



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 1)/Council

No. prev. doc.: 15704/08

Subject : Public access to documents
- Confirmatory application 20/c/01/08

Delegations will find enclosed a draft reply from the Council, as it stands after examination by the Working Party on Information at its meeting on 25 November 2008, to confirmatory application 20/c/01/08.

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.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION 20/c/01/08
made by e-mail on 12 November 2008 to the Council,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents

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 the following documents:
 - a) 15486/07 (RESTREINT UE) and 7095/08 (RESTREINT UE): cover notes containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement;
 - b) 7759/08 (RESTREINT UE): I/A Item Note from the Article 133 Committee containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement;
 - c) 12875/08, 13448/08 and 13750/08: working documents from the Commission Services concerning the Plurilateral Anti-Counterfeiting Trade Agreement;
 - d) 13382/08 and 13949/08: notes from the Presidency to Delegations concerning the Plurilateral Anti-Counterfeiting Trade Agreement; and
 - f) 13637/08 (RESTREINT UE): an outcome of the consultation of the Justice and Home Affairs Counsellors on 26 September 2008 concerning the Plurilateral Anti-Counterfeiting Trade Agreement, 3rd negotiating session 8-10 October 2008, Tokyo, Japan.

2. In its reply dated 6 November 2008, the General Secretariat granted the applicant access to the partially declassified versions of the documents under a) and b) (the applicant was thus granted access to documents 15486/07 EXT 1 + EXT 1 REV 1, 7095/08 EXT 1 + EXT 1 REV 1 and 7759/08 EXT 1). Access to those parts of the documents under a) and b) which were not declassified was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

As regards documents under c), d) and f), the General Secretariat refused the applicant access to them in their entirety pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

3. In his confirmatory request, the applicant claims that the anti-counterfeiting trade agreement (ACTA) is not a "standard" commercial agreement. According to the applicant, ACTA raises significant legal issues pertaining to the domain of civil liberties and it is therefore unacceptable that it is negotiated behind closed doors.
4. The Council has examined the above-mentioned documents in the light of the applicant's arguments and decided as follows:
5. The protection of intellectual property rights (IPR) is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness. In order to strengthen IPR enforcement practices and rules, the United States of America and Japan have presented an initiative for a new Anti-Counterfeiting Trade Agreement (ACTA).

On 20 November 2007, the Commission submitted a Recommendation to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement, in other words to join the ACTA negotiating process. A revised version of the Recommendation was submitted to the Council by the Commission on 29 February 2008.

According to the Commission, ACTA will establish, among nations committed to strong IPR protection, a common standard for IPR enforcement to combat global infringements of intellectual property rights by increasing international cooperation and coordination among enforcement authorities, promoting technical assistance and partnerships with industry, defining the framework of practices that contribute to effective enforcement of IPRs, and strengthening relevant IPR enforcement measures themselves. The definite scope of ACTA is, however, still very much open and under negotiation.

Documents 15486/07, 7095/08 and 7759/08

6. Documents 15486/07 and 7095/08 are cover notes containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement (ACTA). In the reply of the General Secretariat to the applicant's initial request for access, the applicant was granted access to the explanatory memorandum of the Commission. However, access to the recommendations of the Commission as well as the directives for the negotiation was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

7. Document 7759/08 (RESTREINT UE) is a I/A Item Note from the Article 133 Committee containing a Recommendation from the Commission to the Council to authorise the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement (ACTA). In the reply of the General Secretariat to the applicant's initial request for access, the applicant was granted access to pages 1-2 (except parts of point 3). However, access to the directives for the negotiation in annex I as well as the draft joint statement by the Council and the Commission concerning the ACTA negotiations was refused pursuant to Article 4(1)(a) of the Regulation (protection of the public interest with regard to international relations).

8. It is recalled that the exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of public interest as regards international relations, are mandatory. In consequence, once it is established that the requested document (or parts of it) 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. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests, such as those invoked by the applicant in his confirmatory application.
9. The Council considers that full release of these documents to the public would enable the EU's negotiating partners to assess the measure of the EU's willingness to compromise. This would prejudice the EU's position in the efficient conduct of these negotiations. For these reasons, the Council confirms the General Secretariat's decision to grant partial access to these documents as set out in its reply to the applicant of 6 November 2008.

Documents 12875/08, 13448/08 and 13750/08

10. Documents 12875/08, 13448/08 and 13750/08 are working documents from the Commission Services concerning the ACTA. The first two documents contain, respectively, the draft EU reaction to Japan/U.S. Joint proposal on Civil Enforcement and the revised draft EU reaction to the same proposal. Document 13750/08 contains a compilation of all comments provided by ACTA partners on the civil enforcement chapter. All three documents contain detailed information on the different ACTA partners' positions with regard to the sensitive subject of civil judicial proceedings concerning the enforcement of intellectual property rights, as well as comments concerning other negotiating partners' positions.
11. The Council considers that, given the sensitive content of the documents, their full release to the public would seriously undermine the protection of the public interest as regards the EU's international relations. Disclosure would negatively affect the climate of confidence in the on-going negotiations and hamper open and constructive co-operation, which is essential in this process. Moreover, if the EU's negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations.

12. Full access to documents 12875/08, 13448/08 and 13750/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).
13. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the documents form an inseparable whole.

Documents 13382/08, 13637/08 and 13949/08

14. Documents 13382/08 and 13949/08 are notes from the Presidency to delegations and contain comments on the draft Community contribution made in response to a Japan-US joint document proposing civil law measures to be included in ACTA. These documents have been drafted on the basis of discussions in the meetings of the Working Party on Intellectual Property on 11 September (subgroup "Patents") and 6 October 2008 (subgroup "Copyright").

Document 13637/08 (RESTREINT UE) is an outcome of the consultation of the Justice and Home Affairs Counsellors on 26 September 2008 concerning the Japan-US joint proposal on draft criminal law measures to be included in ACTA. The document has been drafted in view of the 3rd negotiating session on ACTA on 8-10 October 2008 in Tokyo, Japan.

15. All three above-mentioned documents contain detailed information on the EU's position in the framework of the negotiations on ACTA. The Council considers that full disclosure of these texts would reveal the EU's strategic objectives to be achieved in these negotiations. It would thereby compromise the overall conduct of the on-going negotiations and thus be prejudicial to the EU's interest in the efficient conduct of such negotiations.

16. Full access to documents 13382/08, 13637/08 and 13949/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).

17. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the documents form an inseparable whole.
