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NOTE

From:	Presidency
To:	Delegations
Subject:	Information note on internal arrangements for the consultation of the Member States with a view to assessing the applicability of an exception to the disclosure of joint documents held by the GSC - Article 4 (5) of Regulation 1049/2001

1. In the performance of its duties, the GSC normally holds documents which have been jointly authored by a group of or by all the Member States jointly ("joint MS documents") which concern matters falling outside the Council's authority as defined in the Treaties. For example this is the case of documents of intergovernmental conferences in relation to which the GSC has been entrusted with administrative tasks of support.¹

¹ For other examples, see 12258/15, paragraph 1.

2. Upon receipt of a request for public access to joint MS documents, the GSC consults the originators of the documents with a view to determine whether their disclosure is possible. It should be recalled, in this regard, that the Court of Justice has held, in the framework of Regulation 1049/2001, that an Institution can only refuse access to documents originating from one or more Member States if the Member State(s) concerned provide(s) reasons capable of justifying the application of one or more exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001. In that case the Institution is empowered to make sure that the grounds relied upon as justification for the Member State's objection to disclosure of the documents are not unfounded.² If accordingly one of the Member State's concerned gives a reasoned refusal the GSC is consequently obliged to refuse the request for access.³
3. In the case of joint MS documents originating from a large number or from all Member States, the usual procedure of written consultation by e-mail has proven particularly cumbersome. Moreover, the bilateral nature of the consultation makes it more difficult for Member States to co-ordinate their positions. As a consequence, the coherence of the assessment of possible risks linked to disclosure may be affected.
4. It seems therefore opportune to provide for arrangements that could allow Member States to be consulted and, if possible, to exchange views on their positions in a more effective way.

² See T-59/09 (paragraph 51).

³ See C-64/05 (paragraph 90) and C-135/11 (paragraph 63 and 72). This principle applies both in case of an initial and a confirmatory application for public access.

5. According to the arrangements, when the GSC receives a request for access concerning joint MS documents for which recourse to written consultations would be excessively cumbersome, it will inform the rotating Presidency. The Presidency may submit to the Member States who are originators of the joint MS documents the proposal to convene a meeting of the Member States' representatives to be held in the context of a meeting of the Working Party on Information. The Working Party on Information, whose members are already the contact points for consultations carried out by the GSC under Article 4(5) of Regulation 1049/2001 and have the necessary expertise on access to documents issues, offers an appropriate venue for an exchange of views. It is however for the Member States to decide who should participate in such a meeting. The meeting will be chaired by the rotating Presidency and will be held immediately before or after the meeting of the Working Party on Information. The GSC will provide assistance as required.
 6. The proposal for a meeting and the requested joint MS documents will be sent to the concerned Member States at least 10 working days before the meeting is convened. MS that do not intend to take part in the meeting inform the Presidency in due time thereof. The Member States can make their position known during the meeting or in writing after the meeting, but not later than 17:00 of the fifth full working day after the meeting. The same deadline applies for those Member States who did not attend the meeting. The GSC will record the positions of all the Member States concerned after the consultation has ended and send it to the Member States concerned.
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