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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	8801/21
Subject:	Public access to documents - Confirmatory application No 22/c/01/21

Delegations will find attached a draft reply to confirmatory application No 22/c/01/21 (see 8801/21).

**REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 22/c/01/21,
made by email on 14 May 2021
and registered on 17 May
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document ST 12090/17 INIT, ST 12090/17 REV 1, ST 12823/17 INIT, ST
15496/17 INIT, ST 15762/17 INIT, ST 15762/17 REV 1 and ST 15762/17 REV 2**

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 April 2021, the applicant submitted a request for access to documents **12090/17 INIT + REV 1, 12823/17, 15496/17 and 15762/17 INIT + REV 1 + REV 2.**
 - a) Documents **12090/17 INIT + REV 1** of 12 September and 3 October 2017 are notes from the Commission services to delegations on *Draft EU-Ethiopia Good practices for Readmission Procedure*.
 - b) Document **12823/17** of 10 October 2017 is an 'I/A' item note from the General Secretariat of the Council to the Permanent representatives Committee (Part 2)/Council on *Draft EU - Ethiopia readmission procedure in practice*.
 - c) Document **15496/17** of 6 December 2017 is a note from the Commission services to delegations on *Draft Admission procedures for the return of Ethiopians from European Union Member States*.

d) Documents **15762/17 INIT + REV 1 + REV 2** of 18 December 2017, 17 and 25 January 2018 are 'I/A' item notes from the General Secretariat of the Council to the Permanent Representatives Committee (Part2)/Council on *Admission procedures for the return of Ethiopians from European Union Member States*.

2. On 26 April 2021, the General Secretariat of the Council refused access of the applicant to these documents pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, since their disclosure would undermine the protection of the public interest as regards international relations.
3. On 14 May 2021, the applicant made a confirmatory application, registered on 17 May 2021, against the General Secretariat's refusal of access as mentioned above (see also document **8801/21**).
4. The Council has carefully considered the confirmatory application. Having thoroughly examined the requested documents and carried out the necessary consultations, it has reassessed the request in full consideration of the principles underlying Regulation (EC) No 1049/2001, with the aim of ensuring the widest possible public access to documents.

I. CONTEXT OF THE DOCUMENTS

5. The requested documents contain information on relations of the EU with Ethiopia in the area of migration and migration-related issues. In particular, they define good practices as part of the reinforcement of the cooperation on returns and readmission between the EU and Ethiopia.
6. The effective returns is key to successful migration policy, and third country cooperation on returns and readmission is essential in this regard: no returns are possible without the cooperation of third countries.

7. According to Commission Communication on Enhancing cooperation on return and readmission as a part of a fair, effective and comprehensive EU migration policy (COM(2021) 56 final, page 9), *"it appears that for almost one third of the countries covered by the 2020 assessment cooperation works well with most Member States, for almost another one third the level of cooperation is average, with improvements needed with regard to a number of Member States while for more than one third the level of cooperation needs to be improved with most Member States concerned. Member States' data and information confirm that all EU readmission agreements bring a significant added value in facilitating cooperation in readmission"*.
8. According to the latest available Eurostat data, 1385 Ethiopian nationals were issued return decisions in the EU Member States in 2019¹ and 215² Ethiopian nationals were actually returned which resulted in a return rate of 15%³. According to the Eurostat data in the same year the asylum recognition rate for Ethiopian nationals was 24%⁴.

II. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) NO 1049/2001

9. As a preliminary remark, it is recalled that both the TEU (Article 16(8)) and the TFEU (Article 15(2)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. The requested documents were not drawn up in the context of legislative activities.⁵ Therefore, even if such documents fall within the scope of Regulation (EC) No 1049/2001,⁶ the wider access which is also referred to in recital 6 of Regulation (EC) No 1049/2001 is not relevant in the present circumstances.

¹ https://ec.europa.eu/eurostat/databrowser/view/migr_eiord/default/table?lang=en (select "country of citizenship": "Ethiopia")
² https://ec.europa.eu/eurostat/databrowser/view/migr_eirtn/default/table?lang=en (select "country of citizenship": "Ethiopia")

³ Return rate is calculated as a proportion of those ordered to leave and those actually returned

⁴ Asylum recognition rate is calculated as a proportion of the total number of the first instance asylum decisions and the number of asylum decisions granting Geneva Convention or subsidiary protection status at first instance, based on Eurostat data available at: https://ec.europa.eu/eurostat/databrowser/view/migr_asydcfsta/default/table?lang=en (select "country of citizenship": "Ethiopia" and select "Decisions": "Total" to get the number of total decisions issued for Ethiopian citizens; then select "country of citizenship": "Ethiopia" and select: "Decisions": "Geneva conventions status" and "Subsidiary protection status" to get the number of positive decisions issued)

⁵ See judgement of 11 July 2018, T-644/16, ClientEarth v Commission, EU:T:2018:429, paragraph 56 and the case-law cited.

⁶ See judgment of 3 July 2014, Council v in 't Veld, C-350/12 P, EU:C:2014:2039, paragraph 107.

The invoked exception of Regulation (EC) No 1049/2001

10. According to settled 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.
11. 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".*⁷
12. 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 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".*⁸
13. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless.⁹
14. Moreover, for the purpose of the assessment of a request for access to document under Regulation (EC) No 1049/2001, the Council is not required to establish the existence of a definite risk of undermining the protection of the European Union's international relations, but merely the existence of a reasonably foreseeable and not purely hypothetical risk.¹⁰

⁷ Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32, and *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

⁸ *Ibid.*, and Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

⁹ Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.

¹⁰ Judgment of 25 November 2020, *Bronckers v Commission*, T-166/19, EU:T:2020:557, paragraph 60.

15. In practice, in its answer to a confirmative application, the institution must provide the applicant with plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU's international relations and whether, in the institution's broad discretion in applying the exceptions in Article 4(1) of Regulation (EC) No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical. However, in the description of the document for the purpose of its answer, the institution cannot reveal its content in further detail as doing so may disregard the scope of the interest protected by that provision.¹¹
16. Having thoroughly examined the content of documents **12090/17 INIT + REV 1, 12823/17, 15496/17** and **15762/17 INIT + REV 1 + REV 2**, having consulted with the originating source of documents when appropriate and taking into account the current cooperation with Ethiopia on returns and readmission, the Council considers that access to these documents cannot be granted as they contain detailed information on practical arrangements in the domain of returns and readmission between the EU and Ethiopia. Disclosing these documents to the public entails a risk of undermining the cooperation between the EU and Ethiopia in the return and readmission of Ethiopian nationals who are illegally staying on the territory of Member States.
17. Differently from the readmission agreements which the EU has concluded with a number of third states, the *Admission procedures for the return of Ethiopians from European Union Member States* is not an international agreement but a non-binding instrument under international law. Consequently, the implementation of this instrument depends entirely on the mutual trust between the Parties and the willingness of the Ethiopian authorities to cooperate with Member States in the return of Ethiopian nationals present illegally on the territory of the EU. Besides, it is a live tool that can evolve within short notice depending on the state of play of the constant political dialogue on this issue between the EU and its counterpart(s).

¹¹ See, to that effect, judgments *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 106; of 7 February 2018, *Access Info Europe v Commission*, T-851/16, T:2018:69, paragraphs 54 and 122, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 51 and 113-114.

18. The issue of return and readmission is very sensitive for many third countries, including Ethiopia. There were cases where the public availability of information on return and readmission arrangements have resulted in societal pressure on the governments of the concerned third countries and led to decreased willingness on their side to cooperate with the EU on return and readmission and even to a temporary suspension of the cooperation.
19. In light of the above, the Council considers that disclosure of the requested documents is likely to undermine the EU-Ethiopia relations. The risk of undermining cooperation in the area of returns and readmission with the Ethiopian authorities is real and not merely hypothetical in view of the non-binding nature of the applicable instrument and of empirical evidence showing the deterioration of cooperation as a result of societal pressure.
20. The applicant claims that "*similar readmission arrangements with other countries (Joint Way Forward with Afghanistan) have been publicly disclosed by the institutions*", and expects the Council "*to substantiate how documents related to negotiations with Ethiopia substantially differ and specifically pose a threat to future negotiations*". The Council does not agree with this claim. To start with, each access to documents request must be assessed separately, based on its own merits. It is clear that the EU's international relations are different from country to country and the risk that disclosure of certain documents would undermine those relations must be assessed by reference to a specific country and depends on the circumstances of each case. The fact that a different institution took a decision to disclose similar arrangements with Afghanistan is therefore not relevant for the assessment of a document concerning the migration arrangements between the EU and Ethiopia.
21. The applicant also states that some documents have been allegedly disclosed by a third party and are already available in the public domain. On this basis, the Applicant claims that the argument "*that disclosure would be detrimental to the negotiations is not credible, as current and future negotiating partners can easily access them online already*", and that "*refusing to formally disclose at that stage [when the documents in question have been leaked] risk undermining the credibility of the institution*".

22. The Council considers that an unauthorized leak does not prevent the institution from processing applications for public access to documents according to Regulation (EC) No 1049/2001. More importantly, the alleged claim that the documents are already available in the public domain due to a leak cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.¹² An opposite approach would have the pernicious effect of encouraging leaks as a way to push institutions to make public the relevant documents and in so doing it would undermine the public interests protected by Regulation (EC) No 1049/2001 and the purpose itself of the Regulation.
23. In light of the above, the Council considers that the applicant's arguments pertaining to the alleged leak of some requested documents are not relevant nor sufficient to establish the necessity of the disclosure by the Council of the requested documents to the public domain and that, as confirmed by the EU Courts, it is unacceptable for leaks to be used as a means to overturn the applicable legal framework on access to documents.
24. Finally, the applicant claims that the requested documents "*have an impact on EU legislation*" and even if the matter is considered as "*non-legislative*", non-legislative activity of the institutions does not fall outside the scope of Regulation (EC) No 1049/2001.
25. The Council recalls that the requested document were not draw up in the context of the legislative activities. Even if such documents fall within the scope of Regulation (EC) No 1049/2001, their disclosure would undermine the protection of the EU's international relations, for the above-mentioned reasons, and their disclosure must be refused pursuant to Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.
26. In consequence, the Council considers that disclosure of documents **12090/17 INIT + REV 1, 12823/17, 15496/17 and 15762/17 INIT + REV 1 + REV 2** cannot be granted as they fall within the scope of application of the exception related to the protection of the public interest as regards international relations pursuant to the third indent of Article 4(1) (a) of Regulation (EC) No 1049/2001.

¹² See in that regard, Judgment of 25 October 2013, T-561/12 Beninca v Commission, EU:T:2013:558 paragraph 55, according to which the unauthorised disclosure of a document cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001. Also to that effect, judgement of 20 May 2020, T-526/19. Nord Stream 2 AG v European Parliament and Council, EU:T:2020:210 paragraph 52 to 56; and Order of 17 December 2020 in T-350/20 Lukáš Wagenknecht v European Commission, paragraphs 18 to 21.

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

27. The Council has also examined the possibility of granting partial access to documents **12090/17 INIT + REV 1, 12823/17, 15496/17 and 15762/17 INIT + REV 1 + REV 2**, as provided for in Article 4(6) of Regulation (EC) No 1049/2001. However, it has come to the conclusion that the entire documents are covered by the abovementioned exception and that those documents do not entail several parts that could be disclosed without indirectly revealing the content and substance of the remaining parts.

III. CONCLUSION

28. In the light of the above considerations, the Council confirms that access to documents **12090/17 INIT + REV 1, 12823/17, 15496/17 and 15762/17 INIT + REV 1 + REV 2** should be refused pursuant to the third indent of Article 4(1)(a) (protection of the public interest as regards international relations).