



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 1 December 2010**

**16773/10**

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**COVER NOTE**

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from : General Secretariat of the Council  
to : Working Party on Information  
Subject : Public access to documents  
- Confirmatory application No 24/c/01/10

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Delegations will find attached:

- A request for access to document sent to the General Secretariat of the Council on 22 September 2010 and registered on the same day (Annex 1).
- A reply from the General Secretariat of the Council dated 3 November 2010 (Annex 2).
- A confirmatory application dated 22 November 2010 and registered on the same day (Annex 3).

[E-mail message sent on 22 September 2010 - 12:37]

This e-mail has been sent to access@consilium.europa.eu using the electronic form available in the Register application

This electronic form has been submitted in DE

Title/Gender:

Family Name:

First Name:

E-Mail:

Occupation:

On behalf of:

Address:

Telephone:

Mobilephone:

Fax:

Requested document(s): 13400/10, 13176/10, 12926/1/10, 12926/10,

1st preferred linguistic version: DE - Deutsch

2nd preferred linguistic version: EN - Englisch



## ANNEX 2

Brussels, 3 November 2010

### COUNCIL OF THE EUROPEAN UNION

#### GENERAL SECRETARIAT

Directorate-General F  
Press  
Communication  
Transparency

- Access to Documents/  
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**Ref. 10/2076-nh/ank**

Dear Sir,

Your request of 22 September 2010 for access to documents:

ST 13400 2010 INIT  
ST 13176 2010 INIT  
ST 12926 2010 REV1  
ST 12926 2010 INIT

has been registered by the "Access to Documents" unit. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35). On 13 October 2010, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

Documents **12926/10 RESTREINT UE** and **12926/1/10 REV 1 RESTREINT UE** are notes from the Presidency to the delegations concerning a Pluri-lateral Anti-Counterfeiting Trade Agreement (ACTA) – Chapter 2 Section 3 "Criminal Enforcement".

Document **13400/10 RESTREINT UE** is a note from the General Secretariat to the Working Party on Customs Union (Customs Legislation and Policy) on the 10th round of Anti-Counterfeiting Trade Agreement negotiations, which took place in Washington from 16 to 20 August 2010 and concerned customs issues.

Document **13176/10 RESTREINT UE** is a note from the Presidency to the Permanent Representatives Committee concerning a Pluri-lateral Anti-Counterfeiting Trade Agreement (ACTA) – Chapter 2 Section 3 "Criminal Enforcement".

They are classified as "RESTREINT UE", which means that unauthorised disclosure of the information they contain could be disadvantageous to the interests of the European Union or of one or more of its Member States.

The four documents contain detailed information on both the EU's and its negotiating partners' positions in the framework of the negotiations on ACTA. The Council considers that full disclosure of these texts would reveal the EU's strategic objectives in these negotiations. It would therefore compromise the overall conduct of the on-going negotiations and thus be prejudicial to the EU's interest in the efficient conduct of such negotiations. Disclosure would also negatively affect the climate of confidence in the on-going negotiations and hamper open and constructive cooperation, which is essential in this process, as well as for future negotiations

Full access to these documents is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest with regard to international relations).

However, pursuant to Article 4(6) of the Regulation, you may have access to those parts of the documents which are not covered by this exception. You will find them in documents **12926/10 EXT 1, 12926/1/10 REV 1 EXT 1, 13400/10 EXT 1 and 13176/10 EXT 1.**

According to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply <sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

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<sup>1</sup> Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

**[Confirmatory application sent by e-mail on 22 November 2010 - 13:39]**

Dear Mr Thomsen,

I hereby submit a confirmatory application in case 10/2076-nh/ank, on the following grounds:

I. The European Parliament has now called on the other institutions to allow public access to ACTA documentation on at least four occasions, in resolutions and by a written declaration. It therefore seems a foregone conclusion that there is no justification for assuming a "public interest" in keeping this documentation confidential. The Article 207 procedure is specifically required to abide by the principles set out in Article 21 of the EU Treaty; the public interest must therefore be defined on a democratic basis, and the best way of doing that is through parliament.

II. As you will be aware, criminal provisions for the enforcement of intellectual property rights are not part of the *acquis* at present.

Where such provisions are needed at European level, the "ordinary legislative procedure" has to be followed, with due regard for the specific conditions of Article 83(2) TFEU, to incorporate criminal sanctions into the *acquis*.

The Member States would first be required to harmonise criminal enforcement in Europe by European law. Given this "gap" in the *acquis*, negotiating criminal sanctions in this area with third countries may well be in breach of the Treaties and fails to take account of the European Parliament's prerogatives. It may be that Article 207 TFEU does not provide a proper legal basis for negotiations of this type with third countries. Legislation on enforcement, especially in criminal matters, goes beyond "commercial aspects of intellectual property" within the meaning of Article 207. Member States are not allowed to "change forum" by bringing in third countries, undermining the European Parliament's extended powers post Lisbon.

In the European Parliament recently, Trade Commissioner De Gucht claimed that the term *acquis* applied only to substantive law, as if implementing legislation such as Directive 2004/48/EC were not part of the *acquis*. He said that the ACTA was "about the enforcement of existing law, and that is why I have repeatedly stipulated that we are not going to change the *acquis communautaire*. The *acquis communautaire* is about substantive law and we are not changing that." In other statements the Trade Directorate confuses the corpus of existing EU law (*acquis communautaire*) with the question of European treaty options for EU legislation. This curious understanding of the law on the part of the Commission shows the need for scrutiny, for which transparency about the conduct of the negotiations is essential. It is particularly unclear on what legal basis the Council Presidency is conducting negotiations on criminal sanctions.

There is therefore considerable public interest in uncovering any abuse of authority or any Treaty violation in this case. Protecting the public interest in regard to international relations outweighs the institutional interest in concealing the fact that the Presidency does not have the authority to conduct these negotiations. Conducting negotiations without having an adequate basis in the European Treaties is prejudicial to the EU's international relations and transparency is needed to clarify these practices. The question whether Europe is conducting these negotiations legally can only be answered by looking at the documents.

If there were no proper negotiating remit, this would adversely affect the atmosphere of trust in future negotiations with third countries and hamper open and constructive cooperation.

III. Article 15(1) TFEU places a duty on the institutions to be as open as possible. Article 15(2) applies to the Council and its Presidency. There is no legal basis in the Treaties for withholding information or for concluding confidentiality agreements with third countries. The requirement for openness under Article 15(2) and (3) takes precedence, particularly in legislative matters. These are purely legislative issues, being pursued under the cover of a trade agreement in form, but not in substance. It is clear from the outset that there is no basis in the EU Treaties for holding secret legislative negotiations with third countries. Retrospectively applying Article 4 of Regulation (EC) No 1049/2001 (which has not yet been adjusted to the Lisbon arrangements, by the way) does not make up for the fact that there is no basis in law for keeping these negotiations confidential.

The classification of documents is irrelevant for the purposes of Article 15 of Regulation (EC) No 1049/2001. Furthermore, the Council can always withdraw its negotiating directives and terminate the negotiations if third countries make procedural requests which would prevent the Union from complying with the EU Treaty, in particular rights under Article 15 TFEU.

IV. Apart from genuine trade agreements, it is not usual for international legislative or regulatory dialogue to be kept confidential. It is customary for negotiations to be open in the case of legislative agreements, since disclosure of the entire negotiating history is essential for subsequent interpretation of the law ("historical method of interpretation"). Under Article 25 of the German Basic Law, the general rules of international law form an integral part of federal law and are therefore relevant to the Presidency's representation of Germany. The principles of Article 21 of the EU Treaty in conjunction with Article 207 TFEU apply.

I would therefore ask you to reconsider your opinion.

Yours sincerely

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