



CONSEIL DE
L'UNION EUROPÉENNE

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NOTE POINT "I/A"

du:	Groupe "Information"
au:	Coreper (2 ^{ème} partie)/Conseil
n° doc. préc.:	15143/09
Objet:	Accès du public aux documents - Demande confirmative 25/c/01/09

Les délégations trouveront en annexe un projet de réponse du Conseil à la demande confirmative 25/c/01/09, tel qu'il résulte de l'examen effectué par le Groupe "Information" lors de sa réunion du 23 novembre 2009.

Les délégations danoise, finlandaise et suédoise ont indiqué qu'elles voteraient contre ce projet de réponse. Les délégations DK, FI, NL et SE ont fait les déclarations ci-après:

DK: *"Le Danemark soutient la divulgation totale du document 17152/08 et la divulgation partielle des documents 15931/08 et 15958/08. Le Danemark estime en revanche que le document 16464/08 devrait être divulgué conformément à l'arrêt Turco (voir les affaires jointes C-39/05 P et C-52/05 P) et ne peut dès lors pas souscrire à la conclusion proposée."*

FI: *"La divulgation du document 16464/08 devrait être appréciée conformément à l'arrêt rendu par la Cour de justice dans l'affaire Turco, étant donné que ce document contient l'avis du service juridique d'une institution sur une question de droit qui se pose lors de l'examen d'une initiative législative. La Finlande estime que le caractère de ce document ne peut pas être considéré comme particulièrement sensible comme l'exige l'arrêt susmentionné. C'est pourquoi, la Finlande ne peut pas souscrire aux motifs fournis à l'appui du refus.*

Toutefois, en ce qui concerne la divulgation totale du document 17152/08 et la divulgation partielle des documents 15931/08 et 15958/08, la Finlande accepte les modalités de divulgation proposées."

NL: *"En ce qui concerne le document 16464/08, nous souscrivons à la décision de ne pas donner accès au document sur la base de l'article 4, paragraphe 3. Nous ne sommes toutefois pas d'accord avec l'argumentation concernant l'article 4, paragraphe 2, deuxième tiret. Une mention très générale et abstraite au risque que représente la divulgation des avis juridiques est faite aux points 11 et 12 en ce sens que la divulgation peut aboutir à ce que moins d'avis soient demandés ou rendus, voire à ce qu'aucun avis ne le soit. Or, dans l'affaire Turco, la Cour a estimé qu'invoquer un tel risque général et abstrait ne suffisait pas pour faire obstacle à la divulgation.*

Cet arrêt a précisé que le règlement n° 1049/2001 ne fait pas obstacle à ce que la divulgation d'un avis juridique spécifique, rendu dans le contexte d'un processus législatif, puisse être refusée, au titre de la protection des avis juridiques, mais uniquement lorsque ce refus concerne un avis ayant un caractère particulièrement sensible ou une portée particulièrement large allant au-delà du processus législatif en cause. Toutefois, dans un tel cas, l'institution concernée doit motiver de façon circonstanciée ce refus qui est raisonnablement prévisible et non purement hypothétique. C'est pourquoi nous ne pouvons pas souscrire à la formulation générale et abstraite des points 11 et 12."

SE: *La Suède se félicite de la divulgation du document 17152/08.*

La Suède se félicite également de la divulgation partielle des documents 15931/08 et 15958/08. La Suède estime toutefois que les positions de la Suède exposées dans les documents demandés devraient être divulguées dans leur intégralité, étant donné qu'elles sont déjà accessibles au public.

La Suède est en désaccord avec la décision concernant le document 16464/08, en particulier en raison de l'interprétation qui a été donnée de l'exception du secret visée à l'article 4, paragraphe 2, deuxième tiret (point 12 du projet de réponse). Cette interprétation n'est pas conforme à l'arrêt Turco. Il n'existe pas de véritable risque, raisonnablement prévisible et non purement hypothétique, que la divulgation du document demandé puisse porter atteinte à la protection des avis juridiques et son contenu n'a pas un caractère particulièrement sensible."

La majorité des délégations a marqué son accord pour que le résultat du vote soit rendu public.

Le Comité des représentants permanents est donc invité à suggérer que, lors de sa prochaine session, le Conseil:

- approuve, en point "A", le projet de réponse figurant à l'annexe de la présente note, les délégations danoise, finlandaise et suédoise votant contre;
- décide de publier le résultat du vote.

L'annexe n'est disponible qu'en anglais.

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.