



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 February 2011

5275/11

**INF 3
API 3
JUR 13**

"I/A" ITEM NOTE

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

No. prev. doc.: 5274/11

Subject : Public access to documents
- Confirmatory application made by Ms Sigita Urdze (No 01/c/01/11)

Delegations will find enclosed a draft reply from the Council to confirmatory application made by Ms Sigita Urdze (No 01/c/01/11), as it stands after examination by the Working Party on Information at its meeting on 11 February 2011.

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

DK: *"Regarding document 14325/10, Denmark would – as a general remark – like to stress the importance of due application of Article 4(6) of Regulation 1049/2001. The Danish opinion is that more information could be released, especially the paragraphs on page 2."*

FI: *"Regarding document 14325/10, Finland is of the opinion that the reasoning in the draft reply that relates to the protection of legal advice is too general. Moreover, Finland considers that the possibility of partial release has not been thoroughly examined and that extending partial release of document 14325/10 would be possible."*

SE: *"SE welcomes the full release of document 10934/10.*

Regarding document 11104/10, SE welcomes that partial access has been granted the applicant. However SE takes the view that extended partial access in accordance with article 4(6) should be granted to the last paragraph on page 2, the first sentence in the last paragraph on p. 4 and the two first paragraphs on p. 8.

Regarding document 14325/10, SE does not agree that the disclosure of the document would undermine the protection of public interest as regards international relations. Furthermore SE does not fully agree with the reasons proposed by the General Secretariat concerning legal advice, in particular as regards paragraphs 13-14. As a general remark, SE would like to stress the strong public interest in disclosing information of this kind and the importance of due application of article 4(6) of Regulation 1049/2001."

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 01/c/01/11,
made by Ms Sigita Urdze by e-mail on 23 December 2010,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 10934/10, 11104/10 and 14325/10

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 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to documents 10934/10, 11104/10 and 14325/10. Document 10934/10 is an amendment to a preliminary draft reply to written question E-2850/10 with the subject "Revolution in Kyrgyzstan". Document 11104/10 is a cover note from the General Secretariat of the Council to delegations and contains the position of the European Union for the 10th EU-Kazakhstan Cooperation Committee. Document 14325/10 contains a contribution from the Council's Legal Service to the deliberations of the Working Party on Eastern Europe and Central Asia concerning a Recommendation from the Commission to the Council with a view to authorise the Commission to open negotiations with the Republic of Kazakhstan for an enhanced Partnership and Co-operation Agreement.
2. In its replies dated 16 and 21 December 2010, the General Secretariat:
 - refused full public access to document 10934/10 pursuant to the second subparagraph of Article 4(3) (protection of the Council's decision-making process) of the Regulation;
 - refused public access to document 11104/10 pursuant to the third indent of Article 4(1) (protection of the public interest with regard to international relations) of the Regulation; and
 - refused full public access to document 14325/10 pursuant to the third indent of Article 4(1)(a) (protection of the public interest with regard to international relations) and the second indent of Article 4(2) of the Regulation (protection of legal advice). Pursuant to Article 4(6) of the Regulation, partial access was granted to paragraphs 1 and 2 of document 14325/10.

3. Following the confirmatory requests made on 23 December 2010, the Council has examined the above-mentioned documents and has come to the following conclusion:

Document 10934/10

4. In the light of its examination, the Council has come to the conclusion that document 10934/10 is not covered by any exceptions under Article 4 of Regulation 1049/2001 and may thus be released in its entirety.

Document 11104/10

5. Document 11104/10 is a cover note from the General Secretariat of the Council to delegations concerning relations with Kazakhstan. It contains the negotiating position of the European Union at the 10th EU-Kazakhstan Cooperation Committee, as agreed by the Eastern Europe and Central Asia Working Group. The document contains, among others, detailed background information and assessment of the current political and economic situation in Kazakhstan as well as a definition of the strategy to be adopted by the EU in the negotiations with that country with respect, inter alia, to trade and investment, energy and transport cooperation as well as several Justice and Home affairs issues.
6. Having thoroughly examined document 11104/10, the Council holds the view that full release of this document to the public would seriously undermine the protection of the public interest as regards the EU's international relations. Disclosure would prejudice relations between the EU and Kazakhstan and thereby affect the climate of confidence and hamper open and constructive co-operation between the partners. Moreover, full release of this document to the public would enable Kazakhstan to assess the measure of the EU's willingness to compromise with regard to the various items on the table. This would prejudice the EU's position in the efficient conduct of negotiations with this country, especially with a view to the future negotiations on an enhanced Partnership and Cooperation Agreement.

7. Therefore, the Council confirms the decision of the General Secretariat in reply to the initial application, whereby it refused full public access to document 11104/10 pursuant to the third indent of Article 4(1) of the Regulation (protection of the public interest with regard to international relations).
8. The Council has also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to document 11104/10. It has decided that partial access may be granted to those parts of the document which are not covered by the said exception, notably to page 1; first, second and third paragraph on page 2, except for the second sentence of the third paragraph; two first paragraphs of point 1 as well as points 2 and 3 on page 3; point 4 and the first paragraph of point 5 on page 4; the second paragraph on page 5 as well as point 6; the second paragraph of point 9 and the first paragraph of point 10 on page 7; and points 11-13 on page 8.

Document 14325/10

9. Document 14325/10 contains a contribution from the Council's Legal Service to the deliberations of the Working Party on Eastern Europe and Central Asia (COEST) concerning a recommendation from the Commission to the Council with a view to authorise the Commission to open negotiations with the Republic of Kazakhstan for an enhanced Partnership and Co-operation Agreement (hereinafter "recommendation") dated 21 October 2010. The document examines the question whether the envisaged comprehensive agreement falls under mixed competence or not, and what consequences the nature of the agreement entails, including as regards negotiator(s). Such legal analysis required a detailed examination of the exact wording of the recommendation as regards a large number of competences to be covered by the envisaged agreement. The recommendation is currently still under discussion in the Council, more specifically at the level of the COEST Working Party. Once the negotiating directives have been adopted by the Council, negotiations will start on the international level followed by the process of signature and conclusion of the agreement.

a) Protection of international relations

10. The protection of international relations is a public interest which constitutes a mandatory exception to the principle of public access by virtue of Article 4(1)(a), third indent of Regulation (EC) No 1049/2001. As regards the requested document, there is a real, twofold risk that its disclosure would undermine such protection of international relations as a public interest. First, the document contains detailed analysis and conclusions on the content, wording and limits of the recommendation to open negotiations on the envisaged agreement. Its disclosure would likely have negative consequences for the Union's negotiating position in the negotiations with the Republic of Kazakhstan and its international relations in general. Second, disclosure of the analysis and conclusions on the sensitive question of mixity of the envisaged agreement and on the ensuing consequences for the negotiation and ratification process could have a negative impact on the political decision-making process which is currently still under way in the Council. The resulting risk of internal complications and delay as regards the adoption of the negotiating mandate and, ultimately, the negotiation, signing and conclusion of the envisaged agreement could weaken the position of the Union as an actor on the international scene.

a) Protection of legal advice

11. Moreover, the exception contained in Article 4(2), second indent of Regulation (EC) No 1049/2001 requires the Council to refuse access to a document where disclosure would undermine the protection of legal advice unless there is an overriding public interest in disclosure. The former interest is construed by the European Court of Justice as "*an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.*"¹

12. As stated above, the requested document contains the Legal Service's examination of the question whether the envisaged comprehensive agreement falls under mixed competence or not, and what consequences the nature of the agreement entails. As such, the document consists of legal advice. The protection of this legal advice would likely be jeopardized in several ways were the document to be divulged.

¹ C-39/05 P and C-52/05 P Sweden, Turco v. Council [2008] ECR I-4723, pt. 42.

13. To begin with, disclosure would risk harming the Council's interest in requesting legal advice. The subject-matter of the legal advice in question is, both legally and politically speaking, complex and sensitive. Therefore, the Council does not only have an increased interest in relying on the opinion of its Legal Service for an effective and correct decision-making process, both internally and as regards its discussions with other institutions of the Union concerned. Because of its sensitivity, the Council must also be able to trust that such legal advice remain confidential. Otherwise it could be incited to take into account the risk of a possible disclosure and decide not to request written contributions from its Legal Service on such matters any more.
14. Simultaneously, the Council's interest in receiving frank, objective and comprehensive legal advice risks also being undermined. If the Council were obliged to make public complex and sensitive legal advice in the field of external relations, the Legal Service itself might consider it more prudent to refrain from putting in writing - potentially controversial - views which might jeopardize the Council's interests during the decision-making process and, ultimately, in possible future legal proceedings.
15. Finally, after a process of cautious balancing of the interests at stake, the Council concluded that its interest in the protection of its legal advice is not overridden by public interest in disclosure of the document in question. The Council does not see at stake any specific public issues that would outweigh its interest in requesting and receiving legal advice in a field that is particularly complex and delicate.
16. Under these circumstances the Council confirms the General Secretariat's initial reply whereby the latter refused full public access to the requested document, with the exception of the two introductory paragraphs. There is, however, an obligation under Article 4(6) of Regulation (EC) No 1049/2001 for the Council to release such parts of the document which are not covered by any of the above exceptions. This is the case for the two introductory paragraphs on pages 1 and 2 of the document which have already been released by the General Secretariat in its initial reply.
