



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 17 April 2009

8355/09

**OMBUDS 5
INST 56
INF 83
API 42
JUR 170**

"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 7952/09

Subject : Complaint 90/2009/(JD)OV made by Mr Ante WESSELS to the European
Ombudsman

Delegations will find enclosed a draft reply from the Council, as it stands after examination by the Working Party on Information at its meeting on 2 April 2009, to the letter sent on 25 February 2009 to the Council by the European Ombudsman concerning complaint 90/2009/(JD)OV.

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

Brussels,

Mr Nikiforos Diamandouros
European Ombudsman
1, avenue du Président Robert Schuman
B.P. 403
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Subject: Request for public access to documents 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08 relating to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) - Complaint made by Mr Ante WESSELS (90/2009/(JD)OV) - your letter dated 25 February 2009

Sir,

Thank you for your letter of 25 February 2009 concerning a complaint by Mr Ante WESSELS in which you ask the Council to submit an opinion on the above matter. I am pleased to inform you of the Council's position on this question.

The complaint

1. In a complaint dated 12 January 2009 submitted to the Ombudsman against the Council, Mr Wessels complains against the decision of the Council of 4 December 2008 in reply to a confirmatory application by the applicant, in which the Council denied public access to documents 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08. Document 13637/08 is classified RESTREINT UE. These documents concern the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA).

The facts

a) Initial application

2. On 29 October 2008, the complainant requested public access to nine Council documents relating to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA).
3. In its reply dated 5 November 2008, the General Secretariat granted the applicant partial access to three of the requested documents. As regards the remaining six documents set out in 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08, public access was refused in its entirety pursuant to Article 4(1)(a) (protection of the public interest with regard to international relations) of Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents ¹.

b) Confirmatory application

4. In his confirmatory application of 9 November 2008, the complainant contested the initial reply of the General Secretariat, and requested the full release of the above six documents.
5. Following consideration of the complainant's arguments, the Council decided to confirm the initial reply by the General Secretariat in which it denied public access to the six documents in question pursuant to the third indent of Article 4(1)(a) of the Regulation (protection of international relations).
6. In its decision, the Council justified the need for protection of the invoked public interest by specifying that the disclosure of documents 12875/08, 13448/08 and 13750/08, relating to working documents from the Commission services containing detailed information on the negotiating position of the different ACTA partners, 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, the Council pointed out that, if the EU's negotiating partners had reason to believe that their positions expressed during confidential

¹ OJ L 145 of 31.05.2001, p. 43.

negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations.

7. As to documents 13382/08, 13637/08 and 13949/08, the Council justified the need for protection of the invoked public interest by specifying that disclosure of those texts would reveal the EU's strategic objectives to be achieved in those negotiations. The Council pointed out that the overall conduct of the on-going negotiations would thereby be compromised, which would be prejudicial to the EU's interest in the efficient conduct of such negotiations.
8. The Council also looked into the possibility of granting partial access to those six documents under Article 4(6) of the Regulation, but concluded that the exception relating to the protection of international relations applied to the content of the documents entirely.

c) Complaint to the Ombudsman

9. In his complaint 90/2009/(JD)OV, the complainant deems that the Council's decision refusing access to the requested documents is unfounded for the following reasons:
 - i) The complainant challenges the Council's refusal to release the documents in question based on the protection of international relations. In general, he calls into question the EU negotiators' decision to conduct the ACTA negotiations away from public scrutiny. He also makes reference to the European Parliament resolution of 18 December 2008 (P6-TA-2008-0634), which calls on the Council not to apply the exceptions set out in Article 4 of Regulation 1049/2001 in respect of ACTA-related documents.
 - ii) The complainant states that ACTA will contain new legal framework and will be binding for the Member States and that it thus is "*(partly) de facto legislation*". In this context, he refers to the recent Turco judgment of the European Court of Justice (joined cases C-39/05 P and C-52/05 P) in which the ECJ stressed the particular relevance of the principle of transparency in the institutions' legislative activities.

- iii) The complainant also contests the Council's decision not to grant partial access to the documents under Article 4(6) of the Regulation. According to the complainant, distinctions can easily be made, for instance by disclosing EU positions which have been communicated to the other negotiating partners. He claims that the Council did not establish why the protection of the invoked interest would be impaired if the documents were to be partly disclosed.

Observations

10. The above three issues are discussed separately.

i) *Protection of international relations*

Article 4 of Regulation 1049/2001 lays down a set of exceptions to the right of public access based on public interest, among them the protection of international relations. The third indent of Article 4(1)(a) provides that

"The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

(...)

- international relations,"

The exceptions set out in Article 4(1) of the Regulation, including the protection of public interest as regards international relations, are framed in mandatory terms. In consequence, once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access².

² See case C-266/05 P Sison v. Council, [2007] ECR I-1233, pt. 46.

In the present case, all six documents in question relate to the conduct of negotiations by the Community and its Member States with their partners on a new plurilateral Anti-Counterfeiting Trade Agreement. Negotiations were launched in October 2007 and are still ongoing. On 14 April 2008, the Council authorised the Commission to open negotiations on a plurilateral Anti-Counterfeiting Agreement, in coordination with the Council and the Member States. On matters falling within the competence of Member States, the Presidency, on behalf of the Member States, fully participates in the negotiations. At present, the different negotiating partners are still discussing various negotiating texts for elements to be included in the agreement and currently there exists no consolidated draft on which the views of the negotiating partners would be converging.

The six documents in question contain detailed information on the EU's and the different ACTA partners' positions in the framework of those international negotiations. More specifically, they include draft proposals and concrete initiatives by the EU and its negotiating partners on different measures to be included in the future agreement. The Council considers that disclosure of the documents in question would be seriously prejudicial to the EU's capacity to conduct those negotiations in a climate of confidence and in constructive cooperation with its negotiating partners, which are considered essential for the efficiency of the negotiations.

The Council does not agree with the complainant that by refusing to release the requested documents relating to the ACTA negotiations, it hampered the proper application of Regulation 1049/2001. As it has been pointed out above, the Regulation provides explicitly an exception from the principle of the widest possible access to documents, based on the protection of international relations. After having determined that the conditions were met for the application of the international relations exception pursuant to Article 4(1)(a), third indent of the Regulation, the Council was bound to refuse access to the requested document, without the possibility of weighing the public interest, even if supported by a European Parliament resolution of 18 December 2008, in the openness of the negotiating process.

ii) *Legislative character of the requested documents*

The Council would recall that, in accordance with the second subparagraph of Article 207(3) EC, the Council defines in its Rules of Procedure the cases in which it is to be regarded as acting in its legislative capacity for the purposes of laying down detailed provisions on access to its documents. Accordingly, Article 7(1) of the Council's Rules of Procedure provides that

"The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)." (emphasis added)

In the present case, the requested documents relate precisely to the conduct of international negotiations, in accordance with the negotiating mandate adopted by the Council on 14 April 2008, and which aim at the adoption of an Anti-Counterfeiting Trade Agreement. Hence, the requested documents discussed by the Council in the framework of those negotiations may not be considered legislative documents within the terms of the Council's Rules of Procedure.

Consequently, the Council considers that the complainant may not rely on the principles laid down by the Court of Justice in its judgment of 1 July 2008 in joined cases C-39/05 P and C-52/05 P: in its judgment, the Court interpreted the legal advice exception, that is to say a relative exception contained in Article 4(2) of the Regulation, in the context of a legislative procedure. In the present case, there is neither a question of one of the exceptions contained in Article 4(2) or (3) of the Regulation, which are both subject to an overriding public interest test, nor of a legislative procedure.

The complainant further argues that ACTA is de facto legislation since it will contain a new legal framework and will be binding for the Member States. In this regard, the Council would recall that all international agreements concluded by the Community are binding on the institutions and on Member States. However, this does not confer a legislative nature on all such agreements: in fact, pursuant to Article 7(1) of the Council's Rules of Procedure, acts concerning international relations do not constitute legislative acts.

iii) *Partial access*

Article 4(6) of the Regulation provides that

"If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."

Under that provision of the Regulation, the institution is required to consider whether it is appropriate to grant partial access to the documents requested and to limit its refusal to parts of the documents covered by the relevant exceptions.

It is apparent from the Council's confirmatory reply that, having considered the possibility of partial disclosure of the documents under Article 4(6) of the Regulation, it concluded that partial disclosure was not possible since the exception in the third indent of Article 4(1)(a) applied to the requested documents in their entirety. In fact, all information contained in the documents relate to proposals and observations on the positions submitted by the EU and its negotiating partners in the ACTA negotiations, the disclosure of which, due to their sensitive content, would be prejudicial to the protection of the EU's capacity to properly conduct those negotiations. Furthermore, it would be impossible to release only the parts of the documents containing the EU's position, as suggested by the complainant, without also revealing the positions of the EU's negotiating partners.

Final remarks

11. The Council appreciates the complainant's close interest in the openness of the ACTA negotiations.
12. In this respect, the Council would note that the Council Presidency and the Commission have appeared on numerous occasions before the European Parliament's responsible committee in order to inform the Members of the Parliament on the progress of the ACTA negotiations. Furthermore, under the special conditions applying for the European Parliament's privileged access to documents, documents relating to the ACTA negotiations relevant for the parliamentary work have been made available to Members of the responsible committee.
13. Finally, the public is kept informed of the negotiations through press releases issued by the Commission and by the ACTA negotiating partners after each of the negotiating rounds. Moreover, in a paper which will be published shortly, the ACTA negotiating partners will clarify the objectives of the future agreement and will also provide an overview of the main issues under discussion.
14. For the reasons set out above, the Council believes the complaint to be unfounded.

(Complimentary clause)

Pierre de Boissieu