



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, 28 April 2021

Ms Luisa Izuzquiza
Email: l.izuzquiza.h2kzdpykkx@fragdenstaat.de

Ref. 21/0877-rh/ns

Request made on: 21.04.2021

Dear Ms Izuzquiza,

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

Please find attached a partially accessible version of document **6357/21**.² However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **6357/21** is an opinion of the Council Legal Service dated 19 February 2021 on the respect of the coherence, operability and ability to evolve of the Schengen and Dublin acquis and the respect of the relevant Protocols, notably of the effet utile of Protocol 21 in the proposed new Pact on Migration and Asylum - "Variable geometry" - Schengen and Dublin acquis relevance of components of the proposed Pact.

This pact includes three new legislative proposals and two amended legislative proposals: i) proposal for a Regulation introducing a screening of third country nationals at the external borders ("proposed Screening Regulation"); ii) proposal for a Regulation on asylum and migration management ("AMMR Proposal"); iii) proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum ("propose Crisis Regulation"); iv) amended proposal for a Regulation establishing a common procedure for international protection in 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).

² Article 4(6) of Regulation (EC) No 1049/2001.

Union ("amended APR Proposal"); and v) amended proposal for a Regulation on the establishment of Eurodec ("amended Eurodac Proposal").

This opinion was issued as a response to questions raised regarding the proposals' relevance for, and possible impact upon, the Schengen and Dublin acquis.

The opinion is structured as follows: introductory part (paragraphs 1-8), an explanation of the Schengen acquis (paragraphs 9 to 20), the context of the proposals (paragraphs 21-30) and the legal advice (paragraphs 31 to 104).

At paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion, the opinion frankly analyses the proposed New Pact on Migration and Asylum and its coherence with the Schengen and Dublin acquis. This New Pact addresses cooperation with the countries of origin and transit, and the integration of refugees and return of those with no right to stay. The requested opinion therefore analyses issues which are not only complex, delicate and controversial but also of highly sensitive nature.

The disclosure of those paragraphs of the opinion would make known to the public internal opinions 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 seeking legal advice and receiving frank, objective and comprehensive advice. Moreover, 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.

Under these circumstances, the disclosure of paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion could undermine the protection of the legal advice under Article 4 (2) of Regulation (EC) No 1049/2001.

Additionally, the requested document is a very recent opinion on an ongoing legislative procedure. The New Pack on Migration and Asylum was submitted by the Commission to the Council on 23 September 2020 and is currently under discussion at the Council (working party level) and the European Parliament (committee level). The Commission presented this Pack as a result of the failure to conclude negotiations on the asylum and return reforms proposed by the Commission in 2016 and 2018. The Council has not yet taken a position on the issue dealt with by the legal opinion. The disclosure of paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion would render public specific points of a complex issue with many facets that need to be weighed together. Indeed, the opinion contains an assessment on certain points of the New Pack on Migration and Asylum, namely the proposals' relevance for, and possible impact upon, the Schengen and Dublin acquis. As the Pact is currently under discussion at the Council's preparatory bodies, the Council has not yet adopted a negotiation position for the interinstitutional discussion. This would bring serious harm to the decision-making process, as the co-legislator predisposition to reach a political agreement on the file might be negatively affected by a partial and particular assessment made in the context of this legislative procedure.

The disclosure of paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion would therefore risk compromising the capacity of the Council to reach an agreement on the dossier and would limit the Council's options during the ongoing negotiations.

Finally, the disclosure of the requested document would seriously undermine the free exchanges of views of its Council's preparatory bodies and carry a risk of self-censorship (case T-403/05 *MyTravel v Commission* paragraphs 50-51).

Under these circumstances, the disclosure of paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion could also undermine the protection of the decision-making process under Article 4(3) of Regulation (EC) No 1049/2001.

Taking into account the particular interest to be protected by non-disclosure of the document concerned against the public interest in the document being made accessible, there is no overriding public interest justifying the disclosure of paragraphs 3 to 8, paragraphs 14 to 15, and paragraphs 32, 33, 38-54, 56-58, 60-74, 76-78, and 80 to 104 of the opinion.

As mentioned above, these paragraphs are of a particularly sensitive nature, as they concern the proposed New Pack on Migration and Asylum and their possible impact upon the Schengen and Dublin acquis (case T-710/14 *Herbert Smith Freehills v Council*, paragraph 74). The Commission proposed this New Pack as the negotiations on the asylum and return reforms presented in 2016 and 2018 did not conclude.

On the basis of the above, partial access is granted to paragraphs 1-2, 9-13 and 16-31, paragraphs 34 to 37, paragraphs 55 (except for footnotes 35 and 36), 59, 75 and 79 pursuant to Article 2(6) of Regulation (EC) No 1049/2001.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.³

Yours sincerely,

Fernando FLORINDO

³ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

Enclosure1.