



**RAAD VAN
DE EUROPESE UNIE**

**Brussel, 16 september 2011 (21.09)
(OR. en)**

13725/11

**INF 144
API 77
JUR 426**

NOTA I/A-PUNT

van:	de Groep voorlichting
aan:	het Coreper (2e deel) / de Raad
nr. vorig doc.:	13724/11
Betreft:	Toegang van het publiek tot documenten - Confirmatief verzoek van de heer Frank Schmidt-Hullmann (nr. 21/c/01/11)

In bijlage dezes gaat voor de delegaties een ontwerp-antwoord van de Raad, zoals dat luidt na bespreking door de Groep voorlichting op 16 september 2011, op een confirmatief verzoek van de heer Frank Schmidt-Hullmann (nr. 21/c/01/11).

De Deense, de Estse, de Finse en de Zweedse delegatie zullen tegen het ontwerp-antwoord stemmen en leggen de volgende verklaring af.:

"Denemarken, Estland, Finland en Zweden zijn van oordeel dat de resterende gedeelten van de documenten niet, althans niet volledig, onder de genoemde uitzondering vallen. Het bewuste Verdrag heeft een bijzonder karakter en de doelstellingen van de EU in het onderhandelingsproces zijn grotendeels gebaseerd op de tekst van het Verdrag en/of het daaraan gehechte protocol, en de toegang tot de documenten zou ten minste tot die gedeelten moeten worden verruimd."

Een meerderheid van de delegaties stemde ermee in dat de uitslag van de stemming openbaar wordt gemaakt.

Het Comité van permanente vertegenwoordigers wordt derhalve verzocht de Raad in overweging te geven in de volgende zitting:

- het ontwerp-antwoord in bijlage dezes als A-punt goed te keuren, waarbij de Deense, de Estse, de Finse en de Zweedse delegatie zullen tegenstemmen;
- te besluiten de uitslag van de stemming openbaar te maken.

De bijlage bestaat alleen in het Engels.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 21/c/01/11,
made by e-mail on 8 August 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 10408/10 and 10602/10 (both RESTREINT UE)

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 documents 10408/10 and 10602/10 (both classified RESTREINT UE), both of which concern a draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). Document 10408/10 contains an outcome of proceedings of the meeting of the Permanent Representatives Committee on 27 May 2010, and document 10602/10 is a note from the Presidency to the Council.
2. In its replies dated 8 August 2011, the General Secretariat granted partial public access to the requested documents. Public access to the remaining parts was refused pursuant to Article 4(1)(a), third indent (protection of the public interest with regard to international relations) and the first subparagraph of Article 4(3) (protection of the Council's decision-making process) of Regulation No 1049/2001.

3. In his confirmatory request made on 8 August 2011, the applicant claims that the Danish version of the full document was for many months freely available to download on the Internet. He argues that the negotiating partners of the EU are thus already in possession of the text and that therefore there is no reason to withhold the documents anymore. He also argues that it would be discriminatory against all EU citizens who do not have a good command of Danish, were the documents not released by the Council.
4. The Council has examined the above-mentioned documents in the light of the applicant's arguments and has come to the following conclusions:
5. Document 10408/10 contains the text of a draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the ECHR as well as the draft negotiating directives, as they arose from the discussions of the Permanent Representatives Committee on 27 May 2010. In its Annex III, it also contains draft Council declarations. Document 10602/10 is a note from the Presidency to the Council dated 3 June 2010 and also contains the text of a draft Council Decision and the draft negotiating directives.
6. The Commission submitted its Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement of the EU to the ECHR on 17 March 2010 (SEC(2010) 305 final/2). The Working Party on Fundamental Rights, Citizens Rights and Fundamental Freedoms was the Council's preparatory body assigned with the examination of the Recommendation. During spring 2010, this Working Party examined the draft in seven of its meetings. On 4 June 2010, the Council adopted the Decision and the negotiating directives.

On 7 July 2010, the negotiations on the accession of the EU to the ECHR were formally launched and are still on-going. They will soon enter a difficult phase, as several outstanding issues of a highly sensitive nature are expected to be discussed by the negotiating partners starting from October 2011.

7. The Council considers that full release to the public of documents 10408/10 and 10602/10 which contain the draft text of the above-mentioned Council Decision and negotiating directives would reveal the Union's strategic objectives to be achieved in the international negotiations in question and would thereby enable the Union's negotiating partners to assess the measure of the Union's willingness to compromise. There is hence a real risk that disclosure of the Union's negotiating mandate to the public would weaken the Union's negotiation position and hamper the sensitive overall process of accession to the ECHR. Disclosure would thus undermine an essential public interest as regards international relations under Article 4(1)(a), third indent of Regulation No 1049/2001.
8. Moreover, disclosure of preparatory documents relating to the position of the Union in the negotiations would, beyond the ongoing negotiating process, jeopardize the climate of confidence among those actors directly or indirectly involved in those negotiations who trust that negotiating objectives will not be disclosed. This could have negative consequences for future international negotiations to be conducted by the Union and involving those actors.
9. For the above-mentioned reasons, the Council concluded that full public access to documents 10408/10 and 10602/10 must be refused pursuant to Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of the public interest with regard to international relations).
10. The applicant objects to such a conclusion claiming that the Danish version of the documents under scrutiny has been available on the Internet and that there is no reason to withhold the requested documents anymore.

11. Following an inquiry regarding this claim, the Council concluded that not the requested documents but another document (doc. 10817/10) concerning the same Commission Recommendation but produced later in the decision-making process was indeed made fully accessible in Danish for a certain time on the website of the Council. However, the inquiry into the circumstances of the publication of that document in Danish showed that the publication of the document in its entirety had occurred only due to human error. Instead of the intended release of a partially declassified version of the document in all languages, the document was, in Danish only, mistakenly made public in its full version by the General Secretariat. That error has in the meantime been corrected and the document accordingly withdrawn from the website of the Council. In other words, the Danish version of document 10817/10 was temporarily released by error and by no means intentionally due to a change of the Council's transparency policy as regards disclosure of preparatory documents relating to the position of the Union in international negotiations. Such an unintentional act cannot be invoked in order to justify the release of the requested documents. On the contrary, it calls for a correction in order to safeguard the public interest in the Union's international relations as described above.
12. Moreover, it should be pointed out that document 10817/10 is an outcome of proceedings of the session of the Council (Justice and Home Affairs) of 4 June 2010 and contains the final version of the Decision and of the negotiating directives adopted by the Council. As indicated in point 5 above, the requested documents 10408/10 and 10602/10 were issued before the Council session of 4 June 2010 and contain draft versions of the Council Decision and negotiating directives in question. If the final version (document 10817/10) and the requested draft versions were to be publicly known, a comparison of those sets of documents would allow third parties to measure how the texts in question evolved during the Council's internal decision-making process, thereby allowing for an in-depth assessment of the Union's strategic objectives to be achieved and used during the ongoing negotiations. This would weaken the Union's negotiation position and hamper the sensitive overall process of accession to the ECHR.

13. The Council has examined, pursuant to Article 4(6) of the Regulation, the possibility of granting extended partial access to the documents under scrutiny. As regards document 10408/10, it has come to the conclusion that there was no room to grant extended partial access, since the exception referred to in paragraph 9 of this reply applies to the to date undisclosed parts of the document in their entirety. With respect to document 10602/10, the Council has decided that extended partial access may be given to those parts of the document which are not covered by the exception, namely to the draft Council declaration in Annex III to the document on page 12. An extended partially declassified version of document 10602/10 which includes the part mentioned above is contained in document 10602/10 EXT 3.
-