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COMPET 652
DELECT 230

I/A-PUNKT-VERMERK

Absender: Generalsekretariat des Rates
Empfänger: Ausschuss der Ständigen Vertreter (1. Teil)/Rat

Betr.: Delegierte Richtlinie der Kommission ../../EU vom 31.10.2014 zur
Änderung des Anhangs III der Richtlinie 2014/32/EU in Bezug auf den
Durchflussbereich für Wasserzähler
– Absicht, keine Einwände gegen den delegierten Rechtsakt zu erheben

1. Die Kommission hat dem Rat den eingangs genannten delegierten Rechtsakt gemäß dem Verfahren nach Artikel 290 AEUV vorgelegt. Der delegierte Rechtsakt stützt sich auf Artikel 47 der Richtlinie 2014/32/EU¹. Da die Kommission dem Rat den delegierten Rechtsakt am 31. Oktober 2014 übermittelt hat, kann der Rat bis zum 31. Dezember 2014 Einwände dagegen erheben.
2. Die Gruppe "Technische Harmonisierung" hat den delegierten Rechtsakt mit Hilfe eines elektronischen Informationsverfahrens geprüft und am **27. November 2014** einvernehmlich festgestellt, dass es für den Rat keinen Grund gibt, Einwände dagegen zu erheben.

¹ ABl. L 96 vom 29. März 2014, S. 149.

3. Dem Ausschuss der Ständigen Vertreter wird daher vorgeschlagen, dem Rat zu empfehlen, er möge bestätigen, dass er nicht beabsichtigt, Einwände gegen den delegierten Rechtsakt zu erheben, und dass die Kommission und das Europäische Parlament darüber zu unterrichten sind. Dies bedeutet, dass der delegierte Rechtsakt gemäß Artikel 47 der Richtlinie 2014/32/EU veröffentlicht wird und in Kraft tritt, sofern das Europäische Parlament keine Einwände erhebt.
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DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 33/c/03/14,
made by letter on 3 November 2014,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents
MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1)
and MD 57/14 + ADD 1 (EU RESTRICTED)

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 "Regulation 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. The applicant introduced an initial request on 29 April 2014 for public access to documents on behalf of a person listed in the Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (the Decision) and Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (the Regulation). In his initial application, the applicant requested access to all information leading to the inclusion of the applicant's client on the list as well as the origin of the information and to all documents on which the Council of the EU based its decision. In view of the above, the application was considered as submitted (a) in exercise of the right of public access to EU documents pursuant to Regulation 1049/2001 and (b) in exercise of the rights of defence that a listed person or entity enjoy in relation to his/her/its designation, including in the context of court proceedings (request for *privileged individual access*).

2. At the first stage, the General Secretariat of the Council identified the following documents as corresponding to the request: 6840/14 ADD 1 RESTREINT UE/EU RESTRICTED, 6903/14 ADD 1 RESTREINT UE/EU RESTRICTED, 7324/14, 7325/14, 7972/14, 6840/14, 6840/14 COR 1, 6903/14, 6903/14 COR 1, CM 1922/14, CM 1932/14, SN 1694/14 and MD 65/14.
3. In its replies dated respectively 20 May 2014 and 19 June 2014, the General Secretariat of the Council indicated that documents 6840/14 ADD 1 RESTREINT UE/EU RESTRICTED, 6903/14 ADD 1 RESTREINT UE/EU RESTRICTED, 7324/14, 7325/14 and 7972/14 were already public and granted full public access to documents 6840/14, 6840/14 COR 1, 6903/14, 6903/14 COR 1, CM 1922/14, CM 1932/14 and SN 1694/14. It refused public access to document MD 65/14 on the basis of Article 4(1)(a) third indent (protection of the public interest as regards international relations) and Article 4(1) (b) (protection of privacy and integrity of the individual) of Regulation 1049/2001.
4. By e-mail dated 3 July 2014, the applicant contested the assessment made by the General Secretariat of the Council regarding the request pursuant to Regulation 1049/2001 and asked the Council to reconsider disclosure of document MD 65/14.
5. On 28 July 2014, a letter was sent to the applicant informing him of the Council's confirmatory decision of 24 July 2014 by which full access to document MD 65/14 was refused pursuant to Article 4(1)(a) third indent (protection of the public interest as regards international relations) and Article 4(1) (b) (protection of privacy and integrity of the individual) of Regulation 1049/2001.
6. Furthermore, by letter dated 9 July 2014, the Council replied to the applicant's request for privileged access mentioned above in paragraph 1.

7. On 24 October 2014 the General Secretariat, having identified supplementary documents relating to the applicant's initial request of 29 April 2014, sent the applicant a further initial reply. With this reply, full public access was granted to documents 6761/14, 6902/14 and 6902/14 ADD 1. Public access to documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) was refused pursuant to Article 4(1)(a) third indent (protection of the public interest as regards international relations) of Regulation 1049/2001.
8. By email sent on 5 November 2014, the applicant introduced a confirmatory application contesting the assessment made by the General Secretariat and asking the Council to reconsider disclosure of documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED).
9. In his confirmatory application, the applicant firstly recalls that Regulation 1049/2001 is intended to give the fullest possible effect to the right of public access to documents of the Institutions, that the exceptions set out in Article 4 of the Regulation have to be interpreted and applied strictly and that particular care has to be exercised when adopting a decision on whether to give access to a document or not. The applicant claims that with its initial decision, the General Secretariat had violated these principles. Secondly, the applicant contests the use by the General Secretariat of the exception concerning the protection of the public interest as regards international relations, alleging that the General Secretariat did not show how the release of the concerned documents would specifically and effectively undermine the interest in question and how this risk is reasonably foreseeable and not purely hypothetical. According to the applicant, the General Secretariat did not even try to give reasons for that risk being real, nor did it give any specific elements for the negative consequences of the release of the documents. Finally, the applicant submits that the reasoning given by the General Secretariat to refuse access to the documents is not acceptable where the request is made by a person subject to the legal act concerned.

10. The Council has carefully considered the confirmatory application. The Council has reconsulted the Commission and the EEAS, the originators of the requested documents, and has then itself reassessed whether public access could be granted to each of these documents and has come to the following conclusions.

The requested documents

11. On 20 February 2014, the Council condemned in the strongest terms all use of violence in Ukraine. It called for an immediate end to the violence, full respect of human rights and fundamental freedoms. It also called upon the Ukrainian Government to exercise maximum restraint and opposition leaders to distance themselves from those who resort to radical action, including violence. In light of the deteriorating situation, targeted measures against those responsible for human rights violations, violence and use of excessive force were considered necessary. On 3 March 2014, the Council agreed to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State Funds. On 5 March 2014, with a view to consolidating and supporting the rule of law and respect of the human rights in Ukraine, the Council adopted the Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine and the Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine. Restrictive measures are used as an important instrument in order to attain the Common Foreign and Security Policy (CFSP) objectives set out in Articles 21 and 23 of the Treaty on European Union.
12. The above-mentioned documents set out draft proposals made by the European External Action Service (EEAS) for the text of the above-mentioned Council Decision, adopted on 5 March 2014.

13. These restrictive measures were adopted as a response to the violent escalation of the political crisis in Ukraine. Right from the beginning of this crisis, the Union modulated its response to the developments on the ground. That response consisted, among other things, in the adoption of restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State Funds. In order for the restrictive measures instrument to work, it is important that third parties do not know how far the Union is prepared to go in the adoption of sanctions relating to the crisis in Ukraine.

Exception pursuant to Article 4(1)(a), third indent

14. The Council would note that the applicant is right when stating that according to the well-established case-law of the Court of Justice, the assessment that an institution is called to carry out pursuant to Article 4(1)(a) third indent of Regulation 1049/2001 is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest. Nevertheless, the applicant forgets that it follows from the above that, when carrying out such an assessment, the Council enjoys a particularly wide margin of discretion.² The Council also underlines that when abiding to its obligation to provide reasons for the decision not to disclose a document, it shall not, in so doing, undermine the sensitive interests protected by the exception to the right of access through disclosure of the very information which the exception is designed to protect.³ Furthermore, the Council notes that it does not have to provide “*evidence*” for a decision refusing public access; indeed, in the case at hand it would be impossible to do so – or to provide more detailed reasons – without revealing the protected information. Lastly, the risks mentioned above are, in the Council’s view, reasonably foreseeable.

² Judgment of the Court of 1 February 2007, *Sison / Council*, C-266/05 P, ECR 2007 p. I-1233, paragraph 34; Judgment of the General Court of 4 May 2012.

³ Judgment of the Court of 1 February 2007, *Sison / Council*, C-266/05 P, ECR 2007 p. I-1233, paragraph 81 and 82.

15. The Council would also note that when refusing access to the documents, the General Secretariat made its own assessment of the contents of the documents and of the context they have been drafted in. The applicant seems to think a third party was involved in the process of deciding how to respond the applicant' request for public access. The Council would in this context refer to the General Secretariat's reply in which it was stated that "*The General Secretariat considers that public release of these documents would enable third countries to assess the differences between the proposals for sanctions and the final outcome. This would enable third countries to determine to what extent the Union is prepared to go with its restrictive measures policy. Revealing that information would be detrimental to the Union's ability to use restrictive measure to their maximum effect.*" Third countries have been mentioned in the reply but only in the context of the harm the release of the documents would cause to the interest to be protected.
16. The Council would also recall that the exception provided for in Article 4(1)(a), third indent, (protection of international relations) is mandatory. In consequence, once it is established that the requested documents fall within the protected sphere of the public interest as regards international relations, and that the protection of the invoked interest would be undermined if the documents were to be disclosed, the institution is obliged, by Regulation No 1049/2001, to refuse public access.
17. The Council considers that releasing these documents to the public sphere would give third parties – including parties to the conflict in Ukraine – insights in shifts in the Council's thinking regarding the conflict. It is of prime importance that the Union is capable to act and speak with one voice in external relations and that it is able to control the messages it wishes to send to third countries; any confusion of the Union's political messages is not helpful and allows third countries to exploit differences of opinion within the Union. This is *a fortiori* the case where the Union has to move delicately in the context of a violent conflict with potentially grave consequences. A release of the documents would thus ultimately jeopardise the Union's response to this crisis situation, including by the adoption of effective restrictive measures.

18. Furthermore, with the understanding that a good balance between transparency and effectiveness in the sphere of the EU's international action in full compliance with Regulation 1049/2001 should be achieved, the assessment on whether a document can be made public also takes into account the specific international context of the relations between the EU and the third country concerned by the documents, such as it is the case with Ukraine. In the context of the situation of extreme political sensitivity in Ukraine, the EU is committed to assist Ukraine in its reforms, namely regarding the reform of the judiciary and fight against corruption. For this to be possible, the relations between Ukraine and the EU have to be based on a climate of confidence and trust. Release of the requested documents, especially if their contents are taken out of the context, could severely damage this climate of trust, which would have direct repercussions on the EU-Ukraine relations as a whole and would eventually undermine the effectiveness of EU policy towards Ukraine.
19. It follows from the above, that public access to these documents would undermine the protection of the public interest as regards international relations (Article 4(1)(a), third indent).
20. Pursuant to Article 4(6) of the Regulation, the Council has also assessed for each of these documents whether it would be possible to provide partial access and determined that the above-mentioned exception does not apply to parts of these documents, which can therefore be disclosed. Regarding document MD 57/14 ADD 1 (EU RESTRICTED), the Council considers that the above-mentioned exception does not apply to any parts of these documents anymore, as the contents of the document have already been released to the public sphere in another document (document 6903/14 ADD 1 DCL 1). The applicant may therefore have access to the declassified version of document MD 57/14 ADD 1.
- On this same basis, the applicant may also have full access to the declassified version of the revised version of document MD 57/14 ADD 1, document MD 57/14 ADD 1 REV 1.

Disclose for the purpose of legal proceedings

21. Regarding the applicant's claim that the reasoning given by the General Secretariat to refuse access to the documents is not acceptable where the request is made by a person subject to the legal act concerned, the Council would like to draw the applicant's attention to the fact that this request was examined on the basis of Regulation 1049/2001. This procedure for public access results in a decision on whether or not a document can be made available to the general public as a matter of accountability and democracy. The present decision is without prejudice to the request which the applicant has made for "privileged access" that may be filed by or on behalf of a listed person or entity in relation to his/her/its designation, including in the context of court proceedings. Moreover, the Court has explicitly stated that the purpose of Regulation 1049/2001 is to give the general public a right of access to documents and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them ⁴.
22. As already indicated above, the Council has replied to the applicant's request for privileged access by letter dated 9 July 2014.

⁴ Judgment of the Court of 1 February 2007, Sison / Council, C-266/05 P, ECR 2007 p. I-1233, paragraph 48.