



**COUNCIL OF
THE EUROPEAN UNION**

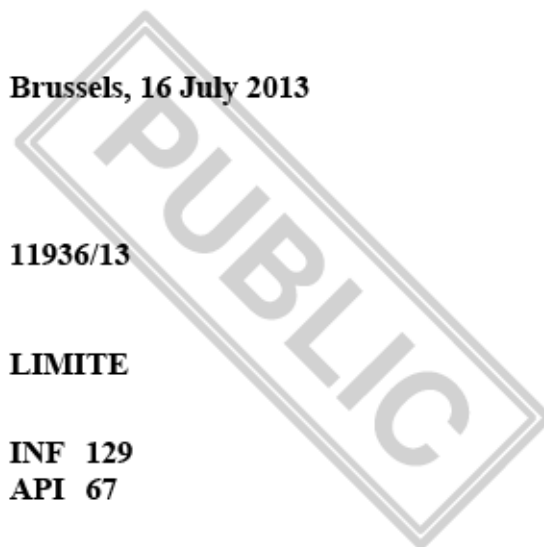
Brussels, 16 July 2013

11936/13

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"I/A" ITEM NOTE

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

No. prev. doc.: 11935/13

Subject : Public access to documents
- Confirmatory application No 26/c/02/09

Delegations will find enclosed a draft for a new partial reply to confirmatory application No 26/c/02/09 following the judgment of the General Court in Case 63/10, approved unanimously by the Working Party on Information by written consultation which ended on 15 July 2013.

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,
- 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 26/c/02/09
made by fax on 3 November 2009,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents

Following the judgment of the General Court of 3 October 2012 in Case T-63/10, the Council has – to the extent its previous decision of 7 December 2009 has been partially annulled by the Court – reconsidered 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 – OJ L 325 of 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to Council decisions concerning the transmission to the International Criminal Tribunal for the Former Yugoslavia (ICTY) of documents requested by that Tribunal in connection with the "Prosecutor v. Gotovina et al." case (IT-06-90-T) (first request) and to the entire correspondence exchanged in this context between the European Union institutions and the ICTY, including any annexes, and in particular the preliminary requests by the ICTY and by Mr Gotovina's defence (second request).
2. In its reply of 23 October 2009, the General Secretariat indicated that it had not identified any document relating to the first application. The General Secretariat refused access to the documents requested in the second application on the grounds that, since they had been transferred to the file of a case currently before the ICTY, the requested documents formed part of pending judicial proceedings, which the ICTY, not the Council, was responsible for handling pursuant to the rules governing the transparency of its activities.

3. In his confirmatory application lodged on 3 November 2009 and registered on that day by the Council, the applicant contested the refusal to disclose the documents in question. First, he asked the Council to indicate the decision on the basis of which the documents were forwarded to the ICTY in the Gotovina case. Second, he contested the limitation of the scope of the application solely to correspondence between Secretary-General/High Representative Solana and the Office of the Prosecutor of the ICTY. Third, he alleged that the General Secretariat was incorrect in basing the refusal of his initial application on the exception relating to the protection of court proceedings, as provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001.
4. After examination of the application the Council, in its decision of 7 December 2009, came to the conclusion, that public access to the requested documents, other than those already made available to the public by the ICTY in its court records database had to be refused in accordance with the third indent of Article 4(1)(a) (protection of international relations) and the second indent of Article 4(2) (protection of court proceedings) of Regulation (EC) No 1049/2001.
5. On 10 February 2010, the applicant brought an action at the General Court against the Council, seeking annulment of that decision.
6. The Council submitted its defence on 7 May 2010.

7. On 3 October 2012, the General Court partially annulled the Council's decision "in so far as [the applicant] was refused access to correspondence between the Council and [the ICTY], and to documents other than the reports drawn up by the European Community's surveillance mission, annexed to that correspondence". The General Court rejected the remaining part of the action and confirmed, in particular, the protection of certain reports of Union observers in Croatia called "reports of August 1995" and "ECMM RC Knin Log reports" (hereafter "reports") under the exception of the protection of international relations set out under the third indent of Article 4(1)(4) of Regulation 1049/2001.¹
9. Pursuant to the first paragraph of Article 266 TFEU the Council has therefore proceeded to the re-examination of the documents concerned by the partial annulment of its previous decision ("documents concerned") in accordance with the Court's judgment. The applicant was informed of this ongoing re-examination by letter dated 21 December 2012. As part of this re-examination, the Council has consulted the ICTY pursuant to Article 4(4) of Regulation 1049/2001.
10. The Council has concluded that public access may be granted to the documents concerned listed in the table in the Annex to this decision to the extent that they do not contain the reports described above which the General Court confirmed to be protected under the exception of the protection of international relations set out under the third indent of Article 4(1)(4) of Regulation 1049/2001.
11. Consultations with the ICTY are continuing with respect to the remaining documents. These will therefore be the subject of a subsequent confirmatory decision as soon as the on-going consultation with the ICTY and their re-examination is completed.

¹ Points 96 and 98 of judgment T-63/10.

Table Documents concerned to be made public at current stage

Document reference number in case C-63/10	Date	Sender	Addressee	Subject	Contains redacted pages relating to protected reports
3	21/05/2008	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
5	16/06/2008	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
9	26/09/2008	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
11	28/10/2008	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
12	16/01/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
14	17/04/2009	SG/HR Solana	Trial chamber I of the ICTY	reply to the request dated 3/4/2009	No
18	26/05/2009	SG/HR Solana	Trial chamber I of the ICTY	reply to request dated 12/5/2009	No
20	9/06/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
21	12/06/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
26	22/06/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
28	31/07/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
29	31/07/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
30	13/08/2009	SG/HR Solana	Trial chamber I of the ICTY	reply to request dated 19/6/2009	No
32	25/08/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
35	18/09/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
38	15/10/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
39	19/10/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes
40	09/11/2009	SG/HR Solana	Prosecutor Brammertz	transmission of documents	Yes