



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 October 2008

13289/08

**INF 181
API 59
JUR 354**

"I/A" ITEM NOTE

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

No. prev. doc.: 13288/08

Subject : Public access to documents
- Confirmatory application 14/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 6 October 2008, to confirmatory application 14/c/01/08.

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

- *FI* : "Disclosure of the document would not undermine the public interest as regards international relations in the meaning of Article 4(a)(1) of Regulation 1049/2001."
- *SV* : "The release of the document would not undermine the protection of international relations. The document should therefore be released in its entirety."

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 the 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
made by e-mail on 19 September 2008,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 15375/06

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 2006/683/EC, Euratom - OJ L 285 of 16.10.2006, p. 47) and has come to the following conclusion:

1. The applicant refers to document 15375/06, which was submitted to the Article 133 Committee and contains the final consolidated version of the Minimum Platform on Investment for EU Free Trade Agreements ("FTAs"), as agreed within the framework of the Article 133 Committee.
2. In its reply dated 29 August 2008, the General Secretariat refused to grant the applicant access to the above-mentioned document, pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).
3. The Council notes that the applicant asks the institution to reconsider its position, stating that the document is required for doctorate studies. The applicant argues that specialist publications are already dealing with the legal instrument of the Minimum Platform which according to the applicant means that the main features of the substance of the Platform are known at least to specialist circles. Moreover, the applicant claims that it is international State practice in investment protection law to make available to the public model agreements for bilateral investment protection agreements.

4. The Council has thoroughly examined the document and carried out internal consultations within its General Secretariat to ascertain the applicability of the above-mentioned exception to the retained document. Following these consultations, the Council has come to the conclusion set out below.
5. Notwithstanding the applicant's interest in the document for academic study purposes, the Council considers that it is not possible to grant the applicant privileged access, since the Institution is obliged, when releasing a document to the public, to do so *erga omnes*.¹
6. As regards the applicant's argument that reference has been made in specialist publications to the substance of the document under scrutiny, it should be recalled that the fact that the document in question is mentioned in specialist literature does not constitute a sufficient ground to conclude that this document was officially released by the Council. In fact, the document has never been made public by the Council. The 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, should not be prejudiced by the unauthorised disclosure, in violation of the Regulation, of the full text of the documents.
7. Document 15375/06 contains the final consolidated version of the Minimum Platform on Investment for EU Free Trade Agreements ("FTAs"). This Minimum Platform is used as a basis for negotiations on trade in services and establishment (i.e. investment) in practically all EU bilateral trade negotiations. The negotiating mandates authorising the Commission to negotiate with third parties contain clear reference to the Platform; in some cases important parts of the Platform may be reproduced. The Platform thus forms an essential part of the negotiating mandates and can therefore not be considered as a solely model text. The applicant's argument concerning the publication of model agreements for bilateral investment protection agreements is in the Council's view thus not valid in this case.

¹ Article 10(2) of Annex II to the Council's Rules of Procedure, OJ L 285 of 16.10.2006, p. 63.

In the Council's view, release of document 15375/06 to the public would enable the negotiating partners of the EU to assess the measure of its willingness to compromise. This would not only prejudice the EU's position in its current trade negotiations but would also have an adverse effect in future negotiations. For these reasons, public access to the document must be denied on the basis of Article 4(1)(a), third indent of the Regulation (protection of the public interest as regards international relations).

8. Furthermore, it is not possible to grant partial access to the document as foreseen in Article 4(6) of the Regulation since its content forms an inseparable whole.
