CONSEJO DE LA UNIÓN EUROPEA

Bruselas, 19 de febrero de 2009 (24.02)
(OR. en)

5955/09

INF 10
API 9
JUR 49

NOTA PUNTO "I/A"

del: Grupo "Información"
al Coreper (2.ª parte)/Consejo
n.º doc. prec.: 5954/09
Asunto: Acceso del público a los documentos
- Solicitud de confirmación 02/c/01/09

Adjunto se remite a las Delegaciones un proyecto de respuesta del Consejo, según resulta de los trabajos del Grupo "Información" en su reunión del 19 de febrero de 2009, a la solicitud de confirmación 02/c/01/09.

Por consiguiente, se invita al Comité de Representantes Permanentes a sugerir al Consejo que, en su próxima sesión, haga constar en acta, como punto "A", su aprobación del proyecto de respuesta que figura en el anexo del presente documento.

El Anexo sólo existe en inglés.

1. The applicant refers to the following documents:

   a) 13750/08 and 17167/08: working documents from the Commission Services concerning the Plurilateral Anti-Counterfeiting Trade Agreement;

   b) 13949/08 and 17249/08: notes from the Presidency to Delegations concerning the Plurilateral Anti-Counterfeiting Trade Agreement;

   c) 16927/08, 16928/08 and 16989/08: notes from the Presidency to the Working Party on Intellectual Property (Copyright) concerning the Plurilateral Anti-Counterfeiting Trade Agreement; and

   d) 15004/08, 15588/08 and 15588/1/08 REV 1 (all RESTREINT UE): outcomes of the consultations of the Justice and Home Affairs Counsellors on 29 October 2008 and the Friends of the Presidency Group on 11 November 2008, respectively, concerning Chapter 2 of the Plurilateral Anti-Counterfeiting Trade Agreement "Draft Criminal provisions").
2. In its reply dated 12 January 2009, the General Secretariat refused the applicant access to the above-mentioned documents in their entirety pursuant to Articles 4(1)(a) (protection of the public interest with regard to international relations) and 4(3) (protection of the decision-making process of the Council) of the Regulation.

3. In his confirmatory application, the applicant asks the Council to include Article 255 of the EC Treaty as a legal basis for its deliberations claiming that "in some cases the way in which implementing legislation is actually put into practice may stand in the way of the exercise of rights under Article 255 of the EC Treaty, as demonstrated by the Turco case". He also asks the Council to consider whether Article 2(6) is applicable to the documents under scrutiny and whether acts of the institutions implementing instruments of international law are involved in this case.

Furthermore, the applicant disputes the claim that trade negotiations are covered by "international relations" within the meaning of Article 4(1)(a). He goes on arguing that "the Secretariat's choice of words supports the view that trade negotiations as such are not directly the subject of "international relations", but may simply have a bearing on international relations". According to the applicant, the Anti-Counterfeiting Trade Agreement is only a trade agreement in terms of its legal form; in actual fact, it constitutes a sui generis change of forum compared with more transparent fora for international debate. The Commission's pronouncements on the content of the Agreement make it clear that the subject of the negotiations is regulatory in nature and extends to areas not yet covered by acts of Community law, including criminal penalties; it may perhaps extend beyond trade-related issues, circumventing usual legislative procedures at international level. This is why, in the applicant's view, disclosure [of documents concerning ACTA] is essential for effective public and parliamentary scrutiny of the procedure.

The applicant also refers to a European Parliament Resolution of 18 December 2008 (P6-TA-2008-0634), which calls on the Council not to apply the said exceptions from Article 4 in respect of ACTA-related documents.
4. The Council has examined the above-mentioned documents in the light of the applicant's arguments while taking the following elements into consideration:

At the outset, the Council would point out that Article 255 TEC confers the right of access to documents on any citizen and any natural or legal person residing or having its registered office in a Member State, subject to the general principles and limits on the public access laid down by the legislator. Regulation 1049/2001 implements that Article by giving the fullest possible effect to the right of public access and by laying down the general principles and limits on such access. The Council takes its decisions on public access to documents in full compliance with Article 255 TEC and Regulation 1049/2001.

5. As to the subject-matter of the applicant's request, 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 on 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.
6. Documents 13750/08 and 17167/08 are working documents from the Commission Services concerning the ACTA and contain a compilation of all comments provided by ACTA partners on the civil enforcement chapter. Both 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.

7. Documents 16927/08, 16928/08 and 16989/08 are notes from the Presidency and contain, respectively, a proposal by Japan for a chapter on international cooperation to be included in ACTA, a proposal by Japan for a chapter on enforcement practices to be included in ACTA and a non-paper by the United States on Internet and technology provisions.

8. The Council considers that, given the sensitive content of the documents, their 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 by undermining the necessary mutual trust among the negotiating parties and thus 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.

As to the applicability of Article 2(6) of the Regulation to the applicant's request, it must be recalled that in accordance with the said Article, the Regulation "shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them". That provision is aimed at ensuring the conformity of the Regulation 1049/2001 with instruments of international law or acts implementing them in the field of the right of public access. Since the ACTA negotiations are aimed at a Plurilateral Anti-Counterfeiting Trade Agreement and thus do not concern the right of public access to documents, and, in addition, they have not been concluded, they are not relevant for the purposes of applying Article 2(6) of the Regulation.
The applicant claims that trade negotiations are not covered by the protection provided to "international relations" under the third indent of Article 4(1)(a) of the Regulation. In this respect, the Council wishes to recall that it is settled case-law that the international relations exception is not limited to documents relating to common foreign and security matters but may also protect documents which relate to issues falling within the scope of the EC Treaty, such as trade matters (see T-264/04 WWF-EPO v Council, para. 41.)

9. Public access to documents 13750/08, 16927/08, 16928/08, 16989/08 and 17167/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).

Regarding the applicant's argument according to which a clear public interest exists in the transparency of documents relating to the ACTA negotiations, as demonstrated by the European Parliament's resolution on the matter, it must be underlined 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. Accordingly, after having determined that the conditions were met for the application of the international relations exception pursuant to Article 4(1)(a), third indent of the Regulation, the Council is bound to refuse access to the requested document, without the possibility of weighing the need for protection of the requested documents against the public interest in the disclosure of the document, as evoked by the applicant.

10. 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 13949/08, 15004/08, 15588/08, 15588/1/08 REV 1 and 17249/08

11. Document 13949/08 is a note from the Presidency to delegations containing comments on the draft Community contribution made in response to a Japan-US joint document proposing civil law measures to be included in ACTA. Document 17249/08 is a note from the Presidency to delegations and contains an outcome of the discussions on proposals from Japan on
international cooperation and enforcement practices and on a non-paper submitted by the United States delegation on Internet and technology provisions. These documents have been drafted on the basis of discussions in the meetings of the Working Party on Intellectual Property (subgroup "Copyright") on 6 October and 9 December 2008, respectively.

Documents 15004/08, 15588/08 and 15588/1/08 REV 1 (all three RESTREINT UE) contain the outcome of consultations of the Justice and Home Affairs Counsellors on 29 October and 11 November 2008, respectively, concerning the joint Japan-US joint proposal on criminal provisions to be included in ACTA. The documents have been drafted in view of the 4th negotiating session on ACTA on 15-18 December 2008 in Paris.

12. All five above-mentioned documents contain detailed information on the EU's position in the framework of the negotiations on ACTA. The Council considers that 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.

13. Public access to documents 13949/08, 15004/08, 15588/08, 15588/1/08 REV 1 and 17249/08 is therefore denied pursuant to Article 4(1)(a), third indent, of the Regulation (protection of the public interest as regards international relations).

14. 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.