



**CONSEJO DE  
LA UNIÓN EUROPEA**

**Bruselas, 26 de octubre de 2010 (27.10)  
(OR. en)**

**14425/10**

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**NOTA PUNTO "I/A"**

De:	Grupo "Información"
A:	Coreper (2. <sup>a</sup> parte)/Consejo
N.º doc. prec.:	14422/10
Asunto:	Acceso del público a los documentos - Solicitud confirmatoria n.º 21/c/01/10

Adjunto se remite a las Delegaciones un proyecto de respuesta del Consejo a la solicitud confirmatoria n.º 21/c/01/10; dicho proyecto es el resultado del estudio realizado por el Grupo "Información" en su reunión del 19 de octubre de 2010.

Las Delegaciones danesa, finlandesa, alemana, sueca y del Reino Unido señalaron que votarían en contra del proyecto de respuesta e hicieron las siguientes declaraciones:

FI: *"En relación con el documento 4 (11903/10), Finlandia considera que debería hacerse público en su totalidad, por no entender de qué manera dicha publicación podría afectar gravemente al proceso de toma de decisiones del Consejo.*  
*En cuanto al documento 6 (12107/10), Finlandia estima que debería disponerse una publicación parcial extensa del mismo en relación con las cuestiones del principio de cada sección del título III. Finlandia tampoco entiende en este caso de qué manera la publicación de dichas partes podría afectar gravemente al proceso de toma de decisiones del Consejo."*

SE y DK: *"El documento 11903/10 debería hacerse público en su totalidad. Gran parte del mismo se refiere a información que ya es de dominio público, y la divulgación del documento en su totalidad no afectaría al proceso de toma de decisiones del Consejo ni ningún otro interés protegido en virtud del artículo 4."*

Las Delegaciones acordaron por mayoría hacer público el resultado de la votación.

En consecuencia, se ruega al Comité de Representantes Permanentes que proponga al Consejo que, en su próxima sesión:

- apruebe, como punto "A" del orden del día, el proyecto de respuesta que figura en el anexo del presente documento y haga constar que las Delegaciones danesa, finlandesa, alemana, sueca y del Reino Unido votaron en contra,
- disponga hacer público el resultado de la votación.

El anexo sólo existe en inglés.

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**DRAFT**

**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION No 21/c/01/10,**  
**made by e-mail on 1 October 2010,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to documents 9312/10 + COR 12, 10511/10, 10511/1/10 REV 1,**  
**10511/2/10 REV 2, 11900/10, 11903/10 + COR 1, 12107/10 and 12461/10**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 (OJ L 145 of 31.5.2001, p. 43) 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 9312/10 + COR 1, 10511/10, 10511/1/10 REV 1, 10511/2/10 REV 2, 11900/10, 11903/10 + COR 1, 12107/10 and 12461/10, all of which concern the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.
2. In its reply dated 14 September 2010, the General Secretariat refused public access to the documents pursuant to the first subparagraph of Article 4(3) of Regulation 1049/2001 on public access to documents (protection of the Council's decision-making process).
3. In the confirmatory request made on 1 October 2010, the applicant claims that the Council's discussions on the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation should be subject to openness and transparency in order for the public to know what stage the proposed Directive had reached and to address any concern in a timely manner. The applicant argues that preparatory documents relating to the same legislative procedure had already been disclosed to the public in July 2008 and May 2010. According to the applicant, there have been no developments that would justify a refusal of the requested documents at present.

4. The Council has examined the above-mentioned documents in the light of the applicant's arguments and has come to the following conclusion:
5. The Working Party on Social Questions, the Council's preparatory body responsible for the proposal in question, started the examination of the Commission proposal in July 2008 and has since met numerous times to discuss it. After more than two years of work on the proposal, discussions are still on-going in this Working Party, a number of major reservations having been entered on the text under discussion at the moment. In particular, concerns have been raised about the timeliness and the need for the Commission's proposal where the action proposed to be taken by the European Union is seen by certain delegations as infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality. Taking also into consideration that the Commission's proposal is based on Article 19(1) of the Treaty on the Functioning of the European Union, prescribing unanimity in the Council for the adoption of the Directive, the resolution of the outstanding issues will still require extensive further work within the Council.

*Documents 10511/10, 10511/1/10 REV 1 and 10511/2/10 REV 2*

6. Public access may be granted to documents 10511/10, 10511/1/10 REV 1 and 10511/2/10 REV 2 containing a consolidated text of the draft Directive reflecting the state of play of the negotiations at the time of drafting of the documents (June/July 2010), which are not covered by any exceptions under Article 4 of Regulation (EC) N° 1049/2001.

*Documents 9312/10 + COR 1 and 11900/10*

7. At the outset, it is recalled that in Article 4(3) of Regulation 1049/2001, the legislator provided for a specific exception from the right of public access to documents for the purpose of the preservation of the institution's decision-making capacity. According to the first subparagraph of Article 4(3) of the Regulation, public access to a document, drawn up by an institution for internal use which relates to a matter where the decision has not been taken, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process. As an exception from the exception, a document is to be made public if an overriding public interest justifying disclosure is established.

8. Documents 9312/10 + COR 1 and 11900/10 contain the outcomes of proceedings of the meetings of the Working Party on Social Questions on (up to and including) 3 May 2010. At this meeting, the Working Party continued its discussions on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The said documents contain references to delegations' positions taken in the preliminary discussions of the Council's Working Party.
9. In view of the fact that the Council has to address highly significant and politically sensitive issues within the context of the examination of the Commission's proposal, relating to both the scope and the content of the measures to be taken by the European Union to combat discrimination, it is of an utmost importance to guarantee the serenity of the debate within the Council at the early stages of the legislative process. In fact, the possibility to conduct frank and candid policy discussions – without the risk for delegations to be exposed to undue external pressure – constitutes an essential pre-condition for the Council to achieve progress on difficult questions, and hence to preserve the efficiency of the Council's decision-making.
10. In this regard, disclosure of the identity of the delegations that have put forward proposals during these preliminary discussions would seriously prejudice the efficiency of the Council's decision-making process on the Commission's proposal at this stage when difficult negotiations are still on-going and no convergence of views has been recorded and no conclusions have drawn on the issues examined. In particular, if delegations identities would be disclosed to the public together with their positions at a time when the legislative procedure was still at an early stage, delegations would loose some of their ability to modify their positions in the light of the discussions. This would, in turn, seriously affect the chances of finding a compromise on the legislative proposal within the Council, taking also into account the fact that unanimity is required for the Council's action on the matter. The risk of seriously undermining the Council's decision-making procedure is reasonably foreseeable. In fact, if it was to be accepted that delegations' names could be released to the public together with the contents of their positions expressed during the Council's preliminary exchanges on the proposal, delegations would be exposed to the risk of undue external pressure, which

would considerably reduce their flexibility to formulate and reconsider their positions in the light of the arguments exchanged in the debate and thwart their efforts to overcome the outstanding points in the discussions.

11. In addition, the release of the identities of delegations in relation to their positions may lead delegations to refrain from fully exposing their positions from the preliminary stages of discussions in the Council's preparatory bodies. This would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be seriously prejudicial to the overall transparency of the Council's decision-making.
12. The Council considered, in the light of the arguments brought by the applicant, whether there existed an overriding public interest in full disclosure of the documents, including delegations' identities. It has concluded that, since the deletion of the identity of the delegations in an on-going legislative procedure does not prevent citizens from taking cognisance of the different issues discussed within the Council, the advantages stemming from the openness of the Council's legislative process do not prevail over the public interest in protecting the Council's decision-making capacity.
13. In the light of the above, the Council reaffirms its view that, on balance, all possible factors which would, at the present stage, plead in favour of releasing documents 9312/10 + COR 1 and 11900/10 in their entirety are outweighed by the need to protect the Council's on-going decision-making process. The Council is therefore of the opinion that full access to the above-mentioned documents has to be refused pursuant to the first subparagraph of Article 4(3) of Regulation 1049/2001 (protection of the Council's decision-making process). However, it has decided that partial access may be granted, in accordance with Article 4(6) of the Regulation, to those parts of the documents which do not make reference to delegations' identities.
14. The Council has also examined whether it would be possible to assess, on a case-by-case basis, whether the name of the Member States concerned could be released. However, this option was rejected because it would lead to very arbitrary assessments which themselves could be challenged. This approach does not, of course, prevent the Member State delegations concerned from making public their own position, as they see fit.

15. Finally, the Council recalls that these documents, and any other document relating to the proposed act, will be made available to the public in accordance with the rules laid down in Article 11(6) of Annex II to the Council's Rules of Procedure.

*Documents 11903/10 + COR I, 12107/10 and 12461/10*

16. Document 11903/10 contains a questionnaire prepared by the Belgian Presidency in view of the meeting of the Working Party on Social Questions on 16 July 2010 relating to the issue of equal treatment in the area of financial services. Document 12107/10 contains an outcome of discussions of the meeting of the Working Party on 16 July 2010. Document 12461/10 contains the answers of one delegation to the above-mentioned Presidency questionnaire.
17. It is recalled that a case relating to the issue of the compatibility with the fundamental rights of the European Union of the provisions of one of the anti-discrimination directives of the European Union<sup>1</sup> permitting differences in treatment on the grounds of gender in the sector of financial services is currently pending before the Court of Justice (Case C-236/09, Association Belge des Consommateurs Test-Achats and Others). Since the above documents address a similar issue in the context of the Council's examination of the Commission's proposal, the outcome of the pending case before the Court of Justice will inevitably have a bearing on the Council's discussions on the matter. In these conditions, full disclosure of documents 11903/10, 12107/10 and 12461/10 would seriously damage the Council's decision-making capacity by impeding internal discussions of the Council on this particularly sensitive question at a time when the above-mentioned case is pending before the Court of Justice.
18. Therefore, the Council confirms the decision of the General Secretariat in reply to the initial application, whereby it refused full public access to documents 11903/10, 12107/10 and 12461/10 pursuant to Article 4(3), first subparagraph of the Regulation (protection of the Council's decision-making process).

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<sup>1</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373, p. 37.)

19. As regards document 11903/10 COR 1, the Council considers that it is not covered by the above-mentioned exception. Full access may therefore be granted to this document.
20. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to documents 11903/10, 12107/10 and 12461/10. It has decided that partial access may be granted to page 1 of document 11903/10 which is not covered by the said exception. As regards document 12107/10, the Council decided to grant partial access to titles I, II, the first paragraph of title III as well as title IV of the document, with the exception of those parts that identify delegations. The names of delegations must be refused on grounds of the reasons exposed in points 9-15 above. Regarding document 12461/10, the Council decided not to retain the possibility of partial access since it would amount to only small fragmentary parts which would be no use to the applicant.
21. Finally, as regards the applicant's request to extend the application for access to documents to "*the latest document on this Directive*" the Council notes that this document has not yet been requested by the applicant. This request will, therefore, be handled as a separate initial application in accordance with the procedures laid down in Articles 6 and 7 of Regulation (EC) N° 1049/2001.
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