



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

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

No. prev. doc.: 15143/09

Subject : Public access to documents
- Confirmatory application No 25/c/01/09

Delegations will find enclosed a draft reply from the Council to confirmatory application No 25/c/01/09, as it stands after examination by the Working Party on Information at its meeting on 23 November 2009.

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

DK: *"Denmark supports the full disclosure of document 17152/08 and partial access to documents 15931/09 and 15958/08. Denmark finds, however, that document 16464/08 should be disclosed in accordance with the Turco judgment, cf. combined cases C-39/05 P and C-52/05 P, and therefore cannot concur with the suggested conclusion."*

FI: *"Disclosure of the document 16464/08 should be assessed in accordance with ECJ's Turco judgment as the document contains the advice of an institution's legal service on legal question arising when legislative initiative is being debated. Of FI's view, the nature of the document cannot be considered particularly sensitive as required in the judgement. Therefore FI cannot concur with given reasoning.*

However, as regards full disclosure of document 17152/08 and partial access to documents 15931/08 and 15958/08, FI agrees to disclose the documents as suggested."

NL: *"With regard to doc 16464/08, we agree to the conclusion not to give access on the basis of art.4 par. 3. However, we do not agree with the reasoning with regard to art. 4 par. 2, sub 2. A very general and abstract reference to the risk of disclosure of legal advices is made in par. 11 and 12, in the sense that the disclosure may lead to less or no written advice being asked/given. However, in the Turco-case, the Court found that a reference to such a general and abstract risk did not suffice to preclude disclosure.*

This judgment clarified that Regulation 1049/2001 does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but only when it concerns advice being of a particularly sensitive nature or having a particularly wide scope that goes beyond the legislative process in question. However, in such a case, the institution concerned must give a detailed statement of reasons for such a refusal, which is reasonably foreseeable and not purely hypothetical. Therefore, we cannot agree to the general and abstract wording in par. 11 and 12."

SE: *"SE welcomes the release of document 17152/08.*

SE also welcomes the partial access to documents 15931/08 and 15958/08. However, SE takes the view that the Swedish positions as reflected in the requested documents should be disclosed in their entirety since they are already publicly available.

SE does not agree with the decision concerning document 16464/08, in particular as regards the proposed interpretation of the secrecy exception in the second indent of Article 4(2) (paragraph 12 of the draft reply). The interpretation is not in line with the Turco judgment. There is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of the document might undermine the protection of legal advice, and the content is not of a particularly sensitive nature."

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 Danish, 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 25/c/01/09
made by e-mail on 27 October 2009,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 15931/08, 15958/08, 16464/08 and 17152/08

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 documents 15931/08, 15958/08, 16464/08 and 17152/08 which concern the draft Council Regulation on the Statute for a European private company (SPE).
2. In its reply dated 23 October 2009, the General Secretariat refused public access to documents 15931/08, 15958/08 and 17152/08 pursuant to Article 4(3), first subparagraph, of Regulation 1049/2001 (protection of the Council's decision-making process). As to document 16464/08, public access was granted to the introductory paragraph of the document and refused to the remaining parts of this document pursuant to Article 4(2), second indent (protection of legal advice) and Article 4(3), first subparagraph (protection of the Council's decision-making process), of the Regulation.
3. The Council notes that the applicant asks the institution to reconsider its position, stating that the documents are required for academic study purposes.
4. The Council has thoroughly examined the documents and carried out internal consultations to ascertain the applicability of the above-mentioned exception to the documents concerned. The Council has come to the conclusion set out below.

5. The Council understands the applicant's interest in obtaining access to the documents for academic purposes. However, the Council may not take into consideration the applicant's particular interest in obtaining those documents, since it is called upon to rule, in conformity with Regulation (EC) N° 1049/2001 and Article 10(2) of Annex II of its Rules of Procedure, on the disclosure to the public of the requested documents on an *erga omnes* basis.¹
6. Documents 15931/08, 15958/08, 16464/08 and 17152/08 all concern a proposal for a Council Regulation on the Statute for a European private company (SPE).

The Working Party on Company Law, the Council's preparatory body responsible for the proposal, started the examination of the Commission proposal in June 2008 and has since met several times to discuss it. Discussions are now reaching a crucial phase, with a view to reaching an agreement on the legislative file before the end of the year.

Documents 15931/08 and 15958/08

7. Document 15931/08 is a working document from the Presidency to the Company Law Attachés and contains a revised guidance note for the delegations. Document 15958/08 is a note from the Presidency to the Permanent Representatives Committee (Part I) on a possible partial general approach on the draft Council Regulation.
8. Disclosure of the names of the full contents of the requested documents would adversely affect the efficiency of the Council's decision-making process at this crucial stage by compromising the Council's ability to reach an agreement on this dossier, and, in particular, narrow delegations' room for compromise within the Council. Furthermore, if it were to be accepted that documents containing written positions of delegations submitted were to be disclosed in their entirety in an ongoing decision-making procedure, delegations would be induced to cease submitting their views in writing, and instead would limit themselves to oral exchanges of views in the Council and its preparatory bodies, which would not require the drawing up of documents. This would cause significant damage to the effectiveness of the

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

Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be seriously prejudicial to the overall transparency of the Council's decision-making.

9. The Council has weighed the public interest relating to the efficiency of its internal decision-making against the public interest in increased openness, which guarantees that the EU institutions enjoy greater legitimacy and are more accountable to the citizens. In accordance with the principle of proportionality, as provided in Article 4(6) of the Regulation, it has concluded that public access may be granted to these documents by releasing the contents of the documents, whilst suppressing the names of the respective delegations. This solution enables, on the one hand, citizens to scrutinise, in accordance with the democratic principles, the information which forms the basis of the proposed legislative act under discussion within the Council, and on the other hand, to preserve the effectiveness of the Council's decision-making process, as explicitly provided for in Article 207(3) TEC.
10. As regards the remaining parts of the requested documents, public access to these documents must be refused on the basis of Article 4(3), first subparagraph, of Regulation 1049/2001 (protection of the Council's decision-making process).

Document 16464/08

11. Document 16464/08 contains an opinion of the Legal Service of the Council concerning the draft Council Regulation on the Statute for a European private company (SPE). The legal advice contained in this document is of a particularly sensitive nature, since it analyses delicate issues relating to the powers of the Community legislator under Article 308 TEC to adopt measures such as those proposed by the Commission and their compatibility with the principle of subsidiarity.
12. Disclosure of the contents of the document would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting 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. Moreover, the Legal Service could come under external pressure which could affect the way in which legal opinions are drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences. Lastly, disclosure of the legal advice would also affect the ability of the Legal Service to effectively defend the decision taken by the Council before the Community courts.

13. In addition, and in view of the fact that the decision-making process is currently ongoing, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions within the Council on the legality of the proposed act and would compromise its capacity to find an agreement on the dossier.
14. In the view of the foregoing, the Council is unable to grant the applicant full access to this document, since the disclosure of the document would prejudice two of the protected interests under Regulation 1049/2001, notably the protection of legal advice under Article 4(2), second indent and the institution's ongoing decision-making process under Article 4(3), first subparagraph of the Regulation. As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation does not, in the present case, prevail over the above two interests so as to justify disclosure of the document.
15. The Council therefore confirms the partial access granted in the initial phase pursuant to Article 4(6) of the Regulation.

Document 17152/08

16. Document 17152/08 is a note from the Presidency to the Working Party on Company Law and contains a Presidency compromise text of the draft proposal on the Statute for a European private company (SPE). The applicant may have access to document 17152/08 in its entirety.
