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European Union

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NOTE

From: General Secretariat of the Council

To: Delegations

No. prev. doc.: 12960/23

Subject: Public access to documents
- Confirmatory application No 32/c/05/23

Delegations will find attached a draft reply to confirmatory application No 32/c/05/23
(see 12960/23).

REPLY TO CONFIRMATORY APPLICATION No 32/c/05/23
made by email on 12 September 2023 and registered on 13 September 2023

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 the initial request for public access to working document **WK 9185/2023** (consultation of the Working Party of Foreign Relations Counsellors focused on restrictive measures against Belarus) and all documents related to the request in that document, on 25 August 2023 the General Secretariat of the Council (GSC):
 - a. released a partial version of the requested WK document, redacting one line of its first paragraph as its disclosure would cause prejudice to the public interest as regards international relations (Art. 4(1)(a), third indent, of Regulation (EC) No. 1049/2001);
 - b. refused to grant access to the two documents related to the abovementioned document, **WK 13524/1/21 REV 1** and **WK 17497/22**, containing information forming the evidence file supporting the proposal from the European External Action Service (EEAS) that led to the adoption by the Council of the abovementioned restrictive measures. Access to such information was denied pursuant to Article 4(1)(b) (protection of personal data) and Art. 4(1)(a), third indent (protection of the public interest as regards international relations), of Regulation (EC) No. 1049/2001.
2. On 12 September 2023, the Applicant submitted a confirmatory application asking the Council to review its position as regards the three abovementioned documents, arguing in essence that:
 - a. as regards document **WK 9185/2023**, the Council did not specify how the risk of undermining international relations was not merely hypothetical and did not provide a detailed justification for raising that exception;

¹ OJ L 145, 31.5.2001, p. 43.

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

- b. as regards documents **WK 13524/2021 REV 1** and **WK 17497/2022**, it should be possible to disclose their contents by redacting only the identity of the individual(s) concerned.
3. The Council has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the Applicant's comments, whether full or partial public access can be provided to the requested documents.

THE REQUESTED DOCUMENTS

4. The three requested documents concern the EEAS' activities as the originating body for the proposals submitted to the Council with regard to EU's restrictive measures.
- a. Document **WK 9185/2023** was drawn up by the General Secretariat as a follow-up to a consultation from the EEAS, following a specific request from the United States to get access to supporting evidence concerning certain Belarusian persons/entities.
- b. Documents **WK 13524/2021 REV 1** and **WK 17497/2022** are the documents referenced in the abovementioned consultation, identified by the EEAS for the specific case as follow-up to that specific request from the United States. They contain the evidence relied upon for the imposition of EU restrictive measures on those persons/entities.

ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION (EC)

No 1049/2001

5. As regards document **WK 9185/2023**, the Council recalls that, in accordance with 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.
6. On the one hand, "*in respect of the public interest exceptions provided for in Article 4(1)(a)*" of Regulation (EC) No 1049/2001, the Council must be recognised as "*enjoying a wide*

*discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision”.*³

7. 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
8. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, but it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document or parts of a document would harm the abovementioned protected interest.
9. Besides, for the purpose of the assessment of a request for access to documents under 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, but rather the existence of a reasonably foreseeable and not purely hypothetical risk⁵ for which, as previously recalled, the institution enjoys a margin of discretion.
10. 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 exceptions, the public disclosure of which would undermine the public interests protected by them.
11. The redacted part of document **WK 9185/2023** contains elements identifying the person/entity which is the specific interest area of the USA authorities. They reflect sensitive aspects of contacts with the authorities of a third-country in the framework of sharing of information concerning restrictive measures. The trust that is required for those contacts to be fruitful

³ Judgments of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 25, and of 27 November 2019, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, T-31/18, EU:T:2019:815, paragraph 65.

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

⁵ Judgment of 25 November 2020, *Bronckers v Commission*, T-166/19, EU:T:2020:557, paragraph 60.

could be harmed by the release of the parts of the document which identify the focus of third-country ongoing investigations.

12. On this basis, the Council considers that its full release to the public would be detrimental to the public interest as regards international relations in that it would hurt the mutual trust in the relations between the EU and the USA in the framework of restrictive measures cooperation⁶.
13. As regards documents **WK 13524/2021 REV 1** and **WK 17497/2022**, they provide the evidentiary basis for the Council's decision(s) to apply EU restrictive measures on certain Belarusian persons/entities⁷ concerned by the information sharing request received from USA authorities. Following a renewed assessment, the Council confirms that their content cannot be disclosed due to the protection of personal data (Article 4(1)(b) of Regulation (EC) No. 1049/2001) and based on the protection of the public interest as regards international relations (Art. 4(1)(a), third indent, of Regulation (EC) No. 1049/2001).
14. These two documents contain information collected from different sources, serving as the basis for the proposals for Council Decisions in this field, submitted by the EEAS, and joint proposals for implementing Council Regulations, submitted by the EEAS and the European Commission, which constitute third-party documents within the meaning of Article 4(4) of Regulation (EC) No 1049/2001. The documents allow the identification of the person/entity which is the specific interest of USA authorities, similarly to the redacted part of document WK 9185/2023.
15. The possible disclosure of such documents requires consulting the third party with a view to assessing whether an exception under Article 4(1) or (2) of this Regulation applies. It should be noted that not every name or every measure proposed by the High Representative and the Commission is included in the final legal acts adopted by the Council.
16. When the EU imposes autonomous restrictive measures⁵, it often acts in close cooperation with a number of international partners, including through mutual sharing of evidence. If the Union were to publicly release the focus of the investigations conducted by third-country authorities without their consent, this would complicate coordination with them and undermine the mutual confidence between them and the EU. Such a disclosure would expose

⁶ Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.

⁷ Since October 2020, the EU has imposed five packages of sanctions in connection with the situation in Belarus, targeting a total of 233 individuals and 37 entities (see [EU restrictive measures against Belarus - Consilium \(europa.eu\)](https://www.consilium.europa.eu/en/policies/sanctions-belarus/)).

the focus of ongoing investigations and decision-making procedures of third-country partners (see point 13 above), this being a concrete and not hypothetical risk.

17. In light of the above, it must be concluded, based on a renewed assessment, that the release of documents **WK 13524/2021 REV 1** and **WK 17497/2022** to the public would cause a reasonably foreseeable and not purely hypothetical prejudice to the protection of international relations, that is a public interest protected under Article 4(1)(a) of Regulation (EC) No 1049/2001. This serious risk remains clearly valid even after the Council's adoption of the restrictive measures against the persons/entities concerned, since this has no bearing on the investigations and procedures of third-country authorities, which might be ongoing.
18. Moreover, these two documents contain a wide range of personal data, including names, pictures and e-mail addresses of natural persons. This information clearly falls within the scope of the exception relating to the protection of the privacy and the integrity of the individual in accordance with Union legislation regarding the protection of personal data (Article 4(1)(b) of Regulation (EC) No 1049/2001). Such Union legislation, as applicable to the GSC, is contained in Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (hereinafter "Regulation (EU) 2018/1725").
19. In accordance with Article 3(1) of Regulation (EU) 2018/1725, personal data is defined very broadly as "any information relating to an identified or identifiable natural person". The Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. It has, in particular, stressed that professional data or information provided as part of a professional activity may well be characterised as personal data⁸; it has also further stressed that the fact that some information has already been made public does not exclude its characterisation as personal data⁹; finally, names and forenames, even when alone, qualify as personal data¹⁰.
20. According to established case law, when an application is made seeking access to personal data within the meaning of Article 3(1) of Regulation (EU) 2018/1725, the provisions of that

⁸ See, among others, judgment of 19 September 2018 in Case T-39/17, *Port de Brest v Commission*, EU:T:2018:560, paragraphs 38 and 43.

⁹ Judgment of 25 September 2018 in Joined Cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, EU:T:2018:602, paragraph 52.

¹⁰ Judgment in Case C-28/08 P, *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 68.

Regulation become applicable in their entirety¹¹. More specifically, pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, personal data may be transferred to recipients established in the Union only if two cumulative conditions are met. Firstly, the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. Secondly, 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.

21. It is for the Applicant to first establish the need to have the data transferred, the institution concerned not being obliged to verify itself whether reasons justifying the transfer of personal data exist¹². In the case at hand, the Applicant has not established the necessity of the transfer in the confirmatory application, it is therefore not necessary for the Council to proceed to determining whether there is any reason to assume that that transfer might prejudice the legitimate interests of the data subject.
22. It also has to be stressed that, in the present case, the personal data are not an accessory set of details, since they are at the core of both documents, which are a compilation of different sources reporting on certain persons/entities.
23. Concerning the request to grant partial access by redacting only the identity of the individual(s) concerned or all personal data, the Council has found that the release of any of the elements of the two documents, forming an inseparable whole, would allow the identification of the persons and entities which are the focus of an investigation by USA authorities, which would give rise to a serious prejudice to the protection of international relations, as explained above.
24. Hence, it is impossible to grant partial access to the two documents in line with Article 4(6) of Regulation (EC) No 1049/2001.
25. Finally, the Council also wishes to inform the Applicant that the request from the United States is part of the cooperation among partner organisations in their common endeavour to counter activities threatening international peace and stability and universally recognised democratic values, and such cooperation does not prejudice the status of the documents concerned under the rules of every jurisdiction.

¹¹ Ibid., paragraph 63, regarding the predecessor of Regulation (EU) 2018/1725, Regulation (EC) No 45/2001.

¹² See, among others, judgment of 2 October 2014 in Case C-127/13, *Strack v Commission*, EU:C:2014:2250, paragraphs 106-107.

CONCLUSION

26. For the reasons set out above, the Council concludes that:
- a. no further partial access can be granted to document **WK 9185/2023**, the remaining part being kept undisclosed on the ground of Article 4(1)(a), third indent, of Regulation (EC) No. 1049/2001;
 - b. access to documents **WK 13524/2021 REV 1** and **WK 17497/2022** must be refused in their entirety on the ground of Article 4(1)(a), third indent, and Article 4(1)(b) of the abovementioned Regulation.
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