



EUROPEAN COMMISSION
LEGAL SERVICE
The Director-General

By e-mail

Mr Giacomo ZANDONINI

Subject: Your application for access to documents – EASE 2025/0919

Dear Mr Zandonini,

I refer to your application under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, registered on 30/01/2025, by means of which you seek access to *“Any preliminary legal assessment, or legal assessment, referred to the Protocol (or Memorandum of Understanding) on migration matters signed on November 6, 2023, between Italian and Albanian authorities, including all annexes, in all formats.”*

Please note that your request has been split among two Commission services, namely the Directorate-General for Migration and Home Affairs (EASE 2025/0521) and the Legal Service (EASE 2025/0919). The present reply concerns the part of your request within the competence of the Legal Service, namely the documents held by the LS of which it is the author and which match the terms of your request.

1. IDENTIFICATION OF THE DOCUMENT

The following document has been identified as falling within the scope of your request:

- Note to the file of the Legal Service on the “Protocol between Albania and Italy on strengthening cooperation on migration matters concluded on 6 November 2023”, document reference Ares(2023)8715788

2. ASSESSMENT OF THE IDENTIFIED DOCUMENT

Having carefully examined the concerned document, I regret to inform you that access to it cannot be granted, since it is covered by the exceptions provided for in Article 4(2), second indent and 4(3), first subparagraph of Regulation (EC) No 1049/2001 (related to the protection of legal advice and court proceedings, as well to the protection of on-going decision-making process), as will be explained below.

Protection of legal advice

The second indent of Article 4(2) of Regulation (EC) No 1049/2001 states by way of exception that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] – court proceedings and legal advice [...], unless there is an overriding public interest in disclosure”.

¹ 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, 31.05.2001, page 43).

I consider that disclosure of the identified document would undermine the protection of legal advice, which, as recognized by the Court of Justice, represents an exception that must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice (Judgement of the Court of Justice of 1 July 2008, Joined Cases C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42).

As a preliminary remark, it must be underlined that the Commission's Legal Service has the exclusive competence to represent the institution before the Union courts. According to the case-law of the Court, the legal representative benefits from what is often referred to as "legal privilege", i.e., it must be able to give advice to its client, without running the risk that that advice is divulged and then used against the client. More specifically, the Court has confirmed that the correspondence between the lawyer and his client is confidential, and the lawyer cannot be forced to divulge it².

In addition, in the Philip Morris judgment in Case T-18/15, the General Court ruled that *'the principle of equality requires the institution by which the contested act was issued to be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were obliged to defend itself, not only having regard to the pleas in law and arguments raised by the applicant (...), but also having regard to the positions taken internally concerning the legality of the various options envisaged in the context of the drawing up of the act in question (...)'*³.

Consequently, it is necessary to protect documents containing legal advice given by the Legal Service of the Commission, when it is plausible that it may be confronted later in Court with its own assessment, given as in-house counsel of the European Commission, in order not to impair its capacity to represent the institution in courts and in particular to defend the legality of its acts.

In its judgment in Case T-84/03⁴, the Court of First Instance⁵ underlined that the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice. The present section concerns the protection of legal advice.

It must be noted that, in relation to the exceptions listed in Article 4(2) of Regulation (EC) No 1049/2001, the Court has accepted that it is, in principle, open to the Union institution to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.⁶ This is the case as regards document identified, which contains legal advice by the Legal Service of the Commission provided internally without connection to a legislative procedure.

² See by analogy judgment of 8 December 2022, *Orde van Vlaamse Balies*, C-694/20, EU:C:2022:963; paragraphs 25 to 28. Judgment of 26 September 2024, *Ordre des avocats du barreau de Luxembourg*, C-432/23, EU:C:2024:791, paragraphs 46 to 52. See also judgment of 28 January 2015, *Evonik*, T-341/12, EU:T:2015:51, paragraph 124, upheld on appeal in judgment of 14 March 2017, C-162/15 P, EU:C:2017:205, as regards art. 7 of the Charter of Fundamental Rights being invoked by legal persons.

³ Judgment of the General Court of 15 September 2016, *Philip Morris Ltd v Commission*, T-18/15, EU:T:2016:487, paragraph 73. In the same sense, judgments of the General Court of 26 July 2023, *Troy Chemical Company BV v Commission*, T-662/21, EU:T:2023:442, paragraph 57; and of 24 January 2024, *Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) v Commission*, T-602/22, EU:T:2024:26, paragraph 66.

⁴ Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

⁵ Now the General Court.

⁶ Judgment of the Court C-139/07 P, *Technische Glaswerke v Commission* EU:C:2010:376, paragraph 54.

The concept of ‘legal advice’, as well as the applicability of the exception protecting it, has been interpreted by the case-law of the EU Courts. Indeed, in its judgment in Case T-755/14, the General Court took the position that ‘*legal advice is advice relating to a legal issue, regardless of the way in which that advice is given*’⁷.

In the above-mentioned judgment, the General Court also explicitly underlined that ‘*it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late, or final stage of the decision-making process. In the same way, the fact of the advice having been given in a formal or informal context has no effect on the interpretation of that concept*’⁸.

In addition, it is apparent from the case-law deriving from the judgment of the Court of Justice in Case C-39/05 P that the concept of ‘legal advice’ relates to the content of a document and not to its author or its addressees⁹.

Following the assessment of the document concerned by the request, it can be confirmed that the document constitutes legal advice provided by the Commission’s Legal Service internally and for future reference. For that reason alone, the document is protected by the legal advice exception¹⁰.

Furthermore, in line with court’s case-law, the institution ‘*must examine whether disclosure [of legal advice] [...] would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice.*’¹¹.

The disclosure of legal advice at issue would have that effect, as is inherent in case of legal advice provided internally, without connection to any legislative file, and on a preliminary basis. This kind of advice should be as a rule protected as part of the institution’s “space to think”.

The requested document deals, on purely internal (in the form of a note to the file) and preliminary basis (prepared on 6 November 2023, just after the Protocol has been signed), with the question whether the concerned Italy-Albania Protocol is compatible with Union law in general and the EU asylum and return acquis in particular; and contains delicate legal advice in that respect. Its disclosure would make known to the public that sensitive advice on delicate topics, drafted under the responsibility of the Legal Service and intended for purely internal use. In this respect, it is to be noted that the General Court explained that the preliminary nature of legal advice is one of the elements that increase the risk of undermining the capacity of the institution of receiving frank, objective, and comprehensive advice in the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/2001¹². Since the advice concerned is of internal and preliminary nature, this further increases the relevant risk linked to its disclosure.

Finally, the General Court has found that documents need to be protected under the exception of the second indent of Article 4(2) of Regulation (EC) No 1049/2001 whenever

⁷ Judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Commission*, T-755/14, EU:T:2016:482, paragraph 47.

⁸ *Idem*.

⁹ Judgment of the Court of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 38-39.

¹⁰ See also Article 4(2)(c) of Annex to Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission, *OJ L*, 2024/3080, 5.12.2024.

¹¹ See *inter alia*, judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 38 to 44, and of 3 July 2014, *Council v in’t Veld*, C-350/12 P, EU:C:2014:2039, paragraph 96.

¹² Judgment of 7 February 2018, *In ‘t Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraphs 90-94.

disclosure ‘would compromise the interest in seeking legal advice and receiving frank, objective and comprehensive advice’¹³ and that the ‘mere assertion that the legal advice in question was drawn up in the context of a legislative process is not in itself sufficient to establish an overriding public interest’¹⁴. As confirmed by the Court of Justice, an overriding public interest exists when the legal advice relates to ‘legal questions arising when legislative initiatives are being debated’, which ‘increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act’¹⁵.

As already indicated, the document identified does not concern advice given in connection with a Union legislative file. The identified document does not form part of any legislative process related to a Commission proposal, and thus does not concern legal questions arising when legislative initiatives are being debated nor would its disclosure increase the transparency and openness of the legislative process. Thus, the legal advice exception is fully applicable in the present case, and an overriding public interest cannot be presumed to exist, as will be further analysed in point 4 below.

Therefore, disclosing the internal legal assessment contained in the document requested would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of this highly sensitive matters. The frankness, objectivity and comprehensiveness of the legal advice would be seriously affected if legal advice on highly sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in the framework of its work.

Protection of court proceedings

Moreover, I consider that the identified document is also covered by the exception related to the protection of court proceedings, the purpose of which is to maintain the independence of the European Union institutions in their dealings with the Court and to ensure the proper course of justice and a fair hearing for the parties.

In this respect, the Court has admitted the possibility that disclosure of documents connected to pending court proceedings may create a risk that the latter proceedings might be undermined.¹⁶

In the present instance, the legal advice contained in the note concerned is linked to several pre-liminary ruling cases, which are ongoing before the Court of Justice (see C-750/24¹⁷, C-758/24¹⁸, C-759/24¹⁹, C-388/24²⁰, C-389/24²¹, C-763/24 PPU²², C-764/24 PPU²³, C-780/24 PPU²⁴, C-781/24 PPU²⁵, C-782/24 PPU²⁶, C-783/24 PPU²⁷, C-784/24 PPU²⁸, C-

¹³ See, among others, judgment of 15 September 2016, *Herbert Smith Freehills LLP v European Commission*, T-755/14, EU:T:2016:482, paragraph 66.

¹⁴ *Idem*, paragraph 73.

¹⁵ Judgment of 21 April 2021, *Laurent Pech v Council of the European Union*, T-252/19, EU:T:2021:203, paragraph 80.

¹⁶ *Ibid*, paragraph 132.

¹⁷ [CURIA - List of results.](#)

¹⁸ [CURIA - List of results.](#)

¹⁹ [CURIA - List of results.](#)

²⁰ [CURIA - List of results.](#)

²¹ [CURIA - List of results.](#)

²² [CURIA - List of results.](#)

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²⁴ [CURIA - List of results.](#)

²⁵ [CURIA - List of results.](#)

²⁶ [CURIA - List of results.](#)

²⁷ [CURIA - List of results.](#)

²⁸ [CURIA - List of results.](#)

785/24 PPU²⁹ and C-786/24 PPU³⁰). The arguments put forward in the identified document are very closely linked to the issues to be discussed in the pending cases. Thus, the disclosure of the requested document would result in undermining the equality of arms, the proper course of justice and a fair hearing for the parties.

Protection of decision-making process

Finally, in accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 *“access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.”*

The requested document marks a first step in a process of assessment of the Protocol in the light of Union law, with a view to enable the Commission to take a position on it, in particular in the context of its functions as guardian of the Treaties. In this context, the analysis contained in the document is still relevant and subject of discussion for decisions to be taken. Putting in the public domain such considerations of the Commission's Legal Service, would severely reduce the Commission's capacity to take a decision after frank and unbiased internal discussions free from external interferences, thus seriously affecting its decision-making process.

I therefore consider that public access to the requested document has to be refused also under art. 4(3) first subparagraph of Regulation (EC) No 1049/2001.

Conclusion

In view of all the above considerations, I am unfortunately not in a position to give access to the document concerned.

3. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the requested document. However, after careful examination, I have come to the conclusion that it is entirely covered by the exceptions invoked so that a partial disclosure cannot be granted without harming the interests protected.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2) second indent and 4(3), first subparagraph. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused document that would outweigh the public interests concerned.

²⁹ [CURIA - List of results.](#)

³⁰ [CURIA - List of results.](#)

5. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General. You can submit it via your EASE portal³¹ account.

Yours sincerely,

[signed electronically]
Daniel CALLEJA

³¹ <https://www.ec.europa.eu/transparency/documents-request>.