



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 25 November 2008**

**15476/08**

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**"I/A" ITEM NOTE**

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from : Working Party on Information  
to : Coreper (part 1)/Council

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No. prev. doc.: 15475/08

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Subject : Public access to documents  
- Confirmatory application made by Mr Ante WESSELS (19/c/01/08)

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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 25 November 2008, to confirmatory application made by Mr Ante WESSELS (19/c/01/08).

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.

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**DRAFT**  
**REPLY ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION 19/c/01/08**  
**made by Mr Ante WESSELS to the Council**  
**by e-mail on 9 November 2008,**  
**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 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 the following documents:
  - a) 12875/08, 13448/08 and 13750/08: working documents from the Commission Services concerning the Plurilateral Anti-Counterfeiting Trade Agreement;
  - b) 13382/08 and 13949/08: notes from the Presidency to Delegations concerning the Plurilateral Anti-Counterfeiting Trade Agreement; and
  - c) 13637/08 (RESTREINT UE): an outcome of the consultation of the Justice and Home Affairs Counsellors on 26 September 2008 concerning the Plurilateral Anti-Counterfeiting Trade Agreement, 3rd negotiating session 8-10 October 2008, Tokyo, Japan.
2. In its reply dated 5 November 2008, the General Secretariat refused the applicant access to the above-mentioned documents in their entirety pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

3. The Council has examined the above-mentioned documents in the light of the applicant's arguments while taking the following elements into consideration:
4. The protection of intellectual property rights (IPR) is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness. In order to strengthen IPR enforcement practices and rules, the United States of America and Japan have presented an initiative for a new Anti-Counterfeiting Trade Agreement (ACTA).

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. According to the Commission, it is important for the European Union to be at the forefront of efforts to improve IPR enforcement and to work with other partners to make them as effective as possible.

*Documents 12875/08, 13448/08 and 13750/08*

5. Documents 12875/08, 13448/08 and 13750/08 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. Document 13750/08 contains a compilation of all comments provided by ACTA partners on the civil enforcement chapter. All three documents contain detailed information on the different ACTA partners' positions with regard to the sensitive subject of civil judicial proceedings concerning the enforcement of intellectual property rights, as well as comments concerning other negotiating partners' positions.

6. 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.
7. Full access to documents 12875/08, 13448/08 and 13750/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).
8. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the documents form an inseparable whole.
9. In his confirmatory request, the applicant submits that in accordance with the principle of participative democracy, as developed by the Court of Justice in the Turco case (joined cases C-39/05 P and C-52/05 P), citizens should be enabled to scrutinize not only legislative proposals but also procedures for the adoption of trade agreements. In consequence, the protection of trade interests should not prevail over the public interest relating to the openness and transparency of the institution's decision-making. Moreover, the applicant claims that while technically the Anti-Counterfeiting Trade Agreement (ACTA) is not a legislative proposal, its acceptance will nonetheless lead to legislative and executive obligations for the undersigning parties.

It is recalled that the legislator balanced the principle of the transparency of the institutions' decision-making when it laid down the general principles and limits on the right of public access to documents in Regulation (EC) No 1049/2001. In this regard, it is recalled that the exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of public interest as regards international relations, are mandatory. 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 access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests, such as those invoked by the applicant.

*Documents 13382/08, 13637/08 and 13949/08*

10. Documents 13382/08 and 13949/08 are notes from the Presidency to delegations and contain comments on the draft Community contribution made in response to a Japan-US joint document proposing civil law measures to be included in ACTA. These documents have been drafted on the basis of discussions in the meetings of the Working Party on Intellectual Property on 11 September (subgroup "Patents") and 6 October 2008 (subgroup "Copyright").

Document 13637/08 (RESTREINT UE) is an outcome of the consultation of the Justice and Home Affairs Counsellors on 26 September 2008 concerning the Japan-US joint proposal on draft criminal law measures to be included in ACTA. The document has been drafted in view of the 3rd negotiating session on ACTA on 8-10 October 2008 in Tokyo, Japan.

11. All three 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.

12. Full access to documents 13382/08, 13637/08 and 13949/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).
13. With regard to the applicant's arguments relating to the existence of an overriding public interest in disclosure, it is recalled that Article 4(1) (a) of the Regulation does not allow the Council to balance the protection of international relations against other interests, such as those invoked by the applicant.
14. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the documents form an inseparable whole.

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