Council of the
European Union

Brussels, 24 February 2021
(OR. en)

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 07/c/01/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 9 February 2021 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 17 February 2021 (Annex 2);
- confirmatory application dated 23 February 2021 (Annex 3).

ANNEX 1

[E-mail message sent to access@consilium.europa.eu on 9 February 2021 - 14:30 using the electronic form available in the Register application]

From: DELETED
Sent: Tuesday, February 9, 2021 2:30 PM
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: Consilium - Electronic Request for Access to documents [ENGLISH]

Family name: DELETED
First name: DELETED
E-mail: DELETED

Requested document(s)

ST 5591 2021 INIT - OPINION OF THE LEGAL SERVICE 25/01/2021
Trade and Cooperation Agreement between the European Union and the European Atomic Energy Comunity, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part EU-only agreement Exercise by the EU of its potential competence

Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 17 February 2021

DELETED
Email: **DELETED**

Ref. 21/0308-mj/nb

Request made on: 09.02.2021

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.[1]

Document **5591/21,** dated 25 January 2021, is an opinion of the Council's Legal Service on the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. The opinion provides legal advice on the legal nature of the agreement, related in particular with the question of exercise by the EU of its so-called potential competence and the consequential EU-only nature of the agreement.

The legal advice relates to a decision-making process of non-legislative nature, which is ongoing within the Council. On 25 December 2020, the Commission submitted its proposal for a Council decision on the conclusion of the Trade and Cooperation Agreement. This proposal is currently under examination by the Council. The issue analysed in the opinion has formed an important part of the basis for the political discussions. Disclosure of the legal advice would adversely affect the

[1] The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

internal discussions of the Council and would hence undermine the decision-making process pursuant to Article 4(3) 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.

Moreover, in view of its subject-matter, disclosure of the advice and the issues with which it deals would undermine the protection of the public interest as regards international relations under Article 4(1)(a) (third indent) of Regulation (EC) No 1049/2001. This is so not only as regards the relations with the United Kingdom to which the requested opinion directly pertains but also with other third countries in view of the broad nature of the questions discussed in the requested opinion.

It should be added that the legal advice covered by this opinion deals with issues which are critical elements for the political discussions and that are particularly prone to litigation. What is more, the requested opinion touches upon horizontal issues (conclusion of EU-only agreements by the exercise by the EU of its potential EU competence, effects for the Member States of the exercise by the EU of its potential competence etc.) that have broad implications going beyond the decision-making process in question. The legal advice is therefore sensitive and particularly wide in scope.

Full disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice and the decision-making process under Articles 4 (2) and (3) of Regulation (EC) No 1049/2001 respectively, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the document. The General Secretariat of the Council also underlines in that regard that in this case the legal advice does not pertain to legislative matters.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to document 5591/21. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to paragraphs 1 to 3, the first two sentences of paragraph 4, paragraphs 5 to 8, the first sentence of paragraph 9 and paragraph 11 of the opinion.

You can ask the Council to review this position within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Fernando FLORINDO

Enclosure

[E-mail message sent to access@consilium.europa.eu on 23 February 2021 - 09:07]

Dear Council of the European Union,

Hereby, I am respectfully filing the attached confirmatory application with regards to my request for access to document 5591/21 Opinion of the Council's Legal Service. Please pass this to person who reviews confirmatory applications. Please, kindly acknowledge receipt.

Yours sincerely,

DELETED

Confirmatory application
Ref. 21/0308-mj/nb
DELETED, 23 February 2021

Dear Council of the European Union,

Hereby, I am respectfully filing, pursuant to Article 7(2) of Regulation (EC) No 1049/2001, the following confirmatory application with regards to my request for access to document 5591/21 'Opinion of the Council's Legal Service on the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.' In your reply dated 17 February 2021, you informed that full access to the requested document could not be granted on multiple grounds which I regret to say I find unjustified, unproportionate and groundless for the reasons explained below.

1. *"Disclosure of the legal advice would adversely affect the internal discussions of the Council and would hence undermine the decision-making process."*

The requested document Opinion of the Council's Legal Service (hereinafter CLS) 5591/21 concerns a publicly available document (Trade and Cooperation Agreement, OJ 31 December 2020, Vol 63, L444 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC>) which is currently provisionally applied based on a decision by the Council (13904/20, 28 December 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13904_2020_INIT>). Thus, it is difficult to follow the logic of the enclosure on the ground that disclosure would 'undermine the decision-making process´, as the publicly available draft international agreement is currently applied between the European Union and the United Kingdom. The provisional application of the Trade and Cooperation Agreement gives effect to the agreement before the parties conclude the ratification procedure.

The International Law Commission defines provisional application as ‘a mechanism available to states and international organisations to *give immediate effect* to all or some provisions of a treaty prior to the completion of all internal and international requirements for its entry into force’. Since the Trade and Cooperation Agreement does not restrict the scope of provisional application, the European Union and the United Kingdom are under an obligation to apply the entire agreement from 1 January 2021. Thus, it is clear that pursuant to Article 4(7) of Regulation No 1049/2001, exception laid down in Article 4(3) shall no longer apply, as the period during which protection would be justified has evidently come to an end.

As issues of democratic accountability and EU citizens’ participation do arise in relation to the conclusion of an international agreement, the existence of public interest is evident as the requested document relates to an agreement which is currently applied between the European Union and the United Kingdom. Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as you propose, it was to be taken into account only in those cases where the decision-making process has come to an end (*Council of the European Union v Sophie in’t Veld*, C-350/12 P, EU:C:2014:2039, paragraph 76).

Noteworthy, the agreement awaits only ratification process to be concluded that is a public process which involves European Parliament. Herewith, it is no longer a matter of ‘internal discussions’ within the Council but of obtaining European Parliament’s consent. Thus, instead of ‘decision-making process’ it would be accurate to talk about the ‘ongoing conclusion process’ (Partially accessible version of the CLS opinion, page 2). This is further confirmed by the Commission’s proposal regarding the extension until 20 April 2021 of the provisional application of the EU-UK Trade and Cooperation Agreement that is a purely technical extension to allow the time needed for the completion of the legal-linguistic revision of the Agreement in all 24 languages for its scrutiny by the European Parliament (https://ec.europa.eu/luxembourg/news/eu-uk-trade-and-cooperation-agreement-commission-proposes-extend-provisional-application_fr).

Lastly, it is difficult to understand the logic of non-disclosure since the Council has by its decision to provisionally apply the Trade and Cooperation Agreement already approved the legal basis of the agreement and thus has inevitably been convinced of the competences of the European Union to conclude the agreement. Following your reasoning, it would thus cumbersomely suggest that the Council would have *de facto* acted *ultra vires*. Should this indeed be the case, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing open debate. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an act, but also as regards the legitimacy of the decision-making process as a whole (*Sweden and Turco v Council*, C-39/05 P, I-04723, paragraph 59; *Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 46).

2. *"Disclosure of the advice and the issues with which it deals would undermine the protection of the public interest as regards international relations."*

You do not evidence this claim explaining how disclosure could specifically and actually undermine the interest protected by the exception laid down in third intent of Article 4(1)(a) of Regulation (EC) No 1049/2001 (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52). Your reply states that the CLS's opinion concerns the potential competence of the European Union with regards to the Trade and Cooperation Agreement and, thus, the choice of the appropriate legal basis. The choice of legal basis rests on objective factors and does not fall within the discretion of institutions. As a consequence, the mere fear of disclosing an opinion regarding the legal basis of a decision authorising the concluding of the agreement on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 20).

You do not explain how disclosure of the requested document would specifically and actually undermine the protection of the public interest upon which you are relying (*Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 31). On the contrary, it is evident that a disclosure does not establish a risk, that any interest of the European Union in the field of international relations may be undermined, since the content of the currently provisionally applied agreement is agreed and published. Thus, there are no strategic interests or objectives pursued by the European Union in the negotiations in risk to be revealed. As regards the relation with the United Kingdom to which the requested opinion pertains, the United Kingdom Parliament has adopted an implementation bill concerning the agreement. Unlike the European Parliament, there is no requirement for the United Kingdom Parliament to hold a consent vote on the Trade and Cooperation Agreement, as the main role for the latter in the ratification process was passing the European Union (Future Relationship) Act 2020. You fail to evidence how international relations with the United Kingdom or with other third countries would in practice be undermined, as it is evident that the positions of both the European Union and the United Kingdom as well the content of the agreement are already publicly announced. In addition, the assertion of the 'broad nature of the questions discussed' in the requested opinion clearly does not constitute a detailed statement of reasons (*Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 37).

Lastly, the exception codified in the third indent of Article 4(1)(a) of Regulation (EC) 1049/2001 does not however remove the need to take into account the possibility of an overriding public interest in the context of Article 4(2) of that regulation (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 93). The Trade and Cooperation Agreement, already provisionally applied and when entering into force, is an international agreement concluded by the EU and by virtue of Article 216(2) TFEU binding upon the institutions and on its Member States and thus part of EU law. Such an agreement forms an integral part of EU law (*Adhésion de l'Union à la CEDH,* Opinion 2/13, EU:C:2014:2454, paragraph 180). It is thus the impact of such agreement that the need to confer greater legitimacy on the institutions and the increased confidence of citizens in them constitute an overriding interest (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 93). It is thus my submission that your refusal of public access to a document which concerns the question of the legal basis of the agreement is unjustified.

3. *“Opinion deals with issues that are particularly prone to litigation.”*

A purely hypothetical risk of litigation, whether issue indeed is ‘prone to litigation’ or not, is not a lawful exception within the meaning of Regulation (EC) No 1049/2001, as you do not provide concrete reasoning nor evidence that the requested document would indeed be subject of or connected to any disputes before court (*Philipp Morris v Commission,* T-800/14, EU:T:2016:486, paragraph 71). It would be untenable, and contrary to the object of the Regulation (EC) No 1049/2001 and the second subparagraph of Article 1 TEU, if access to a document were always automatically refused on the grounds that it might potentially be the subject of or connected to legal proceedings at some point in the future. The existence of hypothetical risk of court proceedings, the purpose and nature of which are not specified in your reply, cannot constitute an argument capable of rendering the requested document sensitive in its character either (*Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 45). Moreover, concerning the assertion relating to the existence of a risk of litigation as regards the questions analysed in the requested document, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions (*Sweden and Turco v Council*, C-39/05 P, I-04723, paragraph 59; *Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 46).

4. “*Sensitive and particularly wide in scope”*

Your reply states that the requested document is sensitive on the grounds that it ‘deals with issues which are critical elements for the political discussions’, and such issues are ‘particularly prone to litigation’; and touches upon horizontal issues that have ‘broad implications going beyond the decision-making in question’. However, such definition of sensitiveness does not per se fall within the meaning of Article 9 of the Regulation (EC) No 1049/2001, and consequently, does not justify the non-disclosure. Only documents classified as “TRÈS SECRET/TOP SECRET”, “SECRET” or “CONDIFENTIAL” in accordance with the rules of the institution concerned may constitute ‘sensitive documents’ within the meaning of Article 9. The requested document 5591/21 pertains none of the aforementioned classifications. Worth emphasising, “LIMITE” is a distribution marking, and not a classification level within the meaning of the Council’s security rules. Moreover, the assertion that the requested opinion ‘touches upon horizontal issues that have broad implications going beyond the decision-making process in question’ does not suffice in order to establish that the requested document, by its contents, has a particularly sensitive character (*Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 42). Furthermore, the width of a document is not per se a ground for non-disclosure under Regulation (EC) No 1049/2001. Thus, it is my submission that the Council cannot lawfully justify non-disclosure on the basis of eminently subjective grounds.

5. *“Full disclosure of such document would undermine the protection of legal advice.*”

Firstly, your reply states that ‘[t]he opinion provides legal advice on the legal nature of the agreement, related in particular with the question of exercise by the EU of its so-called potential competence and the consequential EU-only nature of the agreement´. However, the nature of alleged ‘legal advice’ remains unexplained. On the contrary, on page 2 of the partially accessible version, the Council Legal Service (hereinafter CLS) opinion itself indicates that the opinion ‘does not provide an in-depth examination of all its aspects, nor does it provide a comprehensive and detailed competence analysis´. Rather, ‘this opinion confirms and develops in writing the answers

already provided orally by the CLS´ – thus, the document provides a written form of the oral intervention by the CLS at the meeting of Coreper on 23 November 2020. Herewith, an abstract and vague examination on the issue of the EU exercising externally its potential competence and the legal consequences of such an exercise of competences cannot be reasonably construed as constituting legal advice.

Secondly, notwithstanding the above, your reply does not specifically explain how the full disclosure of the requested opinion would in practice undermine the ability of the CLS to provide legal advice in the future. The mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation (EC) 1049/2001 is not sufficient to justify the application of that provision (*Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 18). In view of the objectives pursued by Regulation (EC) No 1049/2001, exceptions must be interpreted and applied strictly (*Sweden v Commission and others*, C-64/05 P, ECR I-0000, paragraph 66; *Sweden and Turco v Council*, C-39/05 P, I-04723, paragraph 36), and the risk of interest, laid down in the second indent of Article 4(2), being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical (*Sweden and Turco v Council*, C-39/05 P, I-04723, paragraph 43). Non-disclosure cannot be justified on the basis of purely hypothetical risks of 'display caution' or 'external pressure' without concrete reasoning directly connected to the actual content of the document whose disclosure is sought. As regards to the possibility of 'external pressure' or 'external influence', it would clearly be incumbent on the Council to take the necessary measures to put a stop on it (*Sweden and Turco v Council*, C-39/05 P, I-04723, paragraph 64).

As regards the existence of a risk of undermining the ability of the Legal Service to effectively defend its position in court proceedings, it is sufficient to note that and argument of such a general nature cannot justify an exception to the transparency required by Regulation (EC) No 1049/2001 (*Miettinen v Council*, T-395/13, EU:T:2015:648, paragraph 31).

Lastly, moreover, your decision fails to take into account at all the fact that the requested CLS opinion relates to a public, already provisionally applied international agreement between the European Union and the United Kingdom which directly affects to the Union's citizens' life. Regrettably, there is no balancing at all of the particular interest to be protected by non-disclosure of the CLS opinion "against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this 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, are of particular relevance where the Council is acting in its legislative capacity" (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 106).

6. *Requested opinion "does not pertain to legislative matters".*

It is worth emphasising that the non-legislative activity of the institutions does not fall outside the scope of Regulation (EC) No 1049/2001. Suffice it to note in that respect that Article 2(3) of Regulation (EC) No 1049/2001 confirms that the latter applies to all documents held by an institution, drawn up or received by it and in its possession, in all areas of EU activity (*Council of the European Union v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 107; *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88, 109).

Conclusion

To conclude, it is my submission that, regrettably, by refusing to fully disclose the requested CLS opinion, the Council has incorrectly applied the exceptions to the right of public access to the documents of the institutions in Regulation (EC) No 1049/2001 and breached EU primary law. The core EU objective – openness – embodied in the second paragraph of Article 1 TEU is also reflected in Article 15(1) TFEU which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible and in the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union (*ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 74; *P - Leino-Sandberg v Parliament*, C-761/18 P, EU:C:2021:52, paragraph 37).

In the context of the Trade and Cooperation Agreement and its provisional application prior to its formal entry into force, the principle of democracy and citizen participation constitutes an overriding public interest for the disclosure of the full text of the legal opinion in question. The requested document has already sparked a lively debate after its disclosure by a third party online. This not, however, mean that an institution would be relieved of its obligation to grant access to the requested document. On the contrary, in these circumstances, the requesting person retains a genuine interest in obtaining access to an authenticated version of the requested opinion, guaranteeing that that institution is the author and that the document expresses its official position (*P - Leino-Sandberg v Parliament*, C-761/18 P, EU:C:2021:52, paragraphs 47–49).

Therefore, I respectfully ask the Council to reconsider my request of full disclosure of the CLS opinion 5591/21.

Yours sincerely,

DELETED