



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 July 2008

11510/08

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"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 11509/08

Subject : Public access to documents
- Confirmatory application 09/c/01/08

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 17 July 2008, to confirmatory application 09/c/01/08.

The Danish, Dutch, Finnish and Swedish delegations indicated that they would vote against the draft reply. Furthermore, the delegations have made the following statements :

- FI : "Finland is not convinced that the possibility whether to release points 6 and 7 have been examined in compliance with the Court's judgement in joined cases C-39/05 and C-52/05".
- SV : "All documents should be disclosed in their entirety, in accordance with the Court's judgment in the Turco case".

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 Danish, Dutch, 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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REPLY ADOPTED BY THE COUNCIL ON

TO CONFIRMATORY APPLICATION

made to the Council

by e-mail on 6 July 2008,

pursuant to Article 7(2) of Regulation (EC) No 1049/2001,

for access to documents 8134/03, 9094/03 and 15549/03

The Council has considered your 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 2006/683/EC, Euratom - OJ L 285 of 16.10.2006, p. 47).

1. You refer to documents 8134/03, 9094/03 and 15549/03 which contain contributions of the Council's Legal Service on the subject of takeover bids, delivered in the context of the examination by the Council and its preparatory bodies of a Proposal for a Directive of the European Parliament and of the Council on takeover bids.
2. In its replies to dated 23 June 2008, the General Secretariat refused to grant you full access to the above-mentioned documents on the basis of Article 4(2), second indent, of the Regulation (protection of court proceedings and legal advice). However, pursuant to Article 4(6) of the Regulation you were enabled to inspect those parts of the documents which are not covered by the above-mentioned exception, i.e. those parts which do not contain legal advice as such.
3. Your arguments can be summarised as follows:
 - a) First, you submit that a partial release of legal opinions which prevents access to the legal advice as such, makes, in your words "*access to the documents [in question] completely void of any meaning*".

- b) Second, you consider that the Judgement of the Court of 1 July 2008 in the Joint Cases C-39/05 and C-52/05 Sweden and Turco v Council and Others, constitutes a turning point as regards public access to legal opinions of the Council's legal service. You recall that, in the light of the Court's judgment, "*Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's Legal Service relating to a legislative process*". You argue that consequently "*there is no ground for denying disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated as access to such documents increases transparency and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act*". According to you, full access to documents 8134/03, 9094/03 and 15549/03 should therefore be granted.
4. The Council has thoroughly re-examined the documents concerned in the light of your arguments and has come to the following conclusion.
- a) Document 8134/03 is an opinion of the Council Legal Service on a proposal for a Directive of the European Parliament and of the Council on takeover bids, a proposal on which a decision has already been taken by the institutions. It contains advice on the legality of the proposed provisions concerning the exclusion from the scope of the proposal takeover bids by certain natural or legal persons based in third countries as well as on the legality of the provisions containing measures temporarily limiting the use of assets.
- Paragraphs 6 and 7 of the document contain advice on the legality of excluding - from the scope of the Directive - takeover bids by subsidiary undertakings whose parent undertakings do not have their registered office in the territory of a Member State. In particular, it provides advice on that question in the light of the EC Treaty, with a bearing on any Community legislation in the field of company law. Consequently, the Council considers that the opinion contained in the above-mentioned paragraphs has a

particularly wide scope, going beyond the context of the legislative procedure in question. From the Council's point of view, disclosure of these parts of the document, as well as the corresponding conclusions, would be prejudicial to the protection of legal advice, as provided in Article 4(2), second indent, of the Regulation.

As regards the existence of an overriding public interest in the disclosure of paragraphs 6 and 7 of the document, the Council weighed the public interest of increasing openness of the Council's legislative activity and citizens' participation in the legislative process against the Council's interest in seeking legal advice and receiving frank, objective and comprehensive legal advice. It concluded that the disclosure of the advice contained in the requested document, while maintaining the protection of paragraphs 6 and 7 thereof, strikes a good balance between the public interest in the transparency of the legislative process and the protection of legal advice.

As far as the remaining parts of the legal advice contained in document 8134/03 are concerned, the Council considers that those parts of the document do not have a particularly sensitive nature nor a particularly wide scope going beyond the legislative process in question. Therefore, those parts of the document are not covered by the exception under the second indent of Article 4(2). Consequently, and since the requested document does not fall under any other exception under Regulation (EC) No 1049/2001 either, partial access is granted to document 8134/03, with the exception of the passages set out in paragraphs 6 and 7 of the opinion and the corresponding conclusions.

- b) As regards document 9094/03 and 15549/03, containing legal advice on the same proposal, the Council has decided that the requested legal service opinion is not particularly sensitive in nature and does not have a particularly wide scope going beyond the context of the legislative process. Therefore these documents are not covered by the exception under the second indent of Article 4(2). Consequently, and since the requested documents do not fall under any other exception under of Regulation (EC) No 1049/2001 either, the Council decided to give a positive answer to your request for access to documents 9094/03 and 15549/03.
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