



Council of the
European Union

Brussels, 6 May 2022
(OR. fr, en)

8632/22

LIMITE

API 31
INF 61
OMBUDS 10
JUR 282
INST 148

'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	6712/22; 8087/22
Subject:	Complaint 717/2021/DL to the European Ombudsman - Recommendation of the European Ombudsman - approval of the reply

1. At the meeting of the Working Party on Information on 28 April 2022, delegations examined and agreed on a draft Council reply to the recommendation of the European Ombudsman concerning complaint 717/2021/DL (as set out in 8087/22), with the NL, BE, DK, EE, LV, FI and SE delegations voting against.
2. The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:
 - approve the reply as set out in the annex as an 'A' item;
 - decide to make public the statements made by delegations, as appearing in the addendum to this note, and the result of the vote.

DRAFT REPLY

Brussels, XXX

Ms Emily O'Reilly
European Ombudsman
1, Avenue du Président Robert Schuman
B.P. 403
F-67001 Strasbourg Cedex

**Subject: Your letter of 24 February 2022 concerning the complaint 717/2021/DL –
Recommendation**

Dear Ms O'Reilly,

Thank you for your letter of 24 February 2022 concerning the recommendation to the Council of the European Union ("Council") in the complaint 717/2021/DL to grant the widest possible access to a legal opinion on the Trade and Cooperation Agreement between the EU and the European Atomic Energy Community, on the one side, and the United Kingdom of Great Britain and Northern Ireland, on the other side ("TCA") ("document 5591/21").

The Council confirms that the parts of the legal opinion contained in document 5591/21 which were not released before¹ remain sensitive.

The factual situation surrounding this legal opinion did not change since our response to your proposal for a solution, provided by letter of 15 November 2021, and there are no new circumstances that would allow the Council to grant broader access to the legal opinion in question.

¹ In the reply to the initial request, the General Secretariat of the Council (GSC) granted access to paragraphs 1 to 3, to the first two sentences of paragraph 4, to paragraphs 5 and 8, to the first sentence of paragraph 9 as well as to paragraph 11 of the opinion. Access to the remaining parts of the document was refused pursuant to the third indent of Article 4(1)(a) and Articles 4(2) and (3) of Regulation (EC) No 1049/2001. In the response to the confirmatory application, the Council confirmed that access to the parts of the opinion were refused pursuant to the third indent of Article 4(1) (a) and to the second indent of Article 4(2) and to the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Therefore, while the Council has taken into account that the TCA has entered into force since the response to the confirmatory application was adopted, further access to the legal opinion would undermine the third indent of Article 4(1)(a) (protection of international relations) and the second indent of Article 4(2) (the protection of legal advice) for the reasons explained in the response to the confirmative application and the letter of 15 November 2021.

The Council also reiterates that the legal opinion contained in document 5591/21 relates to a decision-making process of non-legislative nature, the negotiation and conclusion of an international agreement. The Council was therefore not acting in its legislative capacity².

As mentioned in the response to the confirmative application, documents drawn up in the framework of the negotiation and conclusion of an international agreement such as document 5591/21 are not subject to the same breadth of access to documents as the legislative activities of an EU institution. More particularly, the Court has held that public participation in the procedure relating to the negotiation and the conclusion of an international agreement, which falls within the domain of the executive, is necessarily restricted in view of the legitimate interest of the negotiations³.

In addition, the arguments put forward in the response to the confirmative application and the letter of 15 November 2021 were not questioned by the General Court in case T-252/19 *Pech v Council*,⁴ to which you refer in your recommendation. This case, which is under appeal, concerns a legal opinion of the CLS which was issued in the context of a legislative process, not in the process of the conclusion of an international agreement. There is therefore a substantive difference between that case and the type of procedure (i.e. non-legislative procedure) in which the legal opinion at the core of this complaint was issued. Additionally, the exception of the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 (the protection of international relations) was not raised in the administrative proceedings leading to the case T-252/19 *Pech v Council*. In any event, the content of the parts of the legal opinion which were not disclosed to the complainant are still sensitive as explained above.

On this basis, the Council concludes that no further access could be granted to the legal opinion contained in document 5591/21.

Yours sincerely,

² See Case T-529/09 *Sophie in 't Veld v Council*, EU:T:2012:215 paragraph 88.

³ See Case T-301/10 *Sophie in 't Veld v Commission*, EU:T:2013:135, paragraph 120, and Case T-529/09 *Sophie in 't Veld v Council*, EU:T:2012:215 paragraph 88.

⁴ Case T-252/19 *Pech v Council*, EU:T:2021:203.