



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 April 2010

8072/10

**INF 51
API 38
JUR 175**

"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 8071/10

Subject : Public access to documents

- Confirmatory application No 11/c/01/10

Delegations will find enclosed a draft reply from the Council to confirmatory application No 11/c/01/10, as it stands after examination by the Working Party on Information at its meeting on 16 April 2010.

The Finnish and Swedish delegations indicated that they would vote against the draft reply and made the following statements:

FI: *"Even if FI is of the view that Article 4(1)(a) of the Regulation 1049/2001 concerning the protection of international relations is applicable, it appears that the possibility of extended partial access in accordance with Article 4(6) of the Regulation has not been thoroughly considered."*

SE: *"Further partial access should be granted to documents 13382/08, 15588/08, 17249/08, 12076/09 and 5363/10, since there are additional parts that are not covered by the secrecy exception in article 4(1)(a) third indent."*

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 Finnish and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 11/c/01/10
made by e-mail on 26 March 2010,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents

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 the following 26 documents:

1. 15486/07
2. 7095/08
3. 7759/08
4. 12875/08
5. 13448/08
6. 13637/08
7. 13750/08
8. 13382/08
9. 13949/08
10. 15004/08
11. 15588/08
12. 16927/08
13. 16928/08
14. 16989/08
15. 17167/08
16. 17249/08
17. 8031/09
18. 12076/09
19. 12968/09
20. 13867/09
21. 14696/09
22. 15044/09
23. 16178/09
24. 17468/09
25. 17779/09
26. 5363/10

- 1.-3.: Documents 15486/07, 7095/08 et 7759/08 (all classified RESTREINT UE) concern a recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement. Documents 15486/07 and 7095/08 are cover notes containing the recommendation from the Commission, document 7759/08 is a "I/A" Item Note to Coreper/Council concerning this recommendation.
- 4.-5. Document 12875/08 is a working document from the Commission services and contains a draft EU reaction to Japan/U.S. joint proposal regarding the sections of the Anti-counterfeiting Trade Agreement (ACTA) concerning civil enforcement. Document 13448/08 contains a revised version of the draft EU reaction.
6. Document 13382/08 is a note to the delegations and contains a summary of comments made in the meeting of the Working Party on Intellectual Property (Patents) on 11 September 2008 regarding the sections of ACTA on civil law measures.
7. Document 13637/08 (RESTREINT UE) contains the outcome of proceedings of the meeting of the Justice and Home Affairs Counsellors on 26 September 2008. During this meeting, the Counsellors discussed the Japan-USA joint proposal regarding the sections of ACTA concerning draft criminal law measures.
8. Document 13750/08 is a working document from the Commission services containing a revised version regarding the sections of ACTA concerning civil enforcement as well as a summary of the comments made by ACTA negotiating parties following the second round of negotiations in Washington in July 2008.
9. Document 13949/08 contains a note from the Presidency on the exchange of views regarding the sections of ACTA on civil law measures which took place in the meeting of the Working Party on Intellectual Property (Patents) on 6 October 2008.

10. Document 15004/08 (RESTREINT UE) contains the outcome of proceedings of the meeting of the Justice and Home Affairs Counsellors on 29 October 2008. During this meeting, the Counsellors discussed the revised Japan-USA joint proposal regarding the sections of ACTA concerning criminal provisions.
11. Document 15588/08 (RESTREINT UE) contains the outcome of the consultation of the "Friends of Presidency" Group on 11 November 2008 regarding the sections of ACTA concerning criminal provisions.
12. Document 16927/08 is a note to the Working Party on Intellectual Property (Copyright) and contains a proposal submitted by Japan regarding the sections of ACTA concerning international cooperation.
13. Document 16928/08 is a note to the Working Party on Intellectual Property (Copyright) and contains a proposal submitted by Japan regarding the sections of ACTA concerning enforcement practices.
14. Document 16989/08 is a note to the Working Party on Intellectual Property (Copyright) and contains a non-paper submitted by the US delegation regarding the sections of ACTA concerning internet and technology.
15. Document 17167/08 is a working document from the Commission services containing a compilation of all comments provided by ACTA negotiating partners regarding the sections of ACTA on civil enforcement.
16. Document 17249/08 is a note to the delegations and contains a summary of discussions held at the meeting of the Working Party on Intellectual Property (Patents) on 9 December 2008 with a view to the 4th negotiating session on ACTA on 15-18 December 2008 in Paris.
17. Document 8031/09 (RESTREINT UE) is a note to the delegations concerning the position of the Member States of the EU regarding the sections of ACTA concerning criminal provisions.

18. Document 12076/09 (RESTREINT UE) is a note to delegations and contains a proposal from the Presidency as regards a consolidated text outlining the positions by all ACTA negotiating partners for the sections of ACTA concerning criminal provisions.
19. Document 12968/09 (RESTREINT UE) contains the outcome of consultations of the "Friends of Presidency" Group on 3 September 2009. During this meeting, the delegations discussed the sections of ACTA concerning criminal provisions.
20. Document 13867/09 (RESTREINT UE) is a note to the "Friends of Presidency" Group and contains the result of the discussions held at the meeting of the "Friends of Presidency" Group on 23 September 2009 regarding the sections of ACTA concerning criminal provisions.
21. Document 14696/09 (RESTREINT UE) contains the outcome of consultations of the "Friends of Presidency" Group on 14 October 2009. During this meeting, the delegations discussed the sections of ACTA concerning criminal provisions.
22. Document 15044/09 (RESTREINT UE) is a note to the delegations and contains a negotiating document representing the position of the Member States of the EU regarding the sections of ACTA concerning criminal provisions.
23. Document 16178/09 (RESTREINT UE) is a note to the Working Party on Intellectual Property and contains draft EU comments to the US proposal regarding the sections of ACTA concerning special requirements related to the enforcement of intellectual property rights in the digital environment.
24. Document 17468/09 (RESTREINT UE) is a note to the delegations containing EU comments to the US proposal regarding the sections of ACTA concerning special requirements related to the enforcement of intellectual property rights in the digital environment.

25. Document 17779/09 (RESTREINT UE) is a note to the delegations and contains a working document regarding the sections of ACTA concerning criminal enforcement.
 26. Document 5363/10 (RESTREINT UE) is a note to the Customs Union (Legislation and Policy) Working Party and contains a document by the Commission services regarding the sections of ACTA concerning border measures.
2. In its reply dated 5 March 2010, the General Secretariat granted partial access to documents nr. 1-10 and 12-25 by releasing the first page of those documents. Access to the remaining parts of the documents was refused pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.
 3. As regards documents nr. 11 and 26, access to these documents was fully refused pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.
 4. In his confirmatory application dated 26 March 2010, the applicant argues that the General Secretariat's reply does not establish how access to the documents under scrutiny could "*actually and specifically*" undermine the protection of the EU's international relations. The applicant also claims that the main thrust of the positions of the States party to the ACTA negotiations have already been disclosed on the internet.
 5. Furthermore, the applicant contests the exception based on Article 4(3) of Regulation 1049/2001 which he claims the General Secretariat has invoked in its initial reply.
 6. The applicant also claims that the States party to the ACTA negotiations have already granted wide access to all preparatory documents to hundreds of persons representing different interest groups and, in addition, that "*EU Member States agreed unanimously to release preparatory documents regarding the ACTA negotiations as soon as possible*".

7. Finally, the applicant claims that more extended access could have been granted to the documents, either by deleting the names of the parties whose negotiating position is revealed or by revealing only the positions of those negotiating parties who accept their position to be released.
8. The Council has examined the above-mentioned documents in the light of the applicant's arguments while taking the following elements into consideration:
9. On 20 November 2007, the Commission submitted a Recommendation to the Council to authorise the Commission to open negotiations of a plurilateral Anti-counterfeiting Trade Agreement, in other words to join the ACTA negotiating process. A revised version of the Recommendation was submitted to the Council by the Commission on 29 February 2008 and adopted by the Council on 14 April 2008. Formal negotiations with the other ACTA partners were launched in June 2008. The EU's objective with ACTA partners is to conclude a new plurilateral treaty improving global standards for the enforcement of intellectual property rights (IPR), to more effectively combat trade in counterfeit and pirated goods.
10. The negotiations are still ongoing and there is, at this stage, no agreed text. So far, eight rounds of negotiations have taken place. During the eighth round in New Zealand on 12-16 April 2010, the participants reaffirmed their commitment to continue their work with the aim of concluding the agreement as soon as possible in 2010.
11. As the applicant pointed out, the EU is indeed actively seeking to increase the transparency of ACTA documents. Following these efforts, the negotiating partners agreed in New Zealand on the principle of publishing the draft consolidated text of the ACTA agreement with the exclusion that the positions of individual negotiating partners are not disclosed.

12. The Council would like to point out that, contrary to what the applicant claims, the exception based on Article 4(3) of Regulation 1049/2001 was not used by the General Secretariat in its reply to the initial application to refuse access to the documents under scrutiny. As regards the exception on which the General Secretariat based its refusal, notably the protection of public interest as regards international relations as provided in Article 4(1)(a), that exception does not allow the Council to balance the protected interest against other public interests, such as those invoked by the applicant in point 1 of his confirmatory application.
13. Regarding the applicant's argument that essential parts of the positions of all ACTA participants have already been disclosed on the internet, it should be recalled that the fact that the documents in question are accessible on the internet does not constitute a sufficient ground to conclude that these documents were officially released by the Council. In fact, the documents have never been made public by the Council. In any case, the Council's decision-making process for processing applications for public access to documents, as provided for in Articles 7 and following of Regulation 1049/2001 and in Annex II to the Council's Rules of Procedure, could not be prejudiced by any unauthorised disclosure of the content of the documents.
14. As regards the applicant's argument that countries participating in the ACTA negotiations have already given extended access to all preparatory documents to hundreds of persons representing different interest groups, it is pointed out that some ACTA negotiating partners have indeed agreed to consult a closed circle of stakeholders on some draft texts. This has, however, been done on the strict basis that these stakeholders agree not to disclose the text they are consulted on.

Documents 15486/07, 7095/08 and 7759/08

15. Documents 15486/07 and 7095/08 (both classified RESTREINT UE) are cover notes containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral Anti-counterfeiting trade agreement. Document 7759/08 (RESTREINT UE) is a I/A Item Note from the Article 133 Committee containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement.

16. The Council considers that full release of these documents to the public would enable the EU's negotiating partners to assess the measure of the EU's willingness to compromise. This would prejudice the EU's position in the efficient conduct of these negotiations. For these reasons, the Council confirms the General Secretariat's decision to refuse full public access to these documents pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.
17. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting extended partial access to the above-mentioned documents, as requested by the applicant. The Council has, however, concluded that the exception referred to applies to all remaining parts of the documents.

Documents 12875/08, 13448/08, 13637/08, 13750/08, 13949/08, 15004/08, 16927/08, 16928/08, 16989/08, 17167/08, 17249/08, 12076/09, 16178/09, 17468/09 and 17779/09

18. Documents 12875/08, 13448/08, 13750/08 and 17167/08 are working documents from the Commission Services concerning the ACTA. The first two documents contain, respectively, the draft EU reaction to Japan/U.S. Joint proposal on Civil Enforcement and the revised draft EU reaction to the same proposal. Documents 13750/08 and 17167/08 contain a compilation of all comments provided by ACTA partners on the civil enforcement chapter.
19. Documents 13949/08 and 17249/08 contain a summary of the discussions held at the meetings of the Working Party on Intellectual Property (Patents) on 6 October and 9 December 2008. During these meetings, the Working Party exchanged views on, respectively, comments sent by Japan and the USA on the civil enforcement chapter of ACTA and on documents sent by Japan concerning international cooperation and enforcement practices and a document sent by USA on internet and technology provisions.

20. Documents 13637/08 and 15004/08 (both classified RESTREINT UE) contain the outcome of proceedings of the meetings of the Justice and Home Affairs Counsellors on, respectively, 26 September and 29 October 2008. During these meetings, a Japan/USA joint proposal (revised proposal on 29 October) regarding the sections of ACTA concerning draft criminal law measures was discussed.
21. Documents 16927/08, 16928/08, 16989/08 and 16178/09 (RESTREINT UE) are notes to the Working Party on Intellectual property (Copyright) and contain, respectively, a proposal submitted by Japan regarding the sections of ACTA concerning international cooperation, a proposal submitted by Japan regarding the sections of ACTA concerning enforcement practices, a non-paper submitted by the US delegation regarding the sections of ACTA concerning internet and technology and draft EU comments to the US proposal regarding the sections of ACTA concerning special requirements related to the enforcement of intellectual property rights in the digital environment.
22. Documents 12076/09 and 17779/09 (both classified RESTREINT UE) are notes from the Presidency to delegations and contain an analysis of, respectively, a Japan-USA joint proposal and a consolidated text submitted by USA on Chapter 2 of ACTA, Criminal provisions. Both documents also contain details of the EU position on this section of ACTA.
23. Document 17468/09 (RESTREINT UE) is a note to the delegations containing EU comments to the US proposal regarding the sections of ACTA concerning special requirements related to the enforcement of intellectual property rights in the digital environment.
24. All these documents contain detailed information on the different ACTA partners' positions with regard to several sections of ACTA as well as comments concerning other negotiating partners' positions. Several of these documents also reveal details on the EU's position on the specific sections.

25. The Council considers that, given the sensitive content of the documents, their full release to the public would seriously undermine the protection of the public interest as regards the EU's international relations. Disclosure would negatively affect the climate of confidence in the on-going negotiations and hamper open and constructive co-operation, which is essential in this process. Moreover, if the EU's negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations.

Full release of these documents to the public would also enable the EU's negotiating partners to assess the measure of the EU's willingness to compromise. This would prejudice the EU's position in the efficient conduct of these negotiations. For these reasons, the Council confirms the General Secretariat's decision to refuse full public access to these documents pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.

26. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting extended partial access to the above-mentioned documents, as requested by the applicant.
27. In the light of this examination, the Council has come to the conclusion that further partial access may be granted to documents 13637/08, 13949/08, 17249/08 and 12076/09 to the following additional parts of the documents which are not covered by any of the exceptions under Regulation 1049/2001:

Document 13637/08:

- 3 first paragraphs on page 2

Document 13949/08:

- page 2

Document 17249/08:

- the titles and the first paragraph on page 2

Document 12076/09:

- the first and the fourth sentence of the first paragraph as well as the second and third paragraphs on page 2

Partially declassified version of documents 13637/08, 13949/08, 17249/08 and 12076/09, which include the additional parts listed above, are set out in documents 13637/08 EXT 2, 13949/08 EXT 2, 17249/08 EXT 2 and 12076/09 EXT 2.

28. As regards documents 12875/08, 13448/08, 13750/08, 15004/08, 16927/08, 16928/08, 16989/08, 17167/08, 16178/09, 17468/09 and 17779/09, the Council has concluded that that the exception referred to applies to all remaining parts of the documents.

Documents 13382/08, 8031/09, 12968/09, 13867/09, 14969/09 and 15044/09

29. Document 13382/08 is a note to the delegations and contains a summary of comments made at the meeting of the Working Party on Intellectual Property (Patents) on 11 September 2008 regarding a draft EU contribution on the sections of ACTA concerning civil law measures.
30. Documents 12968/09, 13867/09 and 14696/09 (all three classified RESTREINT UE) contain the outcomes of the consultations of the "Friends of Presidency" Group on 3 September, 23 September and 14 October 2009. During the meetings held on these dates, the "Friends of Presidency" Group was consulted on the draft EU position on sections of ACTA concerning criminal provisions.
31. Documents 8031/09 and 15044/09 (both classified RESTREINT UE) are notes from the Presidency to delegations and contain, respectively, a draft EU position on criminal provisions to be included in ACTA and the final version of that position.

32. All above-mentioned documents contain detailed information on the EU's position in the framework of the negotiations on ACTA. The Council considers that full disclosure of these texts would reveal the EU's strategic objectives to be achieved in these negotiations. It would thereby 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. For these reasons, the Council confirms the General Secretariat's decision to refuse full public access to these documents pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.
33. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting extended partial access to the above-mentioned documents, as requested by the applicant.
34. In the light of this examination, the Council has come to the conclusion that further partial access may be granted to page 2 of document 13382/08 which is not covered by any of the exceptions under Regulation 1049/2001. A partially declassified version of document 13382/08, which includes the additional part mentioned above, is set out in document 13382/08 EXT 2.
35. As regards documents 8031/09, 12968/09, 13867/09, 14696/09 and 15044/09, the Council has concluded that that the exception referred to applies to all remaining parts of the documents.

Documents 15588/08 and 5363/10

36. Document 15588/08 (RESTREINT UE) contains the outcome of the consultations of the "Friends of Presidency" Group on 11 November 2008. During the meeting held on this date, the "Friends of Presidency" Group was consulted on the draft EU position on sections of ACTA concerning criminal provisions.

37. Document 5363/10 (RESTREINT UE) is a note to the Customs Union (Legislation and Policy) Working Party and contains a document forwarded by the Commission services regarding a draft EU negotiating position with a view to the ACTA negotiating round presently on-going in New Zealand on the sections of ACTA concerning border measures.
38. Both documents contain detailed information on the EU's position in the framework of the negotiations on ACTA. The Council considers that full disclosure of these texts would reveal the EU's strategic objectives to be achieved in these negotiations and thereby compromise the overall conduct of the on-going negotiations. Full release of these documents would thus be prejudicial to the EU's interest in the efficient conduct of such negotiations.
39. For these reasons, the Council confirms the General Secretariat's decision to refuse full public access to these documents pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) No 1049/2001.
40. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the above-mentioned documents. In the light of this examination, the Council has come to the conclusion that partial access may be granted to pages 1-2 of document 15588/08 which are not covered by any of the exceptions under Regulation 1049/2001. A partially declassified version of document 15588/08 is set out in document 15588/08 EXT 1.
41. As regards document 5363/10, the Council has concluded that that the exception referred to applies to this document in its entirety.
