COUNCIL OF THE EUROPEAN UNION

Brussels, 12 December 2013

17244/13

INF 228
API 117

NOTE

Subject: Public access to documents
- Confirmatory application No 25/c/01/13

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 22 October 2013 and registered the same day (Annex 1).
- reply from the General Secretariat of the Council dated 13 November 2013 (Annex 2)
- confirmatory application dated 2 December 2013 and registered on the same day (Annex 3)

ANNEX 1

[E-mail message sent on 22 October 2013 - 09:11]

First Name: **DELETED**

Family Name: **DELETED**

Email: **DELETED**

Postal Address: **DELETED**

Street:

Town:

PostCode:

Residence Country:

Gender:

Country:

Age:

Phone:

Economic Category:

Subject:

Initial question: I respectfully request full access to document 15856/11, an opinion of the Legal Service, titled "Draft agreement on the European Union Patent Jurisdiction (doc.13751/11) - compatibility of the draft agreement with the Opinion 1/09". So far, this document has been published in redacted form only.

Requested document(s): Requested document(s):

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

ANNEX 2

COUNCIL OF THE EUROPEAN UNION

GENERAL SECRETARIAT

Directorate-General F
Communication
Transparency

- Access to Documents/
Legislative transparency

RUE DE LA LOI, 175
B – 1048 BRUSSELS
Tel: (32 2) 281 67 10
Fax: (32 2) 281 63 61
E-MAIL:
access@consilium.europa.eu

Brussels, 13 November 2013

DELETED

e-mail:
DELETED

Ref. 13/1745-ls/mi

Dear **DELETED**,

We have registered your request of 22 October 2013 for access to document 15856/11. 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[1] (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure[2] and has come to the following conclusion:

Document **15856/11** is an opinion of the Council Legal Service relating to the Draft agreement on the European Union Patent Jurisdiction. It contains a legal analysis on the compatibility of the said agreement with Opinion 1/09 of the Court of Justice of the European Union. The documents consequently contains legal advice.

Pursuant to Article 4(6) of the Regulation, you may have access to document **15856/11**, except for footnote 23 to paragraph 30 of the document.

Footnote 23 to paragraph 30 advices on matters dealing with issues which are relevant to a wide range of current and future dossiers. Moreover those issues are contentious and likely to be subject to litigation before the courts. The footnote is therefore particularly sensitive. Its disclosure would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. It would make known to the public an

[1] Official Journal L 145, 31.5.2001, p. 43.
[2] Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of this footnote.

Accordingly, pursuant to Article 4(2), second indent (protection of the public interest as regard legal advice) of the Regulation, access to footnote 23 to paragraph 30 of document 15856/11 has to be refused.

Statutory remedy notice

Pursuant 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[1].

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosure

[1] Confirmatory applications are published in the Council's Register of documents. Please indicate whether you would like your personal data to be removed from Council documents related to your confirmatory application. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 2 December 2013 - 09:52]

From: DELETED
Sent: Monday, December 02, 2013 9:52 AM
To: SECRETARIAT DGF Access
Subject: Your reference 13/1745-ls/mi - Confirmatory application

Dear Madams and Sirs,

please find attached my confirmatory application in the matter cited above.

Kind regards
DELETED

By e-mail to access@consilium.europa.eu
Council of the European Union
General Secretariat
Directorate-General F

Rue de la Loi, 175
1048 Brussels
Belgium

DELETED

DELETED, 2 December 2013

Your reference 13/1745-ls/mi

Request of full access to document 15856/11 – Confirmatory application

Dear Mr. Thomsen,

I confirm receipt of your e-mail of 13 November 2013 with your letter dated 13 November 2013 in which you have rejected my request of 22 October 2013 to be granted full access to document 15856/11 on the basis of Regulation (EC) No 1049/2001. Access to footnote 23 of para. 30 of that document was refused.

I hereby file a

confirmatory application

under Articles 7(2), 8 of Regulation (EC) No 1049/2001, respectfully requesting you to reconsider your position in view of the aspects set out below and to grant me full access to document 15856/11.

Reasons:

For the denial, you have relied on the exception of a protection of legal advice (Article 4(2), second indent of Regulation (EC) No 1049/2001; afterwards "R"), stating that also an overriding public interest in disclosure would not be given.

Already the reasons given for the refusal of full access are inadequate insofar as they are only general statements without any comprehensible substance, disregarding the respective requirements set up by the European Court of Justice (CJEU) (cf. details below mn. 3 ff.). Furthermore, there is at least an overriding public interest in a full disclosure of the document as it is an opinion of the Legal Service relating to legislative activity. For such documents, the CJEU has established a general obligation of disclosure (cf. details below mn. 12 ff.).

In detail:

I.

Your letter of 13 November 2013

1. In your letter of 13 November 2013, in relation to the denial of access to footnote 23, you have provided the following statement (ibid., p. 1, fourth para.):

> *"Footnote 23 to paragraph 30 advices on matters dealing with issues which are relevant to a wide range of current and future dossiers. Moreover those issues are contentious and likely to be subject to litigation before the courts. The footnote is therefore particularly sensitive."*

Insofar, you have indicated that Article 4(2) R would apply and a disclosure be refused, for the following reasons (ibid.):

> *"It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences."*

2. As to the presence of an overriding public interest in a disclosure, you have argued as follows (p. 2, first para.):

> *"As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of this footnote."*

II.

Protection of legal advice (Article 4 (2), second indent R)

3. In view of the purpose of Regulation (EC) No 1049/2001 and the respective CJEU case law, full access to document 15856/11 cannot be denied with regard to Article 4(2) second indent R and on the grounds mentioned in the letter of 13 November 2013. There is at least an overriding public interest in the full disclosure of the document as it relates to a legislative process.

(1)

Inadequate reasons

4. Already the reasons provided for the refused access to footnote 23 are insufficient insofar as only general statements are given which are purely hypothetical and lacking any substance.

(a)

5. In general, Regulation (EC) No 1049/2001 intends to give the fullest possible effect to the right of public access to documents of the institutions,[1] as it has recently again been confirmed by the CJEU in the matter *Council v Europe Access Info*. Pursuant to this principle of widest possible public access to documents, any exceptions have to be interpreted and applied narrowly.[2]

6. Against this background, the CJEU has clearly defined the requirements for an institution wanting to deny access to a document (emphasis added):

> "*Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (Sweden and Others v API and Commission, paragraph 72 and case-law cited). Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (Sweden and Turco v Council, paragraph 43).*"[3]

[1] *Council v Access Info Europe*, C-280/11 P, para. 30; *Sweden and MyTravel Group plc v Commission*, C-506/08, para. 73; *Sweden and Turco v Council*, C-39/05 and C-52/05, para. 33; *Commission v Technische Glaswerke Ilmenau*, Case C-139/07, para. 51; *Sweden and Others v API and Commission*, C-514/07, para. 69.

[2] *Council v Access Info Europe*, C-280/11 P, para. 28; *Sweden and MyTravel Group plc v Commission*, para. 73; *Sison v Council*, C-266/05, para. 63; *Sweden and Turco v Council*, para. 36; *Sweden and Others v API and Commission*, para. 73.

[3] *Council v Access Info Europe*, C-280/11 P, para. 31; also *Sweden and MyTravel Group plc v Commission*, para. 76; *Sweden and Turco v Council*, para. 49; *Commission v Technische Glaswerke*

7. In terms of Article 4(2) second indent R, the CJEU has decided that this exception must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.[4]

(b)

8. Your reply of 13 November 2013 does obviously not fulfill these requirements. It does not explain how a disclosure of footnote 23 could specifically and effectively undermine the protection of legal advice in the sense of Article 4(2) second indent R and why you consider such alleged undermining as reasonably foreseeable and not purely hypothetical. Instead, the reply of 13 November 2013 contains only general statements and abstract assumptions. Why the issues mentioned in footnote 23 should be *"dealing with issues which are relevant to a wide range of current and future dossiers"* is not explained further. The same applies to the allegation that these issues "*are contentious"* and *"likely to be subject to litigation before the courts"*. Likewise, the reasons for the alleged "*sensitivity*" of footnote 23 remain completely opaque. Therefore, it is unclear, why and to what extent these aspects should be suited to undermine the Council's interest in seeking legal advice and receiving frank, objective and comprehensive advice as protected by Article 4(2) second indent R.

9. The argument advanced in the reply of 13 November 2013, that a disclosure of the legal advice may allegedly lead to "*external pressure*" being imposed on the Legal Service (ibid, p. 1, fourth para.), has already been rejected by the CJEU as unfit for a refusal of access.[5] It can thus not be relied on.

10. As to the allegations that a disclosure would cause the Legal Service to "*display caution*" and would affect its ability *"to effectively defend decisions taken by the Council before the Union courts"* no reasons are stated why this should be the case. According to the CJEU, these reasons have to be specified in detail.[6]

11. Already in view of this widely unsubstantiated reasoning, the reply of 13 November 2013 cannot justify a refusal of full access.

Ilmenau, para. 53.
[4] *Sweden and Turco v Council*, para. 42.
[5] *Sweden and Turco v Council*, para. 64.
[6] *Sweden and Turco v Council*, para. 65; *Sweden and MyTravel Group plc v Commission*, para. 115 f.

(2)

Overriding public interest in a disclosure

12. In any case, the full disclosure of document 15856/11 is justified by an overriding public interest in the sense of Article 4(2), last sentence R. It has to be taken into account that document 15856/11 is a legal opinion relating to a legislative procedure. For such documents, the CJEU has stipulated a general obligation of disclosure.

13. The CJEU held (emphasis added):[7]

> "*In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*
>
> *Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*"

14. Therefore, an overriding interest in a disclosure is given in relation to *"documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated"*, i. e. every document relating to a legislative process. As the CJEU has explained further (emphasis added):[8]

> *It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process."*

15. It cannot be doubtful that document 15856/11 relates to a legislative process in the sense set out by the CJEU. The document concerns a legal opinion on an aspect of the creation of a "unitary patent" and a respective court system by way of two Regulations and an intergovernmental Agreement. These Regulations and the Agreement were

[7] *Sweden and Turco v Council*, para. 44 f.; confirmed in *Council v Access Info Europe*, C-280/11 P, para. 32 f.
[8] Sweden and Turco v Council, para. 67 f.

deliberately handled and negotiated by the European institutions together as one legislative "package", they were also voted on together in the Plenary. Therefore, the legal opinion in question clearly relates to a legislative process, so that, under the mentioned case law, the Council has the obligation to fully disclose the document.

16. Despite this, the assessment of an overriding public interest in the reply of 13 November 2013 does not fulfill the requirements established by the CJEU.[9] It does not show any balancing of a particular interest to be protected by non-disclosure of the document against the public interest in a disclosure of the document as set out in recital 2 of the preamble to Regulation No 1049/2001. Instead, it only contains the mere statement that no overriding interest would exist, as the principle of transparency *"would not (…) prevail over the above indicated interest"* (ibid., p. 2, first para.). According to the CJEU, such general statements are not sufficient to deny an overriding public interest.

17. For these reasons, the full disclosure of document 15856/11 cannot be refused on the basis of Article 4(2), second indent R. I respectfully request you to reconsider your decision and grant access to footnote 23 of para. 30.

Please treat this confirmatory application confidential, i. e. please do not make it public.

Yours sincerely

DELETED

[9] Cf. para. 13 above, footnote 7.