



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 16 April 2010

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"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 8256/10

Subject : Public access to documents

- Confirmatory application No 12/c/02/10

Delegations will find enclosed a draft reply from the Council to confirmatory application No 12/c/02/10, as it stands after examination by the Working Party on Information at its meeting on 16 April 2010.

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.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 12/c/01/10
made by e-mail on 5 April 2010,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 15486/07, 7095/08 and 7759/08 (all RESTREINT UE)

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 15486/07, 7095/08 and 7759/08 (all three classified RESTREINT UE). Documents 5486/07 and 7095/08 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 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.
2. In its reply dated 31 March 2010, the General Secretariat granted the applicant access to the partially declassified versions of the above-mentioned documents. The applicant was thus granted access to documents 15486/07 EXT 1 REV 1, 7095/08 EXT 1 REV 1 and 7759/08 EXT 2. Public access to those parts of the documents which were not declassified was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

3. In his confirmatory application dated 5 April 2010, the applicant claims that "*revealing EU's strategic objectives will not hinder the ACTA negotiations from the EU's part in the context of de facto international legislative harmonisation, as opposed to customs tariff negotiations or similar actual trade matters*".
4. The Council has examined the above-mentioned documents in the light of the applicant's argument while taking the following elements into consideration:
5. 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.
6. 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.
7. The negotiating partners agreed in New Zealand on the principle of publishing the draft consolidated text of the ACTA agreement that does not disclose the positions of individual negotiating partners, following the EU's efforts to seek to increase the transparency of the ACTA negotiations.

8. As regards the applicant's argument relating to the legislative or quasi-legislative nature of the requested documents, the Council would like to point out that, since the entry into force of the Lisbon Treaty, the scope of the institutions' legislative activities is defined in primary law. Article 289(3) TFEU provides that "*[l]egal acts adopted by legislative procedure shall constitute legislative acts*". Yet, a procedure leading to the conclusion of an international agreement, as provided under Title V of the TFUE, does not constitute a legislative procedure within the meaning of Article 289 TFEU.
9. Documents 15486/07 and 7095/08 (both 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. In the reply of the General Secretariat to the applicant's initial request for access, the applicant was granted access to the explanatory memorandum of the Commission. However, public access to the recommendations of the Commission as well as the directives for negotiation was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

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 (ACTA). In the reply of the General Secretariat to the applicant's initial request for public access, the applicant was granted partial access to pages 1-2 (except parts of point 3). However, public access to the directives for negotiation in annex I as well as the draft joint statement by the Council and the Commission concerning the ACTA negotiations was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

10. The Council considers that full release to the public of the documents under scrutiny would reveal the EU's strategic objectives to be achieved in these negotiations and would thereby enable the EU's negotiating partners to assess the measure of the EU's willingness to compromise. This would compromise the overall conduct of the on-going negotiations and would thus be prejudicial to the EU's interest in the efficient conduct of such negotiations. Accordingly, pursuant to Article 4(1)(a), third indent, of the Regulation (protection of public interest with regard to international relations), the Council is unable to grant full public access or extended partial access to these documents.

11. The Council therefore confirms the partial access granted to the requested documents in the initial phase pursuant to Article 4(6) of the Regulation.
