



**COUNCIL OF
THE EUROPEAN UNION**

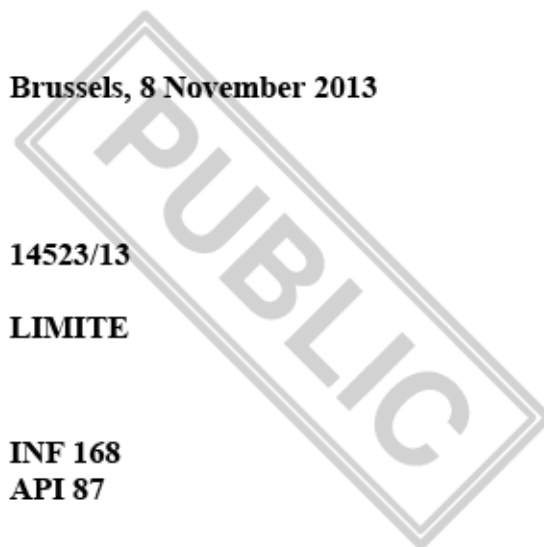
Brussels, 8 November 2013

14523/13

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"I/A" ITEM NOTE

from: Working Party on Information
to: Coreper (part 2)/Council

No. prev. doc.: 14522/1/13 REV 1

Subject: Public access to documents
- Confirmatory application No 19/c/01/13

Delegations will find enclosed a draft reply from the Council to confirmatory application no 19/c/01/13, approved by the Working Party on Information by written consultation which ended on 8 November 2013.

The German, Estonian, Lithuanian, Slovenian, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

DE: *"The footnote 23 is referring to the ERTA case, which is already public. Furthermore, the footnote is only naming potential future cases. This does not disclose the internal position of the Legal Service. Thus, disclosure of the footnote would not undermine the protection of legal advice. Full access to the document should be granted."*

EE/SI: *"Estonia and Slovenia welcome the fact that partial access has been extended, but cannot agree with the reasoning reflected in the draft reply."*

LT/FI/SE: *"Lithuania, Finland and Sweden welcome the fact that partial access has been extended, but cannot agree with the reasoning reflected in the draft reply and believe that full access to the document should be granted."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item,
- decide to publish the result of the vote.

The annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 19/c/01/13,
made by fax and registered mail on 7 October 2013,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to the document 15856/11

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 No 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 refers to document 15856/11 which is an opinion of the Council Legal Service relating to the Draft agreement on the European Union Patent Jurisdiction.
2. Document 15856/11, except for its paragraphs 1, 2 (first sentence) and 4 to 15 - which are already publicly available - contains a legal analysis on the compatibility of the said agreement with Opinion 1/09 of the Court of Justice of the European Union.
3. In its reply dated 24 September 2013, the General Secretariat of the Council refused public access to the remaining parts of the document pursuant to the second indent of Article 4(2) (protection of the public interest as regards legal advice) of Regulation No 1049/2001.
4. In his confirmatory application dated 7 October 2013, the applicant contests the assessment made by the General Secretariat of the Council and asks for disclosure of the document in its entirety.

5. The Council has carefully considered the confirmatory application. It has assessed the request for access in full consideration of the principles underlying Regulation No 1049/2001 and the aim of ensuring the widest possible public access to documents. In so doing the Council has had full regard to the obligations arising under the Treaties and legislation as applied by the Court of Justice of the European Union.
6. In addition, the Council has carefully examined the possibility of granting extended partial access as provided for in Article 4(6) of Regulation No 1049/2001 according to which "*if only parts of the document are covered by exceptions, the remaining parts of the documents should be released*". In so doing the Council has undertaken a careful and detailed assessment of the document in question and has come to the following conclusion.
7. The Council has considered the risks which disclosure of the opinion would entail to the protection of legal advice pursuant to Article 4(2) of the Regulation and to the impact of the legal advice in question on the related cases which are currently still subject to litigation before the Court of the European Union¹. It has come to the conclusion that, on balance and at the present point in time access can now be granted to the entirety of the opinion with the exception of footnote 23 to paragraph 30. The applicant should be therefore provided with a redacted version of document 15856/11.
8. Footnote 23 to paragraph 30 is very sensitive and wide in its application as it addresses a general and contentious legal issue regarding the relationships between international agreements and the European Union legal order. This issue is of a horizontal scope and will be of relevance for future dossiers and also deals with an issue where there is a real risk of future litigation. The disclosure of this part of the legal advice would undermine the protection of legal advice by disclosing the internal position of the Legal Service on a sensitive and contentious issue and entail a foreseeable risk both that the Council would not seek frank and comprehensive advice on such matters and that the Legal Service would not be able to defend effectively the position of the Council before the Courts.

¹ Cases C-146/13 *Spain vs. Parliament and Council* and C-147/13 *Spain vs. Council*.

9. With respect to the exception relating to the protection of legal advice, the Council has carefully weighed the interests at stake. While the Council would underline that the *Turco* case-law² applies only to legislative procedure, which is not applicable to the case under discussion, it has in any event thoroughly taken into account the interest of transparency and openness, and has therefore disclosed the opinion in its entirety with the exception of one footnote. Nevertheless, the Council is convinced that, as for the specific footnote as indicated above, which has a particularly sensitive and broad scope, the public interest invoked by the applicant does not establish an overriding public interest in disclosure under Article 4(2), last sentence, of Regulation No 1049/2001.
10. In view of the foregoing, the Council confirms that access to footnote 23 to paragraph 30 of document 15856/11 has to be refused pursuant to Article 4(2), second indent (protection of the public interest as regard legal advice) of Regulation No 1049/2001.

² Cases C-39/05P, *Sweden and Turco vs Council*, [2008] ECR I-4723.