



**KUNSILL
TAL-UNJONI EWROPEA**

**Brussell, 22 ta' Marzu 2011 (25.03)
(OR. en)**

6786/11

**INF 18
API 12
JUR 67**

NOTA PUNT "I/A"

minn : Grupp ta' Hidma dwar l-Informazzjoni
lil : Coreper (parti 2)/Kunsill

Nru. dok. preċ.: 6785/11

Sugġett: Aċċess pubbliku għal dokumenti
- Applikazzjoni ta' konferma Nru 04/c/01/11

Id-delegazzjonijiet isibu meħmuż abbozz ta' twegiba mill-Kunsill għall-applikazzjoni ta' konferma Nru 04/c/01/11, kif tinsab wara l-eżami mill-Grupp ta' Hidma dwar l-Informazzjoni fil-laqgħa tiegħu tat-18 ta' Marzu 2011.

Id-delegazzjoni Daniża, Finlandiża u dik Svediża indikaw li kienu ser jivvotaw kontra l-abbozz ta' twegiba u għamlu d-dikjarazzjoni li ġejja:

"Id-Danimarka, il-Finlandja u l-Isvezja huma tal-fehma li l-partijiet li fadal tad-dokument ma jaqgħux, għall-anqas mhux interament, taħt l-eċċezzjoni msemmija. Il-Konvenzjoni hija ta' natura speċjali u l-objettivi tal-UE fil-proċess ta' negozjar huma bbażati b'mod wiesa' fuq it-test tat-Trattat u/jew tal-protokoll meħmuż miegħu, u l-aċċess għad-dokument għandu jigi estiż mill-inqas għal dawn il-partijiet."

Il-maġġoranza tad-delegazzjonijiet qablet li jiġi ppubblikat ir-riżultat tal-votazzjoni.

Il-Kumitat tar-Rappreżentanti Permanenti huwa għaldaqstant mitlub jissuġġerixxi li l-Kunsill, fil-laqgħa li jmiss tiegħu:

- jirreġistra l-qbil tiegħu mal-abbozz ta' twegiba anness għal dan id-dokument, bħala punt "A", bid-delegazzjoni Daniża, Finlandiża u dik Svediża jivvotaw kontra,
- jiddeċiedi li jippubblika r-riżultat tal-votazzjoni.

L-Anness huwa disponibbli bl-Ingliż biss.

DRAFT**REPLY ADOPTED BY THE COUNCIL ON**
TO CONFIRMATORY APPLICATION No 04/c/01/11,
made by e-mail on 17 February 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 9689/10 (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 2009/937/EC, Euratom - OJ L 325 of 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 9689/10 (classified RESTREINT UE) which is a note from the Presidency to delegations and contains the draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR).
2. In its reply dated 27 January 2011, the General Secretariat refused public access to the document pursuant to Article 4(1)(a), third indent (protection of the public interest with regard to international relations) and Article 4(3) (protection of the Council's decision-making process) of the Regulation.
3. In his confirmatory request made on 17 February 2011, the applicant argues that keeping the negotiating texts secret for Union citizens is in conflict with the principles of transparency, accountability and decision-making as close as possible to the citizen. According to the applicant, these principles are of increased importance in the context of international negotiations on the ECHR. Referring to Article 6(2) of the Treaty on European Union (TEU), he maintains that these negotiations have a constitutional dimension. Pursuant to the applicant, there is thus overriding public interest in releasing the document. Furthermore, the applicant contends that certain parts of the negotiating mandate can be derived from two public Council documents and that at least those parts of the mandate should therefore be released. Finally, the applicant explains that he requests access to the document under scrutiny for professional purposes.

4. The Council has examined the above-mentioned document in the light of the applicant's arguments and has come to the following conclusion:
5. The document concerned contains the text of the draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the ECHR, as it arose from the discussions of the Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP), the Council's preparatory body dealing with the proposal, on 6 May 2010.
6. The Commission submitted its Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement of the EU to the ECHR on 17 March 2010 (SEC(2010) 305 final/2). After examination of the draft by the Working Party, the Council adopted the Decision on 4 June 2010. On 7 July 2010, the negotiations on the accession of the EU to the ECHR were formally launched and are still on-going.
7. The Council considers that release to the public of document 9689/10 containing the text of the above-mentioned draft Council decision would reveal the Union's strategic objectives to be achieved in the international negotiations in question and would thereby enable the Union's negotiating partners to assess the measure of the Union's willingness to compromise. With regard to the applicant's reference to Article 6(2) TEU, it should be born in mind that it is this same provision that requires the Union to ensure that accession of the Union to the ECHR does not affect the Union's competences as defined in the Treaties.

For all of these reasons there is a real risk that disclosure of the Union's negotiating mandate to the public would weaken the Union's negotiation position and hamper the sensitive overall process of accession to the ECHR. Disclosure would thus undermine essential public interest as regards international relations under Article 4(1)(a), third indent of Regulation 1049/2001.

8. Moreover, disclosure of a preparatory document relating to the position of the Union in the negotiations would, beyond the ongoing negotiating process, jeopardize the climate of confidence among those actors directly or indirectly involved in those negotiations who trust that negotiating objectives will not be disclosed. This could have negative consequences for future international negotiations to be conducted by the Union.
9. Furthermore, the Council cannot share the applicant's contention that, since "[t]he Council has already disclosed indirectly the substance of" certain parts of the negotiating mandate in publicly available Council documents, at least those parts of the mandate should be released. The detailed wording of the mandate as such has never been officially released to the public by the Council. Public access to the exact wording of the mandate or parts of it would reveal to anyone, including those involved in the negotiations, the precise content and limits of the negotiating directives. As stated above, releasing such information to the public would weaken the Union's negotiating position and hamper the sensitive overall process of accession to the ECHR.
10. The Council cannot agree either with the applicant's argument that access should be granted to those parts of the mandate that allegedly do not directly concern the conduct of negotiations such as accession of the Union to Protocols to the ECHR. First, the accession process of the Union to the ECHR consists of a combination of unilateral acts and multilateral negotiations that are intrinsically linked. Second, it is clear that the exception covering international relations applies to both unilateral acts and international negotiations involving the Union.

11. While the Council understands the applicant's interest in inspecting the document for professional purposes, it considers that it is not possible to grant the applicant privileged access, since the institution is obliged, when releasing a document to the public, to do so *erga omnes*¹.
12. As regards the alleged existence of an overriding public interest in releasing the document, the legislator balanced the principle of the transparency of the institutions' decision-making when it laid down the general principles and limits on the right of public access to documents in Regulation (EC) No 1049/2001. The exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of the public interest as regards international relations, are mandatory and do not comprise an "overriding public interest" clause. In consequence, once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access ²
13. For the above-mentioned reasons the Council concluded that full public access to document 9689/10 must be refused pursuant to Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of the public interest with regard to international relations).
14. The Council has examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the document and decided that partial access may be given to the following parts of the document which are not covered by the exception, namely:
 - Pàgini 1 u 2, u wkoll
 - the text of the draft Council Decision on pages 3 and 4, except Article 5.

A partially declassified version of document 9689/10 which includes the parts listed above is contained in document 9689/10 EXT 1.

¹ Article 10(2) of Annex II to the Council's Rules of Procedure, OJ L 325 of 11.12.2009, p. 35.