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LIMITE

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NOTE POINT "I/A"

Origine:	Secrétariat général du Conseil
Destinataire:	Comité des représentants permanents/Conseil
N° doc. préc.:	7392/19; 7393/19
Objet:	Accès du public aux documents - Demande confirmative n° 08/c/01/19

Les délégations trouveront en annexe un projet de réponse du Conseil à la demande confirmative n° 01/c/01/19, approuvé par le groupe "Information" dans le cadre d'une consultation écrite qui a pris fin le 5 avril 2019, les Pays-Bas ayant voté contre.

La déclaration ci- après a été faite:

NL: *"Les Pays-Bas ne peuvent se rallier au projet de réponse, qui n'envisage qu'une divulgation partielle. Compte tenu des circonstances spécifiques de l'affaire et de la jurisprudence constante de la Cour, les Pays Bas estiment qu'il n'est pas démontré de façon suffisamment motivée en quoi la divulgation du document présente un risque prévisible ou pourrait avoir un impact négatif considérable sur le processus décisionnel."*

Les délégations ont marqué leur accord pour que le résultat du vote soit rendu public.

Le Comité des représentants permanents est donc invité à suggérer que, lors de sa prochaine session, le Conseil:

- approuve, en point "A", le projet de réponse figurant à l'annexe du présent document;
- décide de rendre public le résultat du vote.

L'annexe n'est disponible qu'en anglais.

DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION 08/c/01/19,
made by email on 11 March 2019,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 17773/12

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 (EC) 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. On 29 January 2019 the applicant introduced an initial application for access to document 17773/12.
2. Document 17773/12 is a Note of 14 December 2012 drawn up by the Council Working Party on General Affairs and addressed to COREPER (Part 2) concerning the Council's position with a view to opening negotiations with the European Parliament on the following topics:
 - a) Draft Arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy;
 - b) Draft Inter-institutional Agreement between the European Parliament and the Council repealing the Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy.

3. On 26 February 2019, the General Secretariat of the Council (GSC) replied to this application refusing granting access to the requested document on the ground of Article 4, paragraph 3 of Regulation (EC) No 1049/2001, as disclosure would seriously undermine the decision-making process of the institution.
4. In substance, the General Secretariat indicated that the common foreign and security policy (CFSP) arrangement has not been agreed yet with the European Parliament and that exchanges on the reopening of negotiations between the two institutions were undergoing, a new negotiating mandate still being under preparation. It underlined that document 17773/12 sets out, for internal use as part of deliberations and preliminary consultations within the Council, the draft texts of the Arrangement and Inter-institutional Agreement as above, that it would be premature to disclose that document to the public and that such a disclosure would undermine the proper conduct of negotiations and would compromise the conclusion of an agreement on this file.
5. On 11 March 2019, the applicant introduced a confirmatory application requesting the Council to reconsider its position.
6. The Council has carefully considered the confirmatory application and re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001, whether public access to the abovementioned document could be granted.
7. In his arguments pleading for disclosure, the applicant highlights an overriding public interest in following debates on the appropriate manner the Parliament exercises an "*oversight over governing bodies exercising executive and/or administrative functions in a matter of public concern*". In particular, the applicant underlines that "*members of the public [that] are (...) denied access to EU classified documents (...), have a strong interest in ascertaining that their chosen parliamentary representatives are in a position to exercise the role of oversight on their behalf*" and should be given sufficient "*information to hold their representatives both in the Parliament and the Council to account over the position they take throughout the negotiations*".

8. Moreover, the applicant indicates that, in examining its initial application, the General Secretariat of the Council has not sufficiently explained how disclosure “*would seriously undermine the decision-making process*” and failed to consider the possibility of offering partial access to the requested document in line with Article 4, paragraph 6 of the abovementioned Regulation.
9. The Council recognizes that, owing to a technical error, in the reply to the applicant provided by the General Secretariat on 26 February 2019, it was erroneously mentioned that document 17773/12 “*sets out a draft position of the Council with a view to opening up negotiations with the European Parliament on two inter-institutional agreements...in the areas of Justice and Home Affairs and of the Common Foreign and Security Policy (CFSP)*”. The Council wishes to rectify this information, since the domain “Justice and Home Affairs” is out of scope, and the document only focuses on the two subjects indicated in point 2 above.
10. The Council has carefully scrutinized the content of the requested document and re-consulted the competent services of its General Secretariat, having due regard to the developments and the current state of play of negotiations on the above-mentioned pending file.
11. At the outset, the Council recalls that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2), (3)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. The requested document was not drawn up in the context of legislative activities of the Council but is directed at assisting the Council in its decision-making in the administrative domain. Therefore, the wider access which is also referred to in recital 6 of Regulation (EC) No 1049/2001 is not relevant in the present circumstances.
12. The requested document is drawn up by a Council preparatory body for the internal use of the Council in the sense of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and relates to a matter on which the decision-making process is currently ongoing.

13. More specifically, the CFSP arrangement has not been agreed yet with the European Parliament. The Council has been contemplating reopening negotiations with the European Parliament since September 2018, still on the basis of the draft mandate described in document 17773/12.
14. The negotiations on the new Arrangement, aiming to update an Inter-institutional Agreement (IIA) of 2002 in the light of the post-Lisbon institutional set-up, have been put on hold since 2013, pending the entry into force of the IIA on the forwarding to and handling by the EP of classified information in the areas other than the common foreign and security policy, which occurred in 2014, and the gathering of sufficient practical experience with its functioning. The Presidency's aim was to examine the prospects for a resumption of talks, on the basis of the existing mandate from 2012. The EEAS has also been fully involved in the preparation and conduct of these discussions.
15. The Council is therefore pursuing its examination of this file, which is still subject to thorough analysis. In that context, there are still important elements to be discussed which concern the specific arrangements to be established between the European Parliament on the one hand and the Council and the High Representative in this regard.
16. A revision of the abovementioned mandate with a view to reopening negotiations was accordingly on the agenda of the Permanent Representatives Committee to which a progress report was submitted (lastly on 19th December 2018) and of the Working Party on General Affairs (lastly on 8th March 2019) (see respectively the draft agendas CM 1925/1/19 and 15652/1/19 REV 1, both in the public domain). These discussions have been complex, the delegations having expressed divergent positions and sensibilities.
17. Discussions are expected to continue in April 2019 within the Working Party on General Affairs. Moreover, even if the Council managed to reach an agreement internally on a mandate, the terms of the envisaged agreement would then need to be negotiated with the European Parliament.

18. In its assessment, the Council has particularly taken into consideration, on the one hand, the increased public interest in transparency for documents that relate to non-legislative procedures and, on the other hand, the specific nature and the especially sensitive ongoing negotiations on a subject which relates, among others, to the security measures to be put in place in the institutions concerned, to their responsibility to comply with the rules protecting classified documents during their handling and to their commitment to preventing any breach of security, loss or compromise of such information.
19. Given the fact that internal discussions in relation to the mandate for negotiations are ongoing, the Council maintains its view that full access to document 17773/12 cannot be granted, as it would affect the negotiating process and reveal aspects of the future arrangement which concern the role of all the key players, the security rules and the risk management. The disclosure of those parts which concern core elements of the ongoing negotiations would have an adverse effect on the efforts made by delegations in negotiating a compromise solution and on the mutual trust among the institutions, diminishing the chances of the Council to reach an agreement. Consequently, there is a reasonably foreseeable risk that full disclosure of the requested document could have a substantial negative impact on the decision-making process.
20. Given the sensitive nature of document 17773/12, and having thoroughly examined the context in which the document was drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in its disclosure.
21. As regards the argument of the applicant according to which EU citizens "*have a strong interest in ascertaining that their chosen parliamentary representatives are in a position to exercise the role of oversight on their behalf*", it is recalled that article 36 TUE provides that the High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. This obligation (as well as information obligation under Article 218(10) TFEU) ensures the oversight of the Parliament on these policies.

22. The Council has also examined whether, pursuant to Article 4(6) of Regulation (EC) No 1049/2001, partial access could be granted to the requested document. In light of this examination, the Council considers that some parts of the requested document, which have not been disclosed at the stage of the initial reply and which essentially provide background information, are less sensitive in the context of the ongoing discussions and can therefore be disclosed.

CONCLUSION

23. For the above-mentioned reasons, the Council concludes that full disclosure of document 17773/12 would seriously undermine the decision-making process under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001. In addition, in the specific case at hand, the public interest invoked by the applicant does not outweigh the need to preserve the effectiveness of the Council's decision-making. Therefore, the Council is unable to grant full access to the requested document.
24. However, having thoroughly re-examined the requested document in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001, the Council has concluded that partial access shall be granted to those parts of document 17773/12 containing background information, namely its paragraphs 1 to 5.
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