



**KUNSILL
TAL-UNJONI EWROPEA**

**Brussell, 14 ta' Ġunju 2011 (15.06)
(OR. en)**

10373/11

**INF 84
API 48
JUR 247**

NOTA PUNT "I/A"

minn : Grupp ta' Hidma dwar l-Informazzjoni

lil : Coreper (parti 2)/Kunsill

Nru dok. preċ.: 10372/11

Sugġett: Aċċess pubbliku għal dokumenti

- Applikazzjoni konfermatorja Nru 14/c/01/11

Id-delegazzjonijiet isibu meħmuż abbozz ta' twegiba mill-Kunsill għall-applikazzjoni konfermatorja Nru 14/c/01/11, kif tinsab wara l-eżami mill-Grupp ta' Hidma dwar l-Informazzjoni fil-laqgħa tiegħu tal-10 ta' Ġunju 2011.

Id-delegazzjoni Svediża indikat li ser tivvota kontra l-abbozz ta' twegiba. Saru d-dikjarazzjonijiet li ġejjin:

DK u FI: *"DK u FI jaqblu mal-punt safejn ingħata aċċess parzjali. Madankollu, fir-rigward tal-abbozz ta' twegiba, l-aħħar żewġ sentenzi tal-paragrafu 11 u l-paragrafu 12 għandhom jithassru kompletament, minhabba li mhumiex relatati mas-sustanza tad-dokument mitlub, u huma ġenerali u ipotetiċi wisq biex jissodisfaw il-kriterji stretti għall-applikazzjoni tal-eċċezzjonijiet stabbiliti mill-Qorti."*

SE: *"L-Isvezja tilqa' l-fatt li ngħata aċċess parzjali. Madankollu, l-Isvezja tqis li partijiet ulterjuri tad-dokument, mill-inqas il-paragrafi 5 u 6, għandhom jiġu rilaxxati. Barra minn hekk, l-Isvezja taqbel mad-dikjarazzjoni li saret mill-Finlandja u d-Danimarka rigward il-paragrafi 11 u 12 tal-abbozz ta' twegiba."*

Maġġoranza tad-delegazzjonijiet qablet li jiġi ppubblikat ir-riżultat tal-votazzjoni.

Il-Kumitat tar-Rappreżentanti Permanenti huwa għaldaqstant mitlub jissuggerixxi li l-Kunsill, fil-laqgħa tiegħu li jmiss:

- jirreġistra l-qbil tiegħu mal-abbozz ta' twegiba anness għal dan id-dokument, bħala punt "A", bid-delegazzjoni Svediża tivvota kontra,
- jiddeċiedi li jippubblika r-riżultat tal-votazzjoni.

L-Anness hu disponibbli bl-Ingliż biss.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 14/c/01/11,
made by e-mail on 16 May 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 6211/01

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. The applicant refers to document 6211/01 which contains an opinion by the Council Legal Service on the possibility of applying the procedure laid down in Article 96, paragraph (2) of the ACP-EC Partnership Agreement (hereafter "the Cotonou Agreement") to the Republic of Liberia, hereafter Liberia, in respect of its alleged involvement with human rights violations by rebel forces in the neighbouring country of Sierra Leone.
2. In its reply dated 11 May 2011, the General Secretariat refused full public access to the document pursuant to Article 4(1)(a), third indent (protection of international relations), and Article 4(2), second indent (protection of legal advice), of Regulation (EC) 1049/2001. Pursuant to Article 4(6) of that Regulation, partial access was granted to paragraph 1 of document 6211/01.
3. In his confirmatory application dated 16 May 2011, the applicant argues that the Council Legal Service opinion relates to a legislative procedure, related more specifically to a Decision of the Representatives of the Governments of the Member States meeting within the Council of 10 April 2006 on the provisional application of the Internal Agreement amending

the Internal Agreement of 18 September 2000 on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement ¹ (hereafter "the internal agreement"). The applicant refers to the *Turco* jurisprudence of the European Court of Justice ². Besides, he maintains that public access to the document in question would not risk undermining international relations with Liberia since the EU had affirmed the participation of Liberia in violations of human rights in Sierra Leone in Council Decision 2002/274/EC. He also asks the Council to take into due account the interest in transparency on the subject matter of the opinion as a public interest. Moreover, he invokes his interest in the opinion as a scientist. The applicant concludes by pointing out that he is merely interested to know if the Council Legal Service admits the possibility to apply Article 96(2) of the Agreement against a given State when violations are committed in another State.

4. The Council has examined the above-mentioned document and has come to the following conclusion:
5. The requested document contains legal advice, except for its points 1 and 2 and the first sentence of point 3.
6. To begin with, it should be pointed out that the legal advice relates to the Council's decision-making process regarding the opening of consultations with Liberia under Article 96 of the Cotonou Agreement ³, an area where the Council acted in accordance with the former Article 300(2) TEC (now Article 218 TFEU). This area manifestly relates to the EU's international relations, which does not fall under the Council's legislative activities.⁴ Concerning the

¹ OJ L 247, 9.9.2006, p. 46.

² C-39/05 P and C-52/05 P Sweden, *Turco v. Council* [2008] ECR I-4723, pt. 42.

³ It is recalled that Article 96(2) of the Cotonou Agreement provides for a consultation procedure prior to adoption of "appropriate measures" in cases where a Party to the Agreement considers that another Party has failed to fulfil an obligation stemming from respect of human rights, democratic principles and the rule of law.

⁴ Pursuant to the first subparagraph of Article 7 of the Council's Rules of Procedure (OJ L 285 of 16.10.2006, p. 47), as it stood at the material time, *"The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of (...) acts concerning international relations (...)"* (emphasis added).

applicant's reference to the Decision of the Representatives of the Governments of the Member States meeting within the Council of 10 April 2006, the Council points out that, first, the legal advice contained in the requested document is not related to that Decision, and second, the said Decision does not constitute a legislative or other act of the Council or any other institution of the EU. In the light of the foregoing, the legal advice contained in the requested document does not relate to an area where the wider openness of the institutions' procedures would be given a particular weight under the *Turco* case-law of the Court of Justice.

On the protection of the public interest as regards international relations

7. The legal advice examines the question whether it would be justified to apply the procedure laid down in Article 96(2) of the Agreement to Liberia, in respect of its alleged involvement with human rights violations by rebel forces in the neighbouring country of Sierra Leone. In the requested document, the Council Legal Service examines, first, the legal requirements for opening consultations with an ACP Party pursuant to Article 96(2) of the Cotonou Agreement in respect of that Party's alleged involvement with human rights violations in a third country. Second, the Council Legal Service examines whether those requirements, have been met on the facts of the case.
8. The first part of the analysis referred to above is of general, horizontal importance, which remains relevant in similar, future cases where a Party to the Cotonou Agreement allegedly becomes involved in human rights violations in a third country. Were the legal advice to be made public, it could be used by interested parties to influence the Council's decision-making process in the future and to legally or politically contest a decision taken by the Council. This would negatively affect the EU's position on the international stage. There is therefore a risk that divulgation of the legal advice would undermine the public interest as regards international relations of the Union.
9. Two aspects need to be taken into consideration when it comes to the legal assessment of the concrete facts of the case. First, that assessment cannot be separated from the general analysis described above and must therefore benefit from the same legal protection. Moreover,

disclosure of the document would reveal to the EU's counterparts elements pertaining to the position that had been subsequently taken by the Council regarding the opening of consultations with Liberia under Article 96 of the Cotonou Agreement which - in the case the legal advice was critical - could be exploited so as to weaken the EU's position in the future. Divulgence of this part of the legal advice would hence for two different reasons also undermine the public interest as regards international relations of the EU.

10. The applicant maintains that there is an overriding public interest in releasing the requested document by reference to the fact that transparency in itself can constitute an overriding public interest. In this regard it must be recalled that the exceptions provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001, including the protection of international relations, are mandatory and do not comprise an “overriding public interest” clause. In consequence, once it is established that the requested document falls within the protected sphere of public interest as regards international relations and that the protection of the invoked interest would be undermined if the documents were to be disclosed, the institution is obliged to refuse public access.

Concerning the protection of legal advice

11. The reasons set out above in points 6 to 8 apply by analogy to the protection of legal advice. The fact that the requested document addresses a question of general, horizontal nature justifies an increased public interest in its protection beyond the specific context of the decision-making process in question. Furthermore, the legal assessment of Liberia's case is inextricably linked to the general assessment referred to above and must therefore benefit from the same level of legal protection. In addition, it deals with a delicate issue of the consequences of the non-respect for democratic principles and fundamental rights in international law. Were the legal analysis of that case released, this would create the risk that the Council would be more reluctant to consult its Legal Service on delicate questions of international law in the future. This would ultimately undermine the Council's interest in requesting and receiving frank, objective and comprehensive written legal advice from its Legal Service.

12. Moreover, disclosure of the Legal Service's internal advice would seriously affect its capacity to present and defend, in the future, the Council's position in Union courts since that position may be different from the one that it has recommended earlier. Finally, the risk that internal legal advice of general scope could to be disclosed to the public, threatens to affect the way in which the Legal Service drafts its legal advice and hence to prejudice the possibility of the Legal Service to express its views in an independent, frank and objective way.
13. Assessing the question of an overriding public interest in disclosure under Article 4(2), third indent, of Regulation (EC) No 1049/2001 (protection of legal advice), the Council has taken into due consideration the public interest in transparency on matters relating to human rights and democracy. Moreover, it has taken into account the increased public interest to protect legal advice of general, horizontal nature, and in addition, of a particularly sensitive nature. In view of all those interests, the Council concludes that the public interest in the protection of its international relations and legal advice are not outweighed by the public interest in transparency.
14. While the Council understands the applicant's interest in inspecting the document for scientific purposes, it considers that it is not possible to grant the applicant privileged access, since the institution is obliged, when releasing a document to the public, to do so *erga omnes*.⁵
15. For these reasons the Council confirms the General Secretariat's initial reply in so far as the latter refused full public access to the requested document. There is, however, an obligation under Article 4(6) of Regulation (EC) No 1049/2001 for the Council to release such parts of the document which are not covered by any of the above exceptions. This is the case for its paragraphs 1 and 2 and the first sentence of paragraph 3.

⁵ Article 10(2) of Annex II to the Council's Rules of Procedure, OJ L 325 of 11.12.2009, p. 35.