



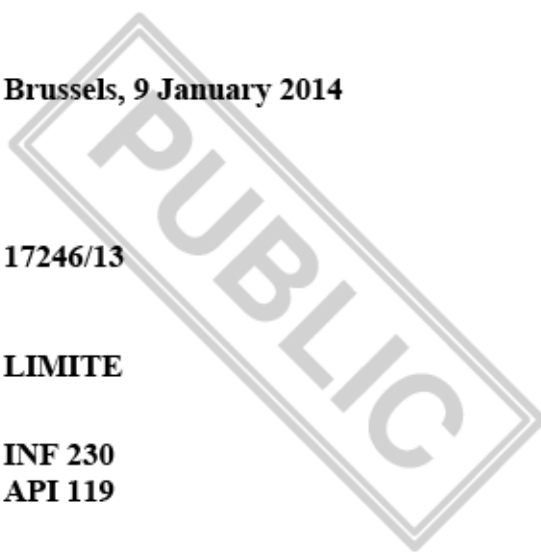
**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 9 January 2014**

**17246/13**

**LIMITE**

**INF 230  
API 119**



**"I/A" ITEM NOTE**

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from: Working Party on Information

to: Coreper (part 2)/Council

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No. prev. doc.: 17245/13

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

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Delegations will find enclosed a draft reply from the Council to confirmatory application No 25/c/01/13, approved by the Working Party on Information by written consultation which ended on 8 January 2014.

The Estonian, Lithuanian, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

EE: *"Estonia welcomes the fact that partial access has been extended, but cannot agree with the reasoning reflected in the draft reply."*

LT: *"Lithuania cannot agree with the reasoning reflected in the draft reply and believes that full access to the document should be granted."*

FI/SE: *"Finland and Sweden welcome the fact that partial access has been granted but cannot agree with the reasoning reflected in the draft reply and believe that full access should be granted."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Estonian, Lithuanian, Finnish and Swedish delegations voting against;
- decide to publish the result of the vote.

The annex is available in English only.

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**DRAFT**  
**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION 25/c/01/13,**  
**made by e-mail on 2 December 2013,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to document 15856/11**

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 document 15856/11 which is an opinion of the Council Legal Service relating to the Draft agreement on the European Union Patent Jurisdiction.
2. Document 15856/11 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 document consequently contains legal advice.
3. In its reply dated 13 November 2013, the General Secretariat of the Council, pursuant to Article 4(6) of the Regulation, gave access to the whole document with the exception of footnote 23 to paragraph 30 of the document. Access to that footnote was refused on the basis of Article 4(2), second indent (protection of the public interest as regards legal advice) of Regulation No 1049/2001.

4. In his confirmatory application dated 2 December 2013, the applicant contests the assessment made by the General Secretariat of the Council and asks for disclosure of the document in its entirety. In that respect the applicant argues that the reasons provided by the General Secretariat were "*inadequate insofar as they are only general statements without any comprehensible substance*". The applicant also argues that there is an overriding public interest in disclosure of the document "*as it is an opinion of the Legal Service relating to legislative activity*". The applicant also refers to obligations under case-law defining the requirements for an institution which refuses access to a document.
5. The Council has considered the confirmatory application in the light of the applicant's arguments and has concluded as indicated below.

#### **I. Assessment of the requested document**

6. The Council has carefully considered the confirmatory application. It has assessed the request for access in full consideration of the principles underlying Regulation No 1049/2001 and the aim of ensuring the widest possible public access to documents. In so doing the Council has had full regard to the obligations arising under the Treaties and legislation as applied by the Court of Justice of the European Union.
7. Regulation No 1049/2001 provides, in its Article 4, for exceptions to the right of public access to documents in cases where such public access would undermine, *inter alia*, the protection of legal advice (second indent of Article 4(2)), unless there is an overriding public interest in disclosure. That exception is engaged in this case.
8. The Council would also underline that, contrary to what the applicant contends, the requested document does not relate to matters where the Council is acting in its legislative capacity. Thus, the document contains an opinion of the Council Legal Service on the compatibility of the said draft agreement with opinion 1/09 of the Court of Justice of the European Union. Such agreement is not a legislative act. In that respect the Council considers that the nature of the document must be assessed on the basis of its content and subject-matter.

The document does not contain an assessment of any other aspects of the unitary patent than the draft agreement and it is therefore clear that it is not a document falling under the obligation of wider access applicable to documents drawn up in relation to the institution's legislative activities.

## **II. The exception relating to the protection of legal advice**

9. As the document has been made public except for its footnote 23, the assessment below will only refer to the applicability of the invoked exception to that footnote.
10. Footnote 23 to paragraph 30 is very sensitive and wide in its application as it addresses a general and contentious legal issue regarding the relationships between international agreements and the European Union legal order. This issue is of a horizontal scope and will be of relevance also for future dossiers. The content of footnote 23 is therefore particularly broad in scope. Moreover, due to its sensitive subject-matter and contentiousness, the footnote deals with an issue where there is a real risk of future litigation. The footnote is therefore also sensitive.
11. Disclosure of this part of the legal advice would therefore undermine the protection of legal advice by disclosing the internal position of the Legal Service on a sensitive and contentious issue and entail a foreseeable risk both that the Council would not seek frank and comprehensive advice on such matters and that the Legal Service would not be able to defend effectively the position of the Council before the Courts. There is consequently a concrete risk that disclosure of footnote 23 would effectively and specifically undermine the protection of legal advice.
12. In relation to the reasoning provided, the Council underlines that it is not in a position to give more detailed reasons without revealing the content of the footnote itself which would deprive the invoked exception of its very purpose. Thus, particularly in the case of refusal of access pertaining to a very limited part of a document the difficulty of providing detailed reasoning without disclosing its content must be taken into account.

13. In the light of the above, the Council confirms that disclosure of footnote 23 of the requested document would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation No 1049/2001.

### **III. Assessment of the public interest in disclosure**

14. The Council has thoroughly examined the footnote in question and balanced the protection of legal advice in the specific context against the general public interest in ensuring transparency and public participation. While the Council would underline that the *Turco* case-law<sup>1</sup> applies only to legislative activities, which is not applicable to the case under discussion, it has in any event thoroughly taken into account the interest of transparency and openness. In that regard the Council also notes that the General-Secretariat has already disclosed the opinion in its entirety with the only exception of one footnote.
15. In the light of its examination, the Council concluded that as for the specific footnote as indicated above, which has a particularly sensitive and broad scope, the public interest invoked by the applicant does not prevail over the protection of legal advice under Article 4(2), second indent, of Regulation No 1049/2001 in the present case.

### **IV. Extended partial access (Article 4(6) of Regulation No 1049/2001)**

16. In addition, the Council has carefully examined the possibility of granting extended partial access to document 15856/11 as provided for in Article 4(6) of Regulation No 1049/2001 according to which "*if only parts of the document are covered by exceptions, the remaining parts of the documents should be released*". In that respect it is underlined that extensive public access was already given to the document at the initial stage which goes to demonstrate that the General-Secretariat already undertook a careful assessment of the document with a view to granting the widest possible access.

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<sup>1</sup> Cases C-39/05P, *Sweden and Turco vs Council*, [2008] ECR I-4723.

17. The Council examined the content of footnote 23, which is the only remaining undisclosed part of the document, with a view to assessing whether access can be granted to parts of that footnote. The Council has considered the risks which disclosure thereof would entail to the protection of legal advice pursuant to Article 4(2), second indent, and has concluded that footnote 23 to paragraph 30 is covered by the invoked exception in its entirety. Consequently, no extended partial access could be given to document 15856/11 in addition to the extensive access already given at the initial stage.

## **V. Conclusion**

18. In view of the foregoing, the Council confirms that access to footnote 23 to paragraph 30 of document 15856/11 has to be refused pursuant to Article 4(2), second indent (protection of the public interest as regard legal advice) of Regulation No 1049/2001.

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