Council of the
European Union

Brussels, 14 November 2014
(OR. en)

15361/14

INF 316
API 136

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 35/c/01/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 10 September 2014, registered on the same day (Annex 1);
- e-mail from the GSC to the applicant dated 11 September 2014 (Annex 2)
- reply from the GSC dated 22 October 2014 (Annex 3);
- confirmatory application dated 4 November 2014, registered on 6 November 2014 (Annex 4).

ANNEX 1

[E-mail message sent to DGC SANCTIONS on 10 September 2014 - 12:41]

From: **DELETED**
Sent: Wednesday, September 10, 2014 12:41
To: DGC SANCTIONS
Cc: **DELETED**

Subject: Access to documents - **DELETED**

Dear Sir/Madam,

Please see attached letter, which is sent to you today by email and registered letter.

Yours faithfully

DELETED

DELETED

DELETED

General Secretariat of the Council of the European Union
DG F - Communication
rue de la Loi 175
B-1048 Brussels
Belgium

Cc. Leonardo Schiavo
Council of the European Union
General Secretariat
Director-General – Directorate C
Rue de la Loi 175
1048, Brussels
Belgium

E-mail : sanctions@consilium.europa.eu

BY EMAIL AND REGISTERED LETTER

Brussels, 10 September 2014

O. Ref.: 000350

Dear Sir/Madam

Our client: DELETED
Request for access to documents 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.

We refer to our previous letters in which we requested access to personal data concerning our client held by the Council in relation to the above matter.

DELETED

We are aware, according to the Council's Extraordinary meeting of 5 September 2014, that the Council has, in other matters raised in connection to the restrictive measures above, granted access to the following documents:

- Document 6840/14
- Document 6840/14 COR 1
- Document 6903/14
- Document 6903/ COR 1
- Document CM 1922/14
- Document CM 1932/14
- Document SN 1694/14
- Document 8525/14
- Document 8526/14
- Document 8647/14
- Document 8647/14 COR 1

We are further aware that the Council has engaged in exchanging information with the Ukrainian authorities. We particularly refer to Document MD 65/14 containing a letter from a judicial authority in Ukraine and which relates to ongoing judicial proceedings and/or investigations against certain persons in Ukraine.

Accordingly, we hereby request access to the above documents 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. We particularly request access to the above mentioned document MD 65/14 which we consider might directly concern our client.

Consequently, should any of the documents above concern our client, we will consider our request to be covered as well under privileged access.

We remain at your disposal should you need further information or clarification.

DELETED

ANNEX 2

[E-mail message from the SECRETARIAT DGF Access on 11 September 2014 - 14:09]

From: SECRETARIAT DGF Access
Sent: Thursday, 11 September 2014 14:09
To: **DELETED**
Attachments: cm01922.en14.doc; cm01932.en14.doc; sn01694.en14.doc

Subject: RE: Access to documents - **DELETED**

Dear Sirs,

Thank you for your message dated 10 September 2014, sent by email and registered letter. The Transparency team of the General Secretariat has received and registered your request for access to documents. Your request for access to document **MD 65/14** which is not publicly available will be treated on the basis of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

Documents **6840/14, 6840/14 COR 1, 6903/14 and 6903/14 COR 1, 8525/14, 8526/14, 8647/14 and 8647/14 COR 1** are already public and available for downloading in the **public register of Council documents**. As an example, you will find documents 6840/14 and 6840/14 COR 1 using the following link:

http://register.consilium.europa.eu/content/out?lang=EN&typ=SET&i=ADV&RESULTSET=1&DOC_ID=6840%2F14&DOS_INTERINST=&DOC_TITLE=&CONTENTS=&DOC_SUBJECT=&DOC_DATE=&document_date_single_comparator=&document_date_single_date=&document_date_from_date=&document_date_to_date=&MEET_DATE=&meeting_date_single_comparator=&meeting_date_single_date=&meeting_date_from_date=&meeting_date_to_date=&DOC_LANCD=EN&ROWSPP=25&NRROWS=500&ORDERBY=DOC_DATE+DESC

For the remaining above-mentioned documents, we would kindly suggest that you consult the register at http://register.consilium.europa.eu/.

The Council's public register contains references to most Council documents since 1999 (exceptions may apply regarding classified documents), of which approximately 75% are public and available for downloading.

By choosing the option "Advanced search", you can search for documents using several criteria, for example: document number, words in title or text and interinstitutional file number. For more information and useful hints, you can consult "How to search in the register".

Documents **CM 1922/14, CM 1932/14 and SN 1694/14** have also been released to the public by the General Secretariat but are not available in the public register. You will find these documents attached to this email.

Yours sincerely,

Transparency and Access to Documents

Council of the European Union
General Secretariat
Communication and Document Management
Document Management
Transparency and Access to Documents

Rue de la Loi/Wetstraat, 175 - B-1048 Bruxelles/Brussel - Belgique/België
www.consilium.europa.eu | access@consilium.europa.eu

ANNEX 3

Council of the European Union
General Secretariat
Directorate-General Communication and Document Management
Directorate Document Management
Transparency and Access to Documents Unit

DELETED

Brussels, 22 October 2014

Ref. 14/1531- mi/dm

Dear **DELETED**,

We have registered your request of 10 September 2014 for access to document MD65/14. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents[1] (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure[2]. On 1 October 2014, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

Document **MD 65/14** is a document transmitted by the European External Action Service (EEAS) to the General Secretariat of the Council. It contains a letter from a judicial authority in Ukraine.

1 Official Journal L 145, 31.5.2001, p. 43.
2 Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

In accordance with Article 4(4) of Regulation 1049/2001, the General Secretariat has consulted the EEAS on the possible public disclosure of document MD 65/14 originated by the Ukrainian authorities. The EEAS has indicated us that the Ukrainian authorities have requested that the information contained in the letter should not be disclosed.

The General Secretariat has examined the document in compliance with its obligation to carry out its own assessment as to whether any of the exceptions to access to documents contained in Article 4 of Regulation 1049/2001 are applicable. It considers that, in the light of its sensitive nature, a unilateral disclosure of document MD 65/14, against the objection of Ukrainian authorities, would negatively affect the climate of confidence among the relevant actors and would hence prejudice the EU's relations with Ukraine. This could also seriously affect trust between the EU and other countries under similar circumstances now or in the future. In the light of the foregoing, the General Secretariat has come to the conclusion that disclosure of document MD 65/14 would undermine the protection of the public interest as regards international relations within the meaning of Article 4(1)(a), third indent, of Regulation 1049/2001.

In addition, the requested document contains information related to identifiable individuals. Such information constitutes personal data within the meaning of Article 2(a) of Regulation 45/2001[3]. The General Secretariat considers that the public interest in obtaining access to such personal data does in the present case not prevail over the interest of those individuals in protecting it. Public disclosure of personal data contained in document MD 65/14 must therefore also be refused pursuant to Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation 1049/2001, in conjunction with Articles 8 and 18 of Regulation (EC) No 45/2001.

Accordingly, pursuant to Article 4(1)(a), third indent, (protection of the public interest with regard to international relations) and Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation 1049/2001 the General Secretariat is unable to grant public access to document MD 65/14.

Regarding your request for access under Regulation 45/2001, a reply has been sent to you on 3 October 2014.

[3] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Official Journal L 8, 12.01.2001, p. 1).

Statutory remedy notice

Pursuant to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply[4].

Yours sincerely,

For the General Secretariat

Jakob THOMSEN

[4] Confirmatory applications are published in the Council's Register of documents. If you introduce a confirmatory application, your personal data will be published in the documents related to your confirmatory application only if you have given your explicit consent for this. Your reply relating to the publication of your personal data will in no way prejudice your rights under Regulation (EC) No 1049/2001.

DELETED

DELETED

Council of the European Union
General Secretariat
Transparency and Access to Documents Unit
Rue de la Loi 175
B – 1048 Brussels
Belgium

SECRÉTARIAT GÉNÉRAL DU CONSEIL DE L'UNION EUROPÉENNE
SGE14/11590
Reçu le 06 -11- 2014
DEST. PRINC. DGF-Access to docs
DEST. COPISTES Service Juridique
M. SCHIAVO

By registered letter

Brussels, 4 November 2014

Dear Mr. Thomsen,

CONFIRMATORY APPLICATION pursuant to Article 7(2) of 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

DELETED

As you are aware, we act on behalf of DELETED in the context of his listing under Council Regulation (EU) No 381/2014 of 14 April 2014, implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine.

We refer here to your letter dated 22 October 2014 concerning our request for access to documents held by the Council in the context of the adoption of CFSP sanctions. By your above mentioned letter you refuse to grant us access to the documents requested on behalf of our client. We hereby formally submit our considerations that your decision to deny access to documents held by the Council is legally unfounded and thus on the grounds as stated below. We therefore formally request that your position is reviewed and reconsidered pursuant to Article 7(2) of Regulation 1049/2001.

I. Factual Background

We refer to your letter dated 22 October 2014 constituting a decision on the requests for access to documents made so far on behalf of our client.

In such letter the Council provides DELETED with a response to the request made under Regulation (EC) No 1049/2001 dated 10 September 2014. In such letter we requested access to the following documents:

- Document 6840/14
- Document 6840/14 COR 1
- Document 6903/14
- Document 6903/COR 1
- Document CM 1922/14
- Document CM 1932/14
- Document SN 1694/14
- Document 8525/14
- Document 8526/14
- Document 8647/14
- Document 8647/14 COR 1
- Document MD 65/14

In connection to the above requests, we were communicated that certain documents had been made public and were as such publicly available. However, in your letter dated 22 October, access to the Document MD 65/14 is refused on the grounds that (i) the authorities in Ukraine have refused access which would result in the undermining of the EU's international relations with Ukraine and other third countries and (ii) the requested document contained personal data concerning identifiable individuals.

We fully disagree with the assessment carried by the Council of our request, and set out below as such detailed observations in this regard.

II. Substantive issues

1. Absence of a review process by an independent body

We hereby formally express our concerns that the reconsideration of the Council's decision regarding our requests for access to documents is not to be carried by an independent body or unit within the Council, but is rather to be reconsidered by the Council itself.

We thus request confirmation by the Council as to the review process and the specific unit or body within the Council in charge of reviewing the decisions adopted in matters related to access to documents.

The possible lack of a review process ensuring the impartiality of the entities involved is fully in breach of the design and objectives of Regulation 1049/2001 which are no less than to ensure "openness" and "accountability" on the EU institutions. We are concerned that full accountability on the Council is not possible in a context such as this in which not a proper impartial and independent procedure to review Council's documents is available to the concerned individuals[1].

The request for information as to the review process put in place by the Council in these cases is made pursuant to the provisions of Regulation 1049/2001 and the principles underlying such Regulation, which calls for the improvement of the transparency in the decision-making process within EU Institutions[2]. The Council cannot escape to such principles.

Such independency and impartiality in the review process is as a matter of fact ensured by other EU Institutions in light of the provisions of EU Law. As a matter of example, within the European Commission, it is for the relevant Directorate-General to take a first decision, whereas an independent body within the Secretary General decides on the revision of the Directorate-General decisions.

It is crystal clear that a review process that does not fully respect the principles and rules as laid down above would breach the most fundamental rights of the defence and rights to an effective judicial system as enshrined by EU Law.

Indeed, Article 41 of the Charter of Fundamental Rights of the European Union reads as follows (underlining added):

Article 41
Right to good administration

*1. Every person has the **right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.***

2. This right includes:
- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of

[1] Council Regulation (EC) No 1049/2001, Recital (2)
[2] Council Regulation (EC) No 1049/2001, Recital (3)

confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

In light of all of the above we hereby formally request the Council to provide us with clear and specific information as to the body or entity in charge to review the refusal decision made by the Council. Only by providing us with such information will we be able to assess whether our client's fundamental rights to an impartial and independent review decision are fully respected.

Further, we request the Council to grant us the possibility to have a meeting with such "review body" so as to enable us to orally express our above concerns. Such request is made pursuant to our client's fundamental rights of defence and in particular his right to a hearing.

2. Failure by the Council to assess the possibility of granting partial disclosure and resulting violation of the general principle of disclosure and transparency

We hereby underline that the general principles underlying the EU rules on access to documents are disclosure and transparency, secrecy being the exception. Full application of the principles of disclosure and transparency requires that the Council must assess, on a case-by-case basis, the possibility to grant partial disclosure to the documents.

As a matter of fact Article 4(6) of Regulation 1049/2001 establishes that *"if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released"*. We therefore insist that the Council grants us at the least partial access to the requested documents as well as a detailed statement of the reasons why such document cannot be disclosed.

As a preliminary comment we stress the fact that it is settled case-law that the Council has to provide a substantive statement of reasons for any decision concerning access to documents. The CJEU has set out the requirements to be satisfied by the statement of reasons. In case Turco v Council, the Court states[3]

[3] Judgment of 1 July 2008 in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*, para 48-49

"The reasons for any decision of the Council in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated.

If the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned."

We further stress the fact that the Council has, in its letter of 22 October 2014, failed to assess the possibility to grant partial access or else justify why such partial access would not be available to our client.

3. Failure by the Council to provide specific and material reasons to justify its refusal and misapplication of the exceptions laid down under Article 4 of Regulation 1049/2001

In its letter of 22 October 2014 the Council alleges as grounds to justify its refusal to grant access the fact that the Ukrainian authorities have requested that the information contained in the letter should not be disclosed, and has accordingly taken the decision that such disclosure against the objection of Ukrainian authorities would negatively affect the climate of confidence among the relevant actors and would hence prejudice the EU's relations with Ukraine. The Council therefore alleges that disclosure would undermine the protection of the public interest as regards international relations.

We hereby argue that the Council is duty bound to

a. Make its own assessment of whether or not disclosure is possible;
b. Justify with specific grounds to what extent disclosure is not possible based on the exceptions as laid down under Article 4 of Regulation 1049/2001.

With regard to the above we submit here that (i) the Council is not obliged to refuse access merely because the third country concerned has refused access and (ii) since the Council is bound to make its own assessment and justify it on the basis of specific and material explanations as to why disclosure is not possible, we take the view that the Council cannot merely state as an exception the fact that disclosure would undermine EU's international relations with Ukraine only based on the fact that Ukraine has denied disclosure. Such line of argumentation by the Council has the consequence and effect of:

(i) Emptying of any substance the exception to access on the grounds that it would undermine international relations;

(ii) Having the same effect as if the Council had not undertaken an individual assessment concerning disclosure.

In connection with this the CJEU has held in Case C-64/05 P *Sweden v Commission* that *"Article 4(5) cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law"*[4]. It goes without saying that the situation is even clearer in cases like the one at stake where the documents or information does not originate in a Member State but in a third country like Ukraine, whose appropriateness with regard to respect and protection of fundamental rights is, as pointed out several times, highly questioned.

We hereby remind once again that under Regulation 1049/2001 access is the rule whereas secrecy remains the exception. As such, the exceptions must be applied strictly and interpreted narrowly. Therefore the Council is bound to provide reasoning for their decision and must explain how and why disclosure of that document or information might pose a foreseeable and more than purely hypothetical harm to the interests as protected under the exceptions. Such assessment must be done on a case-by-case basis and explanations must be materialised with substantive explanations.

We further argue that the obligation for the Council to make its own assessment of the requested access and the lack of obligation for the Council to comply and follow the decision by the Ukrainian authorities is in this case strengthened by the fact that Ukraine is not an appropriate third country as regards protection of fundamental rights, as has been particularly held in our previous requests.

Moreover, Article 12(2) of Regulation 1049/2001 provides that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9 of that regulation, be made directly accessible. In this case, the adoption of restrictive measures against certain individuals, which is legally binding on Member States, falls under that category.

In connection to the above we argue that even in the event that the Council alleges the existence of an exception under Article 4 of Regulation 1049/2001 to justify non-disclosure, Article 4(2) lays down an "exception to the exceptions" when there is an "overriding public interest in disclosure". As such, in situations where there is such an overriding public interest in disclosure, access to the requested documents should still be granted. In this regard the CJEU has ruled that "an overriding public

[4] Judgment of 18 December 2007, Case C-64/05 P, *Sweden v Commission*, para 75

interest" must be something more than the "normal" public interest in disclosure of information i order to be able to escape to the exceptions[5]. It is crystal clear that such overriding public interest i disclosure and access exists in this case insofar as failure to grant access to the requested document seriously undermine our client's rights of defence as well as the proper conduct of the Cour proceedings in equality of arms. At the same time, the fact that the Council to deny access relies o the opinion of a country which has one of the worst record possible concerning human right breaches calls for the public interest in accessing the relevant document. The attached independen legal Opinion of Prof. Marco Frigessi di Rattalma is telling concerning Ukraine's human rights record We underline once again that the Council has failed to consider the existence of an overriding publi interest as detailed above and make such assessment on solid grounds in its refusal decision.

We therefore request the Council to provide us with the requested document. We underline the fac that the mere refusal by the authorities in Ukraine to the access is not a sufficient statement o reasons as detailed above. Further, the fact that the document contains personal data concernin other individuals is not a reason sufficient enough to justify refusal, since (i) this issues may easily b addressed by partial disclosure as stated above and (ii) non-disclosure of the document in tur results in a violation of DELETED data protection rights.

4. Violation of DELETED right of access as protected under EU Law

The Council argues that the requested document contains information related to identifiabl individuals and cannot as such be disclosed.

In this regard we contest that access to information is a fundamental principle under EU Law enshrined by Article 15 TFEU in the following terms:

Article 15

1. *In order to promote good governance and ensure the participation of civil society, th Union institutions, bodies, offices and agencies shall conduct their work as openly a possible.*
2. *(...)*
3. *Any citizen of the Union, and any natural or legal person residing or having its registere office in a Member State, shall have a right of access to documents of the Unio institutions, bodies, offices and agencies, whatever their medium, subject to the principle and the conditions to be defined in accordance with this paragraph.*

[5] Judgment of 1 July 2008 in Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council

Regulation 1049/2001 regarding public access to EU institutions documents is based on the provision above and lays down specific rules to be complied with by the EU Institutions. Recitals 1 to 4, 6 and 11 in the preamble to that regulation are worded as follows:

> *(1) The second paragraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken a openly as possible and as closely as possible to the citizen.*
>
> *(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.*
>
> *(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.*
>
> *(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.*
>
> *(5) (...)*
>
> *(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.*
>
> *(7) (...)*
>
> *(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. (...).*

We underline in this regard that both privacy and access to documents are a fundamental right in the European Union since the Treaty of Lisbon came into force in 2009. This means that the protection of

personal data and the right of access to documents must be balanced on a case-by-case basis and neither right should automatically override the other.

In this connection we stress the need for the Council to balance both rights as stated above and consider and provide substantive justifications as to how disclosure of such document, even partially, would not be available to our client. Such partial disclosure should be able to address any eventual issues which might exist with regard to personal data concerning identifiable individuals. We stress once again that partial access is an essential principle under Regulation 1049/2001 which might at every time be assessed and considered by the EU Institutions.

The right of access is furthermore enshrined by the Charter, which at Article 42 states:

Article 42
Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents

We therefore consider that the Council has violated the essential principles underlying the EU rules on access to documents.

We thus ask the Council should reconsider its position in consideration of all the arguments as set out above.

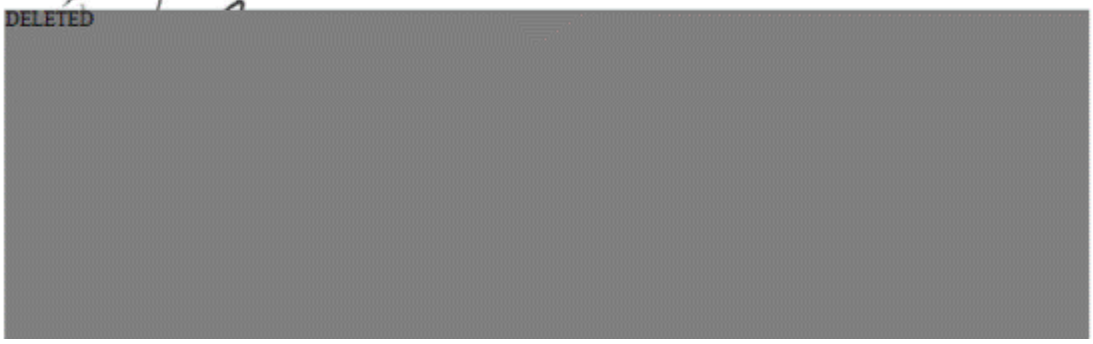
CONCLUSION

In light of the above, we hereby formally request that the Council's decision not to grant DELETED access to documents and information held by the Council, in the context of the listing decision, is reviewed and reconsidered under Article 7(2) of Regulation 1049/2001.

In light of all of the above we therefore formally request the Council to cancel and annul its decision of 22 October 2014 and to grant our client full access to the requested document or, in the alternative, partial access to such document.

We further request to have a meeting with the relevant reviewing body as referred to in point 1 above, to enable our client to express these concerns orally.

DELETED



Annex 1 : Opinion by DELETED concerning Ukraine's Human Rights record

DELETED

DELETED

DELETED hereby declare, as follows:

I am lawyer in Milan and I was admitted to the Milan Bar in 1990. I act as of counsel for major Italian and international law firms.

I am full professor of European Union Law DELETED

I am an expert on litigation and arbitration in an international context. I frequently act as arbitrator in ICC, Uncitral and other administrate and/or ad hoc arbitral proceedings.

I often act as a Counsel at the European Court of Human Rights, European court of Justice and other international and European tribunals and bodies. I act as witness expert on Italian law at several state courts, including the London High Court.

I am the author of five books and over sixty articles on topics of international law, European Union law and private international law. I regularly lecture and speak at academic and professional conferences and I am on the board of several academic reviews. I read and write English, German and French.

DELETED

DELETED

I am a member of the Italian Society of International Law.

***

I have been asked for an opinion about whether Ukraine may or may not be regarded as a State that respects human rights and in particular the European Convention on Human Rights (the "Convention") with

particular regard to criminal matters. In order to render my opinion I have examined in detail the case law of the European Court of Human Rights (the "Court") from 2002 onwards. The relevant case law is contained in three dockets lodged together with this opinion. The full list of cases is attached to docket 1 (pages 1-3).

***

The European Court of Human Rights notified on 29 April 2003 six judgments against Ukraine in the cases of *Poltoratskiy* (application no. 38812/97), *Kuznetsov* (39042/97), *Nazarenko* (39483/98), *Dankevich* (40679/98), *Aliev* (41220/98) and *Khokhlich* (41707/98).

In all six cases the Court held that there had been a **violation of Article 3 (prohibition of inhuman or degrading treatment or punishment)** of the Convention as regards the conditions of detention to which the applicants had been subjected in Ukraine. The Court observed that the complaints raised serious issues of a general nature affecting the application of Article 3 of the Convention in relation to the conditions of detention in Ukraine.

In the case of *Dankevich* the Court held that there had been a violation of Article 13 (right to an effective remedy) of the Convention in connection with Articles 3 and 8. In the case of *Khokhlich* the Court held that there had been a violation of Article 8 regarding the applicant's right to respect for his right to private and family life and his correspondence.

In the case *Koval* (application no. 65550/01) dated 19 October 2006 the Court has held that *"Taking into account its above findings in respect of the conditions of the applicant's detention (see paragraph 76 above), **which clearly had a detrimental effect on the applicant's health and well-being** (see Kalashnikov v. Russia, no. 47095/99, § 98, ECHR 2002-VI, and Nevmerzhitsky, cited above, § 88) and the Court's findings as to the **lack of medical treatment and assistance in respect of the applicant** (see paragraphs 79-81 above), the Court considers that there has been a violation of Article 3 of the Convention. In the light of the above, the Court considers that the nature, duration, severity of ill-treatment to which the applicant was subjected and the cumulative negative effects on his health can qualify the treatment to which he was subjected as **inhuman and degrading** (see Egmez v. Cyprus, no. 30873/96, § 77, ECHR 2000 XII; Labzov v. Russia, no. 62208/00, § 45, 16 June 2005; Mayzit v. Russia, no. 63378/00, § 42, 20 January 2005)"*.

It should be highlighted that this disregard for the medical well – being of the prisoner by the Ukrainian competent penitentiary bodies has been reaffirmed in *Melnik* v. Ukraine (application no. 72286/01) of 28 March 2006 where the Court states that *"the applicant was not provided with adequate or timely medical care"* (106).

It should also be highlighted that the violation of article 3 by Ukraine was **recently reaffirmed by the Court**. Indeed in *Vladimirovich Smirnov* v. Ukraine (application no. 69250/11) judgment 13 March 2014 the Court affirmed that the applicant's detention in an Ukrainian detention facility was not compatible with respect for the human dignity and amounted to degrading treatment. Moreover the Court also ascertained the violation of art. 6 § 1. due to the **deficiencies in safeguarding the claimant's right of access to a lawyer** at the beginning of the investigations. Similar findings against Ukraine where made by the Court in *Andrey*

Yakovenko v. Ukraine (application no. 63727/11), judgment 13 March 2014 and *Zinchenko* v. Ukraine (application no. 63763/11), judgment 13 March 2014.

The European Court of Human Rights notified on 8 November 2005 a judgment in the case of *Gongadze* v. Ukraine (application no. 34056/02). The applicant complained that the State authorities failed to protect the life of her husband and to investigate his disappearance and death. Her late husband, Georgiy Gongadze, was a political journalist and editor-in-chief of the "Ukrainskaya Pravda" Internet journal. He was actively involved, both nationally and internationally, in raising awareness about the lack of freedom of speech in Ukraine.

The Court noted that recent developments demonstrated with a high degree of probability that police officers were involved in the disappearance and murder of Mr. Gongadze. The Court found that the complaints from the late Mr. Gongadze and subsequent events, revealing the possible involvement of State officials in his disappearance and death, were neglected or simply denied without proper investigation for a considerable period of time. The Court therefore found that there had been a violation of Article 2 concerning the authorities' failure to protect the life of the applicant's husband.

As far as failure to investigate the case is concerned, the Court considered that, during the investigation, the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than discovering the truth about the circumstances of the disappearance and death of the applicant's husband. The Court therefore concluded that there had been a violation of Article 2 concerning the failure to conduct an effective investigation into the case.

Similarly, in *Poltoratskiy* and in *Kuznetsov* the Court held that there had been a violation of Article 3 regarding the failure to carry out an effective official investigation into the applicants' allegations of assaults in the Ukrainian Ivano-Frankivsk Prison. The Court reiterated that in these circumstances the Convention required that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. There were no contemporaneous records to demonstrate the nature of the investigation into the allegations. Nor did any external authority appear to have been involved in the investigations. The Court concluded that the investigations had been both perfunctory and superficial and held, accordingly, that there had been a violation of Article 3 in this respect.

Summing up, repeated judgments by the European Court of Human Rights have found that Ukraine has failed to carry out effective investigations into allegations of torture and other ill-treatment. State officials responsible for such acts have routinely gone unpunished, creating a "*climate of virtually total impunity for such acts*".

In the case of *Kaverzin* v. Ukraine, (Application no. 23893/03), judgment dated 15 May 2012 the Court ruled that:

<<178. The present case, along with similar previous cases against Ukraine in which the Court has found a procedural breach of Article 3 of the Convention, also demonstrates that, in spite of the general legal prohibition of torture and inhuman and degrading treatment in Ukraine, in practice agents of the State responsible for such ill-treatment have commonly gone unpunished (see, in particular, Teslenko, cited above, § 116). The lack of any meaningful efforts on the part of the authorities in this regard ***perpetuates a climate of virtually total impunity for such acts***>>.

As far as criminal proceedings are concerned, the negative record of Ukraine before the European Court of Human rights is striking.

Ukraine has been repeatedly found guilty of violations of articles 5 and 6 of the Convention.

In the case *Feldman* v. Ukraine (Applications nos. 76556/01 and 38779/04), judgment of 8 April 2010, the applicant alleged that his detention had been unlawful and unreasonably long and that the lawfulness of his detention had not been reviewed. He relied on Article 5 § 1 (c), 3 and 4 of the Convention, which provides:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

The Court found that Ukrainian law does not cope with the standards requested by art. 5, §1 letter c above as *"It does not appear that the [Ukrainian] court is required to give reasons for continuing a defendant's detention or to fix any time-limit when maintaining the detention"* (74) .

Of paramount relevance is the following paragraph of the judgment:

"75. The Court further notes that similar situations were previously examined by this Court in other cases against Ukraine and with respect to the same legal framework. ***The Court has found the continued pre-trial detention ordered by the prosecutor and the following period not covered by any order to be incompatible with the requirements of lawfulness under Article 5 § 1 given that there were no judicial decision ordering such detention*** *(see Yeloyev v. Ukraine, no. 17283/02, §§ 45-51, 6 November 2008; Solovey and Zozulya v. Ukraine, cited above, §§ 70-73). As to the consecutive period of detention under the judicial order, the Court found that judicial detention orders for indefinite period of time and without indication of the grounds for such detention did not afford the applicant the adequate protection from arbitrariness which is an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1 (see Yeloyev v. Ukraine, cited above, §§ 52-55). The Court sees no reason to depart from its reasoning given in the above-mentioned judgments and concludes that there has accordingly been a violation of Article 5 § 1 of the Convention in the present case".*

In the same case the Court has hold that there had been " ***unreasonable length of detention*** " (Article 5 § 3). By relying essentially on the gravity of the charges and the risk of absconding, the authorities prolonged the applicant's detention on grounds which cannot be regarded as *"relevant and sufficient"* (80).

Moreover, the Court ascertained the violation of art. 5 § 4 ***"lack of review of the lawfulness"*** , as the request by the applicant for release were not examined speedily, but with delay (90).

It is noteworthy to add that the Court highlighted the abusive conduct of the Ukrainian authorities by stating that *"Moreover, even in those situations when the courts ordered the applicant's release, such release orders remained ineffective either due to the applicant's immediate re-arrests or an objection by the prosecutor (see paragraphs 41 and 49 above). In the Court's view,* ***there was thus no adequate judicial response to the applicant's complaints****, contrary to the requirements of Article 5 § 4."* (90).

As far as art. 6 is concerned the claimant complained, *inter alia,* that he had not had a fair trial, that the domestic courts lacked impartiality and had violated his procedural rights. The relevant parts of Article 6 provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."

It is striking that the Court has hold that there had been **a violation of the claimant right to the *"independence and impartiality of the tribunal"*** (Article 6 § 1).

In the case at hand the Court judged that: *" In the instant case, the Court notes that despite the strict rules on the courts' territorial jurisdiction set up in the CCPU, the decision to send the applicant's case to the Artemivsky Court was not justified by any of these rules. It does not appear from the materials of the case that the applicant was notified about the reasons or legal grounds for choosing the territorial jurisdiction in his case"*. (98).

The Court found similar violations of articles 5 and 6 in an impressive track of cases.

So, in the *Salov* v. Ukraine judgment (application no. 65518/01) dated 6 September 2005 the Court judged that art. 6 § 1 had been violated as *"Taking into account the aforementioned considerations as to the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case, the Court finds that the applicant's doubts as to*

the impartiality of the judge of the Kuybyshevsky District Court of Donetsk may be said to have been objectively justified" (86).

In the case of *MIKHANIV* v. Ukraine (Application no. 75522/01) judgment dated 6 November 2008 the Court ascertained the violation of article 5 §1 letter c, 3 and 6 § 1.

The unfair and abusive conduct by the Ukrainian authorities is highlighted at paragraph 87 of the judgment where, discussing the violation of article 5 §1 letter c, the Court affirms that:

" It is not the task of this Court to assess the strategy chosen by the prosecuting authorities in the criminal proceedings, but the situation described above gives the strong appearance that, on two occasions, the authorities used the largely similar charges, which had already been part of the case against the applicant, as a ***pretext to secure his continued detention****, thereby circumventing the effect of courts' orders on the applicant's release. It does not appear that the domestic law clearly regulated such a situation or provided sufficient guarantees against abuse.".*

Violations of article 5 §1 letter c, 5 §3 and 5 § 4 where ascertained in many further cases concerning Ukraine such as *Kharchenko* v. Ukraine (application no. 40107/02), judgment 10 February 2011, *Nechiporuk* and *Yonkalo* v. Ukraine (application no. 42310/04) judgment 21 April 2011; *Lutsenko* v. Ukraine (application no. 6492/11) judgment 3 July 2012.

The *Lutsenko* case also provides evidence of the fact that Ukraine does not guarantee the observance of basic features of the concept of rule of law as applied to criminal proceedings. Indeed the abusive conduct of the *Ukrainian authority* was highlighted by the Court when it criticized the arrest of the claimant observing that " *Such behavior on the part of the domestic authorities strongly suggests that the purpose of the applicant's arrest was not to bring him before a competent legal authority within the same criminal case,* ***but to ensure his availability for examination of the application for a change of preventive measure to a custodial one in a different set of criminal proceedings***".

Furthermore, the Court noted that *"72. The further grounds for the applicant's detention, namely failure to testify and admit his guilt, by their nature* ***run contrary to such important elements of the fair trial concept as freedom from self-incrimination and the presumption of innocence****. In the context of choice of whether or not to impose a custodial preventive measure, the advancing of such grounds appears particularly disturbing as they indicate that a person may be punished for relying upon his basic rights to a fair trial. The Court is also concerned with the fact that the domestic courts agreed with such grounds in ordering and upholding the applicant's detention".*

The Court also judged that: *"73. Finally, ordering further detention* ***without fixing any time-limit on it*** *has been found in the Court's case-law to be contrary to the requirements of Article 5 § 1 (c) (see Kharchenko v. Ukraine, no. 40107/02, § 98, 10 February 2011).*

74. In the light of the above, the Court concludes that the applicant's ensuing detention has been in violation of Article 5 § 1 of the Convention too".

The same disregard by Ukraine for basic features of the concept of the rule of law was established by the Court in *Titarenko* v. Ukraine (application 31720/02) judgment 20 September 2012 , where the Court found that there had been a violation of art. 6 §1. and 6 §3, on account of the applicant 's being questioned without a lawyer at the outset of the criminal proceedings.

Finally in the case *Tymoshenko* v. Ukraine (application no. 49872/11) judgment of 30 April 2013 the Court made several findings which confirmed the **enduring incompatibility of Ukrainian law with the Convention.** So the Court reaffirmed that the fact that according to Ukraine law detention was ordered for an indefinite period of time, in itself runs contrary to the lawfulness requirement enshrined in art. 5 of the Convention (267).

Moreover the Court confirmed its well established case law concerning Ukraine when it found that "***on the whole the domestic law does not provide for the procedure of review of the lawfulness of continued detention after the completion of pre-trial investigations***" (281), in breach of Article 5 § 4.

***

In the light of the foregoing it seems obvious that Ukraine may not be regarded as a State that guarantees the respect of fundamental rights especially with regard to criminal law matters and detention. The European Court of Human Rights has in fact established in numerous and repeated occasions, even recently, the violation of the Convention by Ukraine.

The Ukrainian authorities have repeatedly acted against accused and or suspect persons, violating the basic guarantees provided by the Convention, indeed acting often in an abusive manner towards them, with an aim at circumventing the rules of the Convention. Violence and abuse by the State against accused and/or detained subjects commonly go unpunished, perpetuating a climate of virtually total impunity for such acts.

Furthermore the setting of a significant part of the criminal procedural law of Ukraine looks set to principles, both procedural and substantive, totally incompatible with the Convention, such as in the field of custodial preventive detention. In addition, the European Court found that the detention in Ukraine often involves a violation of Article 3, condemning the treatment of prisoner as inhuman and degrading.

The right of defense of the accused/detained is often violated by the prosecutor's offices and by the Tribunals. Finally, too many times the Court had to ascertain that the Ukrainian courts lack independence and impartiality.

For all these reasons I believe that Ukraine is not a State that offers adequate safeguards for the protection of the fundamental rights of accused, investigated and/or detained persons in criminal proceedings. From the ECHR case law, it comes clear that such lack of protection of fundamental rights in Ukraine is systemic and consistent troughout the last decade disregarding the different changes of governments experienced over the years in the country.

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Milan, 23 July 2014