with the United Kingdom pursuant to Article 498 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. This procedure led to the adoption of Council Decision (EU) 2021/1875 of 22 October 2021 concerning the position to be adopted on behalf of the Union in the annual consultations with the United Kingdom to agree on total allowable catches (TACs), whose legal base is Article 43(3), in conjunction with Article 218(9) TFEU.
5. The documents whose access is sought by this confirmatory application are:
 - **ST 12343/21** of 29.09.2021, note from the GSC to delegations on a Proposal for a Council Decision concerning the position to be taken on behalf of the Union in the annual consultations with the United Kingdom to agree total allowable catches. It contains comments from Denmark, Sweden and Germany on the proposal.
 - **ST 12343/21 ADD 1** of 30.09.2021, note from the GSC to delegations on a Proposal for a Council Decision concerning the position to be taken on behalf of the Union in the annual consultations with the United Kingdom to agree total allowable catches. It contains comments from Belgium on the proposal.

- **ST 12343/21 ADD 2** of 30.09.2021, note from the GSC to delegations on a Proposal for a Council Decision concerning the position to be taken on behalf of the Union in the annual consultations with the United Kingdom to agree total allowable catches. It contains comments from France and the Netherlands on the proposal.
- **ST 12420/21** of 06.10.2021, note from the General Secretariat of the Council (GSC) to delegations on the Proposal for a Council Decision concerning the position to be taken on behalf of the Union in the annual consultations with the United Kingdom to agree total allowable catches. It contains a Presidency compromise on the text of the proposal to be discussed at the Working Party on Fisheries Policy of 07.10.2021.
- **ST 12681/21** of 18.10.2021, note from the GSC to delegations on Bilateral EU-UK, Trilateral EU-UK-NO and bilateral EU-NO consultations on fishing opportunities for 2022. It contains a Commission non-paper on the proposal to contribute to the coordination with the Council in the preparation of the consultations with the UK and with the UK and Norway.
- **ST 13169/21** of 22.10.2021, note from the GSC to delegations on Bilateral EU-UK, Trilateral EU-UK-NO and Bilateral EU-NO consultations on fishing opportunities for 2022. It contains comments from Denmark, Germany, France, Ireland, Spain, the Netherlands, Portugal and Sweden on the Commission non-paper, doc. 12681/21.
- **ST 13169/21 ADD 1** of 25.10.2021, note from the GSC to delegations on Bilateral EU-UK, Trilateral EU-UK-NO and Bilateral EU-NO consultations on fishing opportunities for 2022. It contains comments from Belgium on the EU-UK consultations for 2022, set out in the Commission non-paper, document ST 12681/21.
- **ST 13169/21 ADD 2** of 29.10.2021, note from the GSC to delegations on Bilateral EU-UK, Trilateral EU-UK-NO and Bilateral EU-NO consultations on fishing opportunities for 2022. It contains comments from the Danish delegation on the EU-UK consultations for 2022, set out in the Commission non-paper, doc. 12681/21.
- **ST 13264/21** of 27.10.2021 and its revised version **ST 13264/1/21 REV 1** of 28.10.2021, drawn up by the GSC to delegations on Trilateral EU-UK-NO and bilateral EU-NO consultations on fishing opportunities for 2022. These two documents outline the changes suggested by the Presidency to the Commission non-paper on trilateral EU-UK-NO and bilateral EU-NO consultations on fishing opportunities for 2022.

- **ST 13511/21** of 04.11.2021, note from the GSC to delegations on the Preparation of bilateral EU-UK consultations on fishing opportunities for 2022. It contains the changes suggested by the Presidency to the Commission non-paper on these consultations.
- **ST 13511/1/21 REV 1** of 08.11.2021, note from the GSC to delegations on the Preparation of bilateral EU-UK consultations on fishing opportunities for 2022. It contains revised suggested changes by the Presidency to the Commission non-paper on bilateral EU-UK consultations on fishing opportunities for 2022.
- **ST 13883/21** of 12.11.2021, note from the GSC to delegations on Bilateral EU-UK consultations on fishing opportunities for 2022. It contains a Commission non-paper on the approach in view of the annual consultations for 2022.
- **ST 13952/21** of 16.11.2021, note from the GSC to delegations on Trilateral EU-UK-NO consultations on fishing opportunities for 2022. It contains changes suggested by the Presidency to the Commission non-paper as regards herring on trilateral EU-UK-NO consultations on fishing opportunities for 2022, as endorsed by a written consultation that concluded on 15 November 2021.
- **ST 5680/22** of 10.02.2022, note from the GSC to delegations containing the Outcome of proceedings of the Working Party on Fisheries Policy of 27 January 2022 (I. MAURITIUS II. NPFC III. ICCAT: ALBACORE TUNA IN THE MEDITERRANEAN IV. CONTROL REGULATION V. MACKEREL VI. EU-UK VII. AOB).
- **ST 5880/22** of 11.02.2022, note from the GSC to delegations containing the Outcome of proceedings of the Working Party on Fisheries Policy of 3 February 2022 (I. ICCAT: ALBACORE TUNA IN THE MEDITERRANEAN II. EU-UK III. COASTAL STATES IV. AOB).
- **ST 6020/22** of 21.02.2022, note from the GSC to delegations. It contains the Outcome of proceedings of the Working Party on Fisheries Policy of 10 February 2022 (I. FAO - WORKING GROUP on COFI SUB-COMMITTEE II. NORWAY III. CONTROL REGULATION IV. AOB).
- **ST 6275/22** of 15.02.2022, note from the GSC to delegations containing a Draft decision No 1/2022 of the Specialised Committee on Fisheries establishing a Working Group on Fisheries.

- **ST 6470/22** of 23.02.2022; note from the GSC to delegations on Guidelines on Special Stocks non-paper. It contains a Commission services non-paper on the orientations for the EU position for Guidelines for the setting of the provisional TACs by each party for special stocks to be adopted within the Specialised Committee on Fisheries (SCF) under Article 499(5) TCA.
- **ST 6631/22** of 01.03.2022, note from the GSC to delegations on EU-UK – Consultations on fishing opportunities for sandeel for 2022. It contains a Commission non-paper which aims to contribute to effective coordination with the Council in the preparation of the consultations with the UK to agree on the fishing opportunities.
- **ST 6631/1/22 REV 1** of 02.03.2022, note from the GSC to delegations on EU-UK – Consultations on fishing opportunities for sandeel for 2022. It is a corrected version of document ST 6631/22 (Commission non-paper on the subject).
- **ST 7011/22** of 08.03.2022, note from the GSC to delegations on Guidelines on Special Stocks non-paper. It contains comments from Sweden and Germany on the non-paper setting out guidelines on special stocks with the Trade and Cooperation Agreement between EU and the UK.
- **ST 7011/22 ADD 1** of 09.03.2022, note from the GSC to delegations on Guidelines on Special Stocks non-paper. It contains comments from the Danish and Spanish delegations on the non-paper setting out guidelines on special stocks with the Trade and Cooperation Agreement between EU and the UK.
- **ST 7046/22** of 09.03.2022 and its revised version **ST 7046/1/22 REV 1** of 10.03.2022, note from the GSC to delegations on Guidelines on Special Stocks non-paper, contain a Presidency compromise on the Commission services non-paper on the orientations for the EU position for Guidelines for the setting of the provisional TACs by each party for special stocks to be adopted within the Specialised Committee on Fisheries (SCF) under Article 499(5) TCA.
- **ST 7156/22** of 11.03.2022, note from the GSC to delegations. It contains a Commission Services non-paper on Union position to be taken in the Specialised Committee on Fisheries, established under Article 508 of the EU-UK Trade & Cooperation Agreement.

- **ST 7409/22 ADD 1** of 30.03.2022, draft minutes of the Council meeting (Agriculture and Fisheries) held on 21.03.2022.
- **ST 7418/22** of 25.03.2022, note from the GSC to delegations on a Council Regulation amending Council Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. It contains a draft Decision to use the written procedure for the adoption (this document exists only in French).
- **ST 7418/22 ADD 1** of 29.03.2022, note from the GSC to Coreper on a Council Regulation amending Council Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. It contains statements by Member States on exchange of fishing opportunities for certain stocks under ICCAT, on the re-inclusion of access to EU waters of Western waters on mackerel, on Svalbard cod and in relation to quota pools.
- **ST 7553/22** of 25.03.2022 and its revised version **ST 7553/1/22 REV 1** of 28.03.2022, note from the GSC to delegations. It contains a Presidency (initial and revised) compromise on a Commission Services Non-paper on Union position to be taken in the Specialised Committee on Fisheries, established under Article 508 of the EU-UK Trade & Cooperation Agreement.
- **ST 14002/22** of 16.11.2021, note from the GSC to delegations on Bilateral EU-UK consultations on fishing opportunities for 2022. It contains changes suggested by the Presidency to the Commission non-paper as regards the position to be endorsed by the Working Party on Fisheries on the bilateral EU-UK consultations on fishing opportunities for 2022.
- **WK 5554/2022** of 13.04.2022, note from the GSC to delegations on the Third meeting of the Specialised Committee on Fisheries. It contains the documents submitted by the Parties for the 3rd meeting of the Specialised Committee on Fisheries established by the EU-UK Trade and Cooperation Agreement taking place on 27 April 2022.

ASSESSMENT OF THE REQUESTED DOCUMENT UNDER REGULATION (EC)

No 1049/2001

6. The Council recalls 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.
7. 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*".³
8. 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 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*".⁴
9. Therefore, while the Council enjoys a wide discretion in assessing the probable impact of the release of documents that come within the remit of the exception related to the protection of public security, defence and military matters and international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to one or more documents would harm the abovementioned protected interest.⁵
10. Having carried out a new assessment of the documents in question, the Council considers that full access can be granted to documents **ST 6275/22, ST 7409/22 ADD 1, ST 7418/22 and ST 7418/22 ADD 1**.

³ Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 34; and judgment of 12 September 2013, *Besselink v Council*, T-331/11, ECLI:EU:T:2013:419, paragraph 88.

⁴ Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 46; and similarly judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, ECLI:EU:T:2018:69, paragraph 38.

⁵ 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.

11. Additionally, the Council has concluded that, pursuant to Article 4(6) of Regulation (CE) No 1049/2001, partial access may be granted to the following documents:
- **ST 5680/22**: the text of this document can be released, with the exception of the content of the agenda Section III (ICCAT ongoing negotiations or discussions on the EU's strategic approach in its relations with an allocation scheme for fishing opportunities for Mediterranean Albacore that, if disclosed, might impact on future EU's consultations and negotiations - see also point 19 below) and legal advice in the 2nd sentence of point 2 at page 2. Therefore, the abovementioned parts are respectively refused on the ground of Article 4(1)(a), third indent and Article 4(2), second indent of Regulation (EC) No 1049/2001;
 - **ST 5880/22**: the Applicant may have access to the text, except to the content of Section III (Coastal States Heads of Delegation meeting on mackerel (7-8 February 2022, Copenhagen) - Coastal States Heads of Delegation meeting on Atlanto-scandian herring (9-10 February 2022, Copenhagen) - Coastal States Heads of Delegation meeting on blue whiting (10-11 February 2022, Copenhagen) and Section IV - AOB, 2nd subject (Norway-beam trawls). If released to the public, these parts would cause prejudice to the EU's international relations (Article 4(1)(a), third indent of the abovementioned Regulation);
 - **ST 6020/22**: the Applicant may have access to Section III of the document. The remaining text (focusing on the following topics: Section I: FAO Working Group on COFI Sub-Committee on Fisheries Management: state of discussions and way forward; Section II: State of play of discussion with Norway regarding Svalbard; and Section IV-AOB (information from the Council Legal Service), if released to the public, would undermine public interest as regards international relations (Sections I and II) and the protection of legal advice (Article 4(2), second indent of the abovementioned Regulation).
 - **ST 6470/22**: the Applicant may have access to the cover page of the document, as well as to the full text of Section I ("background") in page 2 and the last paragraph of the same Section in page 3; Section 4 ("procedure") of page 5; and the full text of the Annex containing the "applicable legal framework". The remaining parts, if disclosed, would cause prejudice to public interest as regards international relations (see Article 4(1)(a), third indent of the abovementioned Regulation).

- **ST 7156/22**: public access may be granted to the following parts of the document:
 - the cover page
 - the content from page 1 to page 3 of the Annex (the introductory paragraphs after the main title of page 1 of the Annex and the "Main Orientations", up to half of page 4 of the document)
 - the following parts of the detailed proposed EU's position to be discussed in the SCF:
 - Title of Section I, the full text of the EU applicable legal framework, points 3, 4 and 7 of the Background; the first sentence of point 12 and the first sentence of point 13 of the Multi-year strategies
 - Title of Section II, full text of the EU applicable legal framework and points 16 and 17 of the Background
 - Title of Section III and point 28 of the Background
 - Titles of Sections IV, VI, VII, VIII, IX, X, XI and XII and full text of the respective EU applicable legal framework
 - Points 34, 35 and 49 of the Background of Section IV
 - Point 59 of the Background of Section V
 - Points 64 and 65 of the Background of Section VI
 - Point 80 of the Background of Section VIII
 - The full text of the Background of Section X (sole point 87)
 - Points 98 and 99 of the Background of Section XI.

The remaining parts must be protected as they contain information that, if released to the public, would undermine the EU's international relations (see Article 4(1)(a), third indent of the abovementioned Regulation).

12. In the interest of completeness and insofar as the refusal to grant full access to documents **ST 5680/22** and **ST 6020/22** is also based on the exemptions laid down in Article 4(2), second indent of Regulation (EC) No 1049/2001 (protection of legal advice), the Council considers that, on balance, the principle of transparency which underlies the Regulation would not, in the case of these two documents, prevail over the above indicated interest.

13. The Council considers that the other requested documents cannot be released at this stage. These documents - **ST 12343/21, ST 12343/21 ADD 1, ST 12343/21 ADD 2, ST 12420/21, ST 12681/21, ST 13169/21, ST 13169/21 ADD 1, ST 13169/21 ADD 2, ST 13264/21, ST 13264/1/21 REV 1, ST 13511/21, ST 13511/1/21 REV 1, ST 13883/21, ST 13952/21, ST 6631/22, ST 6631/1/22 REV 1, ST 7011/22, ST 7011/22 ADD 1, ST 7046/22, ST 7046/1/22 REV 1, ST 7553/22, ST 7553/1/22 REV 1, ST 14002/22 and WK 5554/2022** - concern the positions of the Union in view of the consultations with the United Kingdom in fisheries matters.
14. The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part⁶ (hereinafter “the Agreement”), was concluded by Council Decision (EU) 2021/689 of 29 April 2021⁷ and it entered into force on 1 May 2021. Heading Five of that Agreement sets the basis for Fisheries cooperation between the two parties with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties. Article 494 of the Agreement establishes the objectives and principles of that cooperation. Pursuant to Article 496(1) of the Agreement, “*Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3)*”.
15. The arrangements on access to waters and resources are governed by the provisions on Articles 498 to 505 of the Agreement. One of the key elements of these arrangements is the obligation to hold annual consultations with the aim of agreeing, by 10 December of each year, the TACs for certain stocks for the following year, taking into account other annual consultations among coastal states that affect either or both of the parties.
16. In addition, Article 508 of the Agreement foresees the creation of a Specialised Committee on Fisheries, entrusted with certain tasks. This Committee may adopt certain measures listed in the second paragraph of Article 508.

⁶ OJ L149 of 30.4.2021, p.10

⁷ OJ L149 OF 30.4.2021, p.2

17. The positions of the Union in these consultations and in the Specialised Committee on Fisheries are discussed within the preparatory bodies of the Council. All documents listed in paragraph 13 relate to those internal discussions within the preparatory bodies of the Council with a view to setting, and where necessary adapting, the positions to be defended by the Union in these consultations and/or within the said Committee. The Commission conducts the consultations on behalf of the Union.
18. The discussions within the preparatory bodies of the Council concern negotiating objectives and strategies, priorities, red lines, technical elements to be considered and possible compromises to be discussed with the other party of the Agreement. The release of these documents would weaken the EU's position in those negotiations with the United Kingdom and jeopardize the ability of the EU to efficiently manage the negotiations with a view to obtaining the best possible outcome for the Union, since the United Kingdom could gain useful insights on the strategy and tactics of the EU. Furthermore, the Council recalls that, as established by the General Court, in the context of the exception under Article 4(1)(a) third indent of Regulation (EC) No 1049/2001, "*it is not required to establish the existence of a definite risk of undermining the protection of the European Union's international relations*".⁸ Taking into account the sensitive context and the strategic importance of questions related to Fisheries for UK-EU relations, the Council considers that the risk of undermining the Union's negotiation position in this context is reasonably foreseeable and not purely hypothetical.
19. Some of the documents mentioned in point 13 above also contain information about the negotiating position of the United Kingdom. Their release would thus also have a negative impact on the relations of the Union with that country, which could consider such a release a breach of the trust placed in the Union for not releasing information about negotiating tactics and priorities that may be internally sensitive. This is of particular relevance and political sensitiveness taking into account the difficulties concerning the bilateral relations between the Union and the United Kingdom and the sensitivity of the fisheries issues in those relations. Further to this, it should be recalled that the General Court has held on several occasions that, in relation with the exception under Article 4(1)(a) third indent of Regulation (EC) No 1049/2001, "*the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country. Indeed, the pursuit and the quality of those relations depend on that perception. It may therefore warrant the application of the exception concerned*".⁹

⁸ Judgment of 25 November 2020, *Bronckers v European Commission*, T-166/19, ECLI:EU:T:2020:557, paragraph 60.

⁹ Judgment of 27 February 2018, *CEE Bankwatch Network v European Commission*, T-307/16, ECLI:EU:T:2018:97, paragraph 90 and Judgment of 25 November 2020, *Bronckers v European Commission*, T-166/19, ECLI:EU:T:2020:557, paragraph 61.

20. Although the agreed records of the consultations on the TACs for 2022 have already been signed, the Council considers that these negative consequences if the documents in question are released still apply. The negotiation pattern for fisheries is *de facto* an ongoing process since the stocks covered by the negotiations are likely to be the same year after year, as well as the objectives, the priorities and the constraints of each of the parties. Therefore, to allow access to the Union negotiating strategy and tactics is likely to have a negative effect for the Union in future consultations.

ON THE REMARKS AND ARGUMENTS MADE BY THE APPLICANT IN ITS CONFIRMATORY APPLICATION

21. As regards the Applicant's preliminary remarks, the Council cannot share the Applicant's surprise, prompted by its allegation that access has been refused for some documents that, according to the Applicant, fall in the "same categories of documents" whose access had been granted in previous years. Neither in previous years for other requests submitted by the same Applicant nor for the present application has the Council applied an assessment by categories. Furthermore, such an assessment by categories of documents would not be in line with the relevant case-law, which requires that the examination that the institution must undertake be made in respect of each document and carried out in a concrete manner.¹⁰
22. The Council considers that the allegation by the Applicant that the requested documents constitute "legislative documents" is wrong. The documents referred to in points 11 and 13 are not legislative documents. Recital (6) of Regulation (EC) 1049/2001 refers to "cases where the institutions are acting in their legislative capacity", however, the requested documents, which were issued in the context of the preparation for international consultations and negotiations with third countries, do not fall within this category.

¹⁰ Judgment of 13 April 2005, *Verein für Konsumenteninformation v European Commission*, T-2/03, ECLI:EU:T:2005:125, paragraphs 69 to 71 and Judgment of 7 February 2002, *Aldo Kuijter v Council*, T-211/00, ECLI:EU:T:2002:30, paragraphs 56 and 61.

23. It must be noted that some of the documents referred in paragraphs 11 and 13 refer to discussions on ongoing negotiations, and are not even linked to the adoption of a legal act. The other requested documents prepare the adoption of Council Decision (EU) 2021/1875 of 22 October 2021 concerning the position to be adopted on behalf of the Union in the annual consultations with the United Kingdom to agree on total allowable catches¹¹ or the adoption of Council Decision (EU) 2021/1765 of 5 October 2021 on the position to be adopted on behalf of the European Union, for the period 2021–2026, within the Specialised Committee on Fisheries established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. Both Decisions were adopted by the Council with Article 43, in conjunction with Article 218(9) TFEU as legal basis. Neither the legal basis nor the procedure followed for adopting such Decisions can be considered “legislative”, but preparatory acts in view of international negotiations to be conducted.
24. It must be noted in this context that the Court has held that “initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations.”¹² The General Court then concluded that “during that procedure, it must be held that the Council is not acting in its legislative capacity”.¹³

¹¹ OJ L 378, 26.10.2021, p. 6

¹² Judgment of 19 March, *In 't Veld v Council*, T-301/10, ECLI:EU:T:2013:135, paragraph 120 and Judgment of 4 May 2012, *In 't Veld v Council*, T-529/09, ECLI:EU:T:2012:215, paragraph 88.

¹³ Judgment of 4 May 2012, *In 't Veld v Council*, T-529/09, ECLI:EU:T:2012:215, paragraph 88.

25. Since the documents are not legislative, it follows that the obligation to ascertain whether there is any overriding public interest justifying disclosure applies in a different way. In the present case, it should be noted that the exceptions to the right to access under Article 4(1)(a) of Regulation No 1049/2001 are mandatory exceptions, unlike other exceptions to the right to access, and do not make any reference to the consideration of such an interest. In the context of a decision to refuse access under Article 4(1)(a), third indent, of Regulation No 1049/2001, any argument based on an overriding public interest in disclosure cannot be upheld. To the extent that the requested documents contain "environmental information" in the sense of Article 2 of Regulation (EC) No 1367/2006, as argued by the Applicant, it is recalled that Article 3 of this Regulation does not exclude the possibility to rely on the exceptions enshrined in Article 4 of Regulation (EC) No 1049/2001. Rather, Article 6 of Regulation (EC) No 1367/2006 adds more specific rules concerning such requests for access to environmental information which in part favour and in part restrict that access¹⁴. Therefore, the merits of these exceptions still need to be assessed on a case-by-case basis." In this case, while acknowledging that the documents whose access is refused or parts of them may contain environmental information, the Council considers that there is no overriding public interest justifying disclosure, particularly taking into account that the documents whose access is refused are purely internal documents preparing the negotiating strategy and tactics, while the Decisions on the negotiating position of the Union and the agreed records in the fisheries negotiations with the United Kingdom have been made public. The Council also notes that the Applicant has not identified any pressing interest based on concrete elements and a general reference to transparency is not sufficient to substantiate an overriding public interest, particularly when balanced with the need to protect public interest as regards international relations in line with the above explanations provided by the Council.
26. Finally, the Council notes that the explanations provided in the present reply constitute an adequate statement of the reasons justifying the refusal to grant access to the documents referred to in paragraph 13 and the partial access granted to the documents referred to in paragraph 11.

¹⁴ See judgments of 13 July 2017, *Saint-Gobain Glass Deutschland v Commission*, C 60/15 P, EU:C:2017:540, paragraph 65; 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 99.

27. The Council has also thoroughly re-examined the requested documents referred to in point 13 above in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001. Following this examination, the Council has concluded that partial access to these documents cannot be granted, since their content is considered an inseparable whole whose disclosure would undermine the protection of public interest as regards international relations.

CONCLUSION

28. For the reasons set out above, the Council concludes that:

- full access may be granted to documents **ST 6275/22, ST 7409/22 ADD 1, ST 7418/22 and ST 7418/22 ADD 1**;
- partial access may be granted to the following documents: **ST 5680/22, ST 5880/22, ST 6020/22, ST 6470/22 and ST 7156/22**;
- access to documents **ST 12343/21, ST 12343/21 ADD 1, ST 12343/21 ADD 2, ST 12420/21, ST 12681/21, ST 13169/21, ST 13169/21 ADD 1, ST 13169/21 ADD 2, ST 13264/21, ST 13264/1/21 REV 1, ST 13511/21, ST 13511/1/21 REV 1, ST 13883/21, ST 13952/21, ST 6631/22, ST 6631/1/22 REV 1, ST 7011/22, ST 7011/22 ADD 1, ST 7046/22, ST 7046/1/22 REV 1, ST 7553/22, ST 7553/1/22 REV 1, ST 14002/22 and WK 5554/2022** must be refused in their entirety on the ground of Article 4(1)(a), third indent, of Regulation (EC) No. 1049/2001.