



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 16 October 2009

13802/09

**INF 256
API 114
JUR 383**

"I/A" ITEM NOTE

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

No. prev. doc.: 13801/09

Subject : Public access to documents
- Confirmatory application No 22/c/01/09

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 14 October 2009, to confirmatory application No 22/c/01/09.

The Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

DK: *"Denmark agrees with the overall conclusion of the General Secretariat. However, Denmark cannot concur with the reasoning given in the draft reply as regards the application of article 4(2), cf. the Court's Turco judgement"*.

FI: *"Even if certain parts of the document might contain information which should not be disclosed in accordance with Article 4(1) of the Regulation 1049/2001, substantially more extensive access to document could have been granted than what has been proposed. For instance paragraphs 20. and 21. do not seem to contain information the release of which could harm either the protection of legal advice or the protection of international relations in the meaning of Articles 4(2) and 4(1) of the Regulation 1049/2001. Furthermore, Finland cannot concur with the reasoning given in the draft reply as regards the significance of the Court's Turco judgement (joined cases C-39/05 P and C-52/05 P) nor the application of the Article 4(1) concerning international relations as such."*

NL: *"The Netherlands does agree with the conclusion of the Council Secretariat on the basis of the exception concerning the protection of international relations, but does not concur with the argumentation used concerning the exception regarding the protection of legal advice, as this argumentation is not in line with the Turco-judgement."*

SE: *"Sweden agrees with the General Secretariat that access to certain parts of the document should be refused. However, Sweden considers that further partial access could be granted. Furthermore, Sweden does not fully agree with the reasons proposed by the General Secretariat concerning legal advice, in particular as regards paragraphs 10-12."*

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 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 No 22/c/01/09
made by e-mail on 28 September 2009,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 11897/09 (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 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 11897/09 (RESTREINT UE) which comprises an opinion of the Legal Service of the Council on a Recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing.
2. In its reply dated 8 September 2009, the General Secretariat refused public access to the document pursuant to Article 4(1)(a), third indent (protection of international relations) and Article 4(2), second indent of Regulation 1049/2001 (protection of legal advice).
3. In the confirmatory request, the applicant challenges the General Secretariat's refusal to disclose the requested document. Firstly, the applicant argues that the General Secretariat's application of the exception relating to the protection of legal advice under Article 4(2) second indent of Regulation 1049/2001 is contrary to the principles laid down by the Court of Justice in the Turco case. Secondly, the applicant contends that the exception relating to the protection of international relations under Article 4(1)(a), third indent of the Regulation is not applicable to the requested document.

4. The Council has examined the above-mentioned document in the light of the applicant's arguments.
5. The requested document has been drawn up by the Council Legal Service in the course of the internal discussions within the Council on a Recommendation presented by the Commission on 18 June 2009 to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing. During the internal discussions within the Council on the Commission's draft Recommendation, the Council Legal Service was requested to formulate its opinion on the legal basis of the above-mentioned Agreement. The requested document contains an analysis by the Legal Service of this question. Following internal discussions within the Council on the Commission's draft, the Council adopted the negotiating directives for an international agreement between the European Union and the United States on 27 July 2009. The international negotiations on this sensitive matter in the area of the prevention and combating of terrorism and terrorist financing are currently ongoing.
 - a) Protection of international relations
6. First of all, the requested document concerns international relations, a protected public interest under Article 4(1)(a), third indent of the Regulation, since it discusses the legal aspects of the draft negotiating directives for an international agreement between the EU and the US on a sensitive matter relating to the prevention and combating of terrorism and terrorist financing. The document contains an analysis of the legal basis of the proposed Agreement, where the Legal Service discusses the contents of the envisaged Agreement, as recommended by the Commission. The requested document, like the Commission's draft recommendation and the Council's negotiating directives bear the classification "RESTREINT UE", which is applied to information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or one or more of its Member States, in accordance with Section II, paragraph 4 of the Council's security regulations ¹.

¹ Council decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ L 101, 11.4.2001, p. 1.

In fact, disclosure of the requested document would reveal to the public information relating to certain provisions in the envisaged Agreement currently under negotiations, and consequently, would negatively impact on the EU's negotiating position and would also damage the climate of confidence in the on-going negotiations, which is essential in this process. In addition, disclosure of the document would also reveal to the EU's negotiating counterpart elements pertaining to the position to be taken by the EU in the negotiations which - in the case the legal advice was critical - could be exploited so as to weaken the EU's negotiating position. This might, in turn, harm the EU's capacity to draw the negotiations to a successful conclusion.

7. For the reasons set out in paragraph 6 above, the Council cannot agree with the applicant that the exception relating to international relations under Article 4(1)(a), third indent of the Regulation would be inapplicable in the present case where the requested document relates to the examination of the legal basis of the envisaged Agreement.
8. Furthermore, the Council cannot share the applicant's view that Article 4(1)(a), third indent of the Regulation would prescribe a balancing of the public interest in the protection of international relations against other public interests, such as democracy, the rule of law or the protection of the fundamental rights of citizens. In fact, in contrast with the exceptions in Article 4(2) and (3) of the Regulation, which provide for a public interest test, the exceptions set out in Article 4(1), including the protection of international relations, are framed in mandatory terms. Therefore, once the Council determines that the conditions are met for the application of the international relations exception pursuant to Article 4(1)(a), third indent of the Regulation, it is bound to refuse access to the requested document, without the possibility of weighing the public interest in the disclosure of the document.²

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

9. As regards the applicant's contention that the classification of the requested document as "RESTREINT UE" would "cancel out" the application of Regulation 1049/2001, the Council would stress that the applicant's request has been handled in accordance with the provisions laid down in Regulation 1049/2001, and that the level of classification served as an illustration of the sensitive contents of the requested document and not as grounds for refusal of the applicant's request.
- b) Protection of legal advice
10. Secondly, the requested document contains legal advice, where the Legal Service analyses the legal basis and the respective competences of the EU and the European Community to conclude the Agreement. This sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the Agreement, has been subject of divergent positions between the institutions. Divulgence of the contents of the requested document would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the envisaged Agreement. If it were to be accepted that the legal advice contained in the requested document can be made public, this might lead the Council to decide not to request written opinions from its Legal Service, since it could find itself in a situation where it would need to defend the decision it has taken against a - potentially critical - advice given by its Legal Service.
11. Moreover, if the requested internal opinion of the Legal Service were disclosed to the public, the Legal Service might itself refrain from putting in writing views which might expose the Council to risk in the future. Consequently, disclosure would impact on the content of the legal opinions, which would be detrimental to the Council's interest *in "seeking legal advice and receiving frank, objective and comprehensive legal advice."*³

³ See C-39/05 P and C-52/05 P Sweden, Turco v. Council [2008] ECR I-4723, pt. 42.

12. In addition, and given the fact that the Council's Legal Service not only assists the institution in ensuring the legality of the acts it adopts, but also represents it before the Community courts, disclosure to the public of the internal legal advice contained in the requested document and given within the context of the Council's internal discussions on the draft Agreement would seriously undermine the Legal Service's capacity in the future to present and defend, free from all external influences and on an equal footing with the legal representatives of the other parties, the Council's position in court proceedings, a position which may differ from the one previously recommended by the Legal Service.

13. In his confirmatory application, the applicant argues that the interpretation and application of Article 4(2) second indent of the Regulation by the General Secretariat is contrary to the Court of Justice's judgment in the Turco case ⁴. The Council does not share the applicant's view. It would recall in this regard that in the said judgment, the Court interpreted the legal advice exception in the context of a legislative procedure, as it is apparent from its paragraphs 46-47, 59-60, 66-69 and 71. However, the legal advice contained in the requested document does not relate to a procedure where the Council acts in its legislative capacity under Article 7 of the Council's Rules of Procedure. For this reason, the facts of the present confirmatory application must be distinguished from those which gave rise to the judgment of the Court of Justice of 1 July 2008 in case C-39/05 P.

14. Similarly, the Council cannot share the applicant's view that a legal advice drawn up within the Council in the context of the decision-making procedure leading to the adoption of a legally binding act must be directly accessible to the public. In fact, such a view would be contrary to the very wording of Article 4(2) second indent and Article 12(2) of the Regulation.

⁴ C-39/05 P and C-52/05 P Sweden, Turco v. Council [2008] ECR I-4723.

15. The Council, after having carefully weighed the Council's interest in the protection of the internal legal advice given by its Legal Service against the public interest in the disclosure of the requested document, concluded that the protection of its internal legal advice relating to a draft international Agreement currently under negotiation outweighs the public interest in disclosure. The Council cannot agree with the applicant that the fact that the "possible contents of the envisaged Agreement and views on the competence and legal basis for the Community to enter into this International Agreement that will bind the Community and affect the European citizens" would constitute an overriding public interest in disclosure. In fact, this consideration would apply to any international agreement negotiated by the Community or the EU, which would, in turn make it impossible for the Council to refuse public access to an internal legal advice given by its Legal Service in this area.
16. Under those conditions, full public access must be refused to the requested document pursuant to the third indent of Article 4(1)(a) (protection of international relations) and the second indent of Article 4(2) of Regulation 1049/2001 (protection of legal advice). However, the Council has also examined the possibility to provide partial access to the requested document in accordance with Article 4(6) of the Regulation. It concluded that partial access may be granted to the introductory part on page 1, paragraphs 1-4 and the first sentence of paragraph 5 of the document which are not covered by any exceptions under Regulation 1049/2001.
