"Unitary patent" and court system – Law-making in camera

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This article reflects the personal opinion of the author.

As it is well known, the "unitary patent" package has been adopted and now the ratification of the intergovernmental Agreement on the court system by a certain quorum of the Member States is necessary for the "unitary patent" system to enter into force. Less well known is the fact that, during the legislative process, circumstances were withheld from the public which the political front apparently regarded as dangerous for the entry into force of the "legislative package". An exemplary case is Council document 15856/11, an opinion of the Council's Legal Service on the compatibility of the "unitary patent" court system's amended structure with opinion 1/09 of the European Court of Justice (CJEU). Until very recently, this document was available to the public only in extensively blackened form. Requests for complete access to the document filed on the basis of EC Regulation No 1049/2001 were repeatedly refused on the ground that this could delay the ratification process in the Member States or even call into question the entry into force of the Agreement. The document, additional parts of which were made accessible to the public shortly before the publication of this article, shows why: In it, the Legal Service notes that the structure of the adopted court system may still violate European law. A report on the strange understanding of transparency and democracy exercised in the legislative proceedings for the "unitary patent" package.

I. The mechanisms of EU law-making

In an article in issue 52 of the German magazine DER SPIEGEL from the year 1999, the Luxemburg Prime Minister *Jean-Claude Juncker* has been cited as describing the EU law-making mechanisms as follows (http://www.spiegel.de/spiegel/print/d-15317086.html):

> *"We decide on something, then put it on the table and wait a while to see what happens. If there is then no yelling and no uprising, because most people do not understand what has been decided, we continue – step by step until there is no return."*

It appears that this approach, which is remarkable in itself, has been refined in relation to the "unitary patent" package in that the possibilities for the public to gain an insight into the legislative proceedings were reduced to such an extent that a "*yelling*" or even an "*uprising*" were no to be expected. Apparently, circumstances which could have given rise to a controversial debate of the legislative project were withheld from the public.

A good example for this is the meeting of the EU-Parliament's Legal Affairs Committee on 19 November 2012, in which – in camera and without any publicly accessible documentation – the "compromise proposal" on articles 6 to 8 of the "Unitary patent" Regulation was discussed and considered acceptable despite the rapporteur in charge calling it *"sub-sub-suboptimal"* and *"a bad solution"*, for the express reason that after more than 30 years of negotiations, they wanted to present to the public a unitary European patent (for more details on this meeting cf. *Stjerna*, „Unitary patent" and court system – The „sub-sub-suboptimal compromise" of the EU Parliament", accessible at www.stjerna.de, section "Unitary patent"). An audio recording of this meeting, which had subsequently become public, painfully demonstrates to the professional circles the low significance attributed in the negotiations to the "unitary patent" system's balance and practical suitability and at the same time clearly illustrates why closed doors were preferred at critical points of the negotiations.

For the political actors, this approach of an exclusion of the public as far as possible from the negotiation contents has the tremendously helpful side effect that someone having no information will more likely be tempted to believe the information provided by the "official level" – for instance through the frequent political press statements – and to accept it without criticism. This shielding of substantial contents of the legislative proceedings from the public is certainly useful for the political protagonists, but it is, of course, devastating from a democratic point of view, especially in terms of the rules on transparency adopted by the EU itself.

II. Transparency in the EU legislative process – Legal requirements

Before some events from the legislative process on the "unitary patent" package are set out in more detail, it is worth to briefly describe the EU rules on transparency which form the legal background for these events.

1. Art. 15 TFEU and Art. 42 EU Charter of Fundamental Rights

According to Art. 15 (1) of the Treaty on the Functioning of the European Union (TFEU), *"the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible" – thus with the highest possible degree of openness –, "in order to promote good governance and ensure the participation of civil socie-*

ty". Art. 15 (3) TFEU grants to any citizen of the Union as well as any natural or legal person residing or having its registered office in a Member State the *"right of access to documents of the Union institutions, bodies, offices and agencies"*, regardless of the medium used for these documents, this subject to *"the principles and the conditions to be defined in accordance with this paragraph"*. This right of access to documents has fundamental right status, cf. Art. 42 of the European Union Charter of Fundamental Rights.

2. Access to documents under Regulation No 1049/2001

The *"principles and conditions"* mentioned in Art. 15 (3) TFEU are defined in more detail in Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter "R" and "Regulation 1049/2001").

a) Principle: Greatest possible openness

Recital (2) of Regulation 1049/2001 states the following guiding principle:

> *"Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union."*

Accordingly, any documents of the European Parliament, the Council and the Commission – the so-called "institutions" (Art. 1 lit a) R) – are to be made available to the public, "document" in this sense being any *"any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"* (Art. 3 lit a) R). Said "institutions" are allowed *"to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks"* (Art. 2 and recitals (6) und (11) R).

b) Grounds for a refusal of access

The exceptions under which the general right to access can be denied are stipulated in Art. 4 R, distinguishing between absolute and relative grounds for refusal. In case of the former (Art. 4 (1) R), a refusal of access is obligatory, in the latter (Art. 4 (2), (3) R), it can nonetheless be allowed if *"an overriding public interest in disclosure"* is given.

Art. 4 (6) R states that access to a document can be refused only insofar as an exception to the general right to access applies. As a consequence, documents for parts of which an exception is claimed to apply are published with a reference of limited accessibility (*"Document partially accessible to the Public"*), the passages falling under the exception are removed from the document – which is indicated by a respective remark (*"Deleted"*). The procedure for access is explained in more detail in the respective context afterwards.

III. Access to documents in the legislative procedure for the "unitary patent" package

The legislative procedure for the "unitary patent" package rather gave the impression that the principle of greatest possible openness was inverted and the public excluded from any information which could have provided grounds for questioning the politically desired creation of a "unitary patent" and court system.

1. Council document 15856/11

In December 2011, patent attorney *Axel H. Horns* posted an article on his blog (http://blog.ksnh.eu/en/2011/12/18/eu-council-something-to-hide-might-legal-opinion-tun-out-to-be-a-bombshell/) concerning Council document 15856/11 titled "*Draft agreement on the European Union Patent Jurisdiction (doc.13751/11) - compatibility of the draft agreement with the Opinion 1/09*" of 21 October 2011 (the document is accessible at www.stjerna.de).

This document is an opinion of the Council Legal Service in relation to the compatibility of the revised court system structure with opinion 1/09 of the CJEU, in which the initial structure had been rejected as incompatible with European law. On its first page, the document is marked *"Partially accessible to the public"*, indicating that it contained legal advice protected under Article 4 (2) R and would thus only partially be accessible to the public. Accordingly, after the first five pages, on which already a few paragraphs are removed, the complete remainder of the overall 14 pages is deleted. Based on Regulation 1049/2001, *Horns* had filed a request for full access to the document which was refused on very remarkable grounds (cf. his blogpost ibidem.).

2. Initial application for access to Council document 15856/11

The Council's obscure reply led me to filing an own request for access to document 15856/11.

If someone claims access to a document which is not entirely accessible to the public, a so-called "initial application" pursuant to Art. 6, 7 R has to be made, the easiest way to do so being respective online pages of the "institutions" for access requests (for Council documents www.consilium.europa.eu/documents?lang=en).

Such application shall be handled promptly, generally within 15 working days after its registration either access to the document in question has to be granted or this has to be refused with written reasons (Art. 7 (1) R).

a) The Council's reply of 24 January 2012

I filed my initial application on 27 December 2011. On 24 January 2012 I received a reply from the Council's General Secretariat (accessible at www.stjerna.de), denying full access based on three grounds of refusal: The "protection of international relations" (Art. 4 (1) (a), third indent R), the "protection of legal advice" (Art. 4 (2), second indent R) and the "protection of the Council's decision-making process" (Art. 4 (3) sentence 2 R, in the reply erroneously referred to as "Article 3").

They commented as follows (underlining added):

> *"(...) Document 15856/11 is an opinion of the Council's Legal Service related to a draft agreement on the European Union Patent Jurisdiction as elaborated by the Presidency of the Council in September 2011. That agreement is designed as an instrument of international law to which the Union itself would not become a party. The opinion requested by the Council analyses the compatibility of the said draft agreement with Opinion 1/09 of the Court of Justice of the European Union. It therefore contains legal advice except for its paragraphs 1, 2 (first sentence) and 4 to 15. That legal advice is related to ongoing deliberations in the Council. To begin with, these deliberations are for several reasons politically and legally particularly complex and sensitive.*
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> *First, they are politically related to an ongoing decision-making process on the creation of a unitary patent protection, a process that is in itself subject to controversial debate. Second, political decisions are in this case particularly shaped by and conditional upon complex legal considerations. Finally, participating Member States would have to implement a political agreement by means of ratification of an instrument of international law. This could give raise* [sic] *to further political and legal debate in the ratifying Member States. The European Court of Justice has explicitly recognised the possibility to withhold legal advice that is particularly sensitive.*
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> *It follows that divulgation of the legal advice in question 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 this legal advice be disclosed to the public, may lead members of the Council to display caution when requesting written advice in such politically and legally complex and sensitive matters from its Legal Service. Moreover, the Legal Service could come under external pressure which could affect the way in which legal advice is 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 intervene in proceedings before the Union courts.*
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> *In addition, public release of document* [sic] *would risk to further complicate the ongoing complex and sensitive decision-making process described above thus compromising the Council's capacity to find agreement on the dossier.*
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> *Finally, the described negative effects of divulgation to the public could equally affect the ratification process in the Member States willing to participate in the envisaged agreement. This would ultimately delay or put into question the entry into force of the envisaged international agreement. For that reason public disclosure of the document would undermine the protection of international relations of the Member States.*
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> *In the view of the foregoing, the General Secretariat is unable to grant you full access to this document, since the disclosure of the document would prejudice three of the protected interests under Regulation 1049/2001, notably the protection of international relations under Article 4(1)(a), third indent, the protection of legal advice under Article 4(2), second indent and the protection of the Council's ongoing decision-making process under the first subparagraph of Article 3 of the Regulation.*
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> *The General Secretariat of the Council has also examined whether there exists an overriding public interest in disclosure which would prevail over the protection of legal advice. The General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case which also involves issues of international relations, prevail over the protection of legal advice so as to justify disclosure of the document. However, pursuant to Article 4(6) of the Regulation, you may have access to paragraphs 1, 2 (first sentence) and 4 to 15 of the document, which are not covered by any of the exceptions under the Regulation."*

The position of the Council appeared to be as follows:

Since the political decision making process is said to be *"subject to controversial debate"* and *"conditional upon complex legal considerations"* and as the implementation of a political agreement would have to take place through an intergovernmental Agreement which *"could give rise to further political and legal debate"* in the ratifying Member States, a refusal of access was considered necessary with regard to the "protection of international relations". Since this constitutes an absolute ground of refusal which cannot be outweighed by an overriding public interest in disclosure, its applicability alone would exclude full access to the document.

In addition, two further grounds of refusal were advanced.

A denial of access was regarded necessary for the "protection of legal advice", as the publication of an opinion prepared for members of the Council could cause them

to only cautiously request written opinions from their Legal Service in *"such politically and legally complex and sensitive matters"*. On the other hand, it was claimed that a publication could put the Legal Service under *"external pressure"* which could influence its unprejudiced and independent advice. Furthermore, a disclosure would adversely affect the Legal Service's ability to *"intervene effectively"* in court proceedings.

Finally, a refusal of access was considered necessary for the "protection of the Council's decision-making process", as a disclosure was held to *"further complicate"* the *"complex and sensitive decision-making process"* and could compromise an agreement on the dossier in Council. Moreover, it was held that the ratification process in the Member States could be influenced, leading to a delay or even a failure of the envisaged intergovernmental Agreement.

With regard to these two "relative" grounds of refusal, also an overriding public interest in a complete disclosure of the document was held to be missing, as the principle of openness would in the present case, which concerned *"issues of international relations"*, have no priority over the "protection of legal advice".

b) The invoked grounds of refusal

This argumentation is surprising in a number of respects.

First, the format of the communication is remarkable. It did not subsume certain facts under the grounds of refusal considered to be applicable, but instead merely provides some general statements which are followed by declaring applicable a number of refusal grounds. Likewise, an assessment for the presence of an overriding public interest in a disclosure was replaced by the simple allegation that such assessment would have taken place and that no respective public interests would be given.

This, at best, general assessment of the access request contradicts the case law of the CJEU, according to which the institution in question has to provide detailed reasons for a refusal of access (CJEU, C-506/08 P – *MyTravel v Commission*, para. 76):

> *"Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (Sweden and Others v API and Commission, paragraph 72 and case-law cited). Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (Sweden and Turco v Council, paragraph 43)."*

For none of the grounds of refusal regarded applicable by the Council an explanation fulfilling these requirements was provided.

The applicability of the mentioned grounds of refusal is also doubtful in substance. As indicated, the invoked exceptions of a "protection of legal advice" and a "protection of the decision-making process of the Council" can only hinder a disclosure in the absence of an overriding public interest in a disclosure. The CJEU has defined the requirements for the required balancing exercise as follows (CJEU, C-39/05 P and C-52/05 P – *Turco v Council*, para.s 45 f., underlining added):

> *"In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*
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> *Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."*

Furthermore (ibidem, para.s 67 ff., underlining added):

> *"As was pointed out in paragraphs 45 to 47 of this judgment, such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.*
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> *It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process.*
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> *That finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution con-*

cerned to give a detailed statement of reasons for such a refusal."

It is obvious that the Council's reply of 24 January 2012 does not meet this standard.

More serious than the aforementioned aspects are, however, the circumstances which are considered to justify, according to the Council's attitude, a refusal of access for the "protection of international relations" being, as mentioned, an absolute ground of refusal which cannot be overridden by a public interest in a disclosure. Insofar as the Council declared that a disclosure could *"give rise to further political and legal debate in the ratifying Member States"*, this may be true. However, it cannot be seen how such process which is inherent in any democratic legislative process should have to be avoided for a "protection of international relations". The position of the Council reads as if the Member States would have to be protected from a democratic discussion of a controversial legislative proposal. The opposite is true. If a legislative proposal needs to fear a public debate, it has, with some likelihood, considerable shortcomings.

Equally doubtful is the Council's reasoning that a disclosure would have to be denied as full access could *"affect the ratification process in the Member States willing to participate in the envisaged agreement"* and *"ultimately delay or put into question the entry into force of the envisaged international agreement"*. If there should really be a democratic state based on the rule of law and interested in reducing to a minimum public debate of a doubtful legislative proposal as to push through its quick ratification outside a democratic procedure, characterized by transparency, openness and public participation, this would be in clear contradiction to the guiding principle of Regulation 1049/2001 and, therefore, could not claim any confidentiality. If there are circumstances of such serious nature that their disclosure could cause a failure of the whole project, their suppression can hardly be justified with the "protection of international relations" as the creation of such illegitimate legislation is exactly what the principle of greatest possible openness and Regulation 1049/2001 aim to avoid.

3. Confirmatory application for access to Council document 15856/11

In case of a full or partial rejection of an initial application for access, the applicant can, within 15 working days after receipt of the respective communication, file a so-called "confirmatory application" for access (Art. 7 (2), 8 R). Also such confirmatory application shall be handled promptly, it has to be answered within 15 working days from its registration (Art. 8 (1) R).

I filed such confirmatory application for access to Council document 15856/11 with the Council on 31 January 2012, relying on the reasons set out before, namely an insufficient reasoning and the inapplicability of the advanced grounds of refusal (the confirmatory application is accessible at www.stjerna.de).

a) The Council's reply of 9 March 2012

In its reply of 9 March 2012, the Council rejected the confirmatory application (hereafter "Reply II", accessible at www.stjerna.de), emphasizing the grounds of refusal relied on in their reply to the initial application.

By way of introduction, the backgrounds for the preparation of document 15856/11 were described (Reply II, p. 3, para. 11 f., underlining added):

"It has to be recalled that the negotiations for the draft Agreement are taking place between 25 Member States ("contracting Member States") outside the legal and institutional framework established by the EU Treaties, where the envisaged judicial organisation will be created by means of an ordinary international treaty. If some of the preparatory work has been done in the Council's premises, making use of the Council's structures, this solution was chosen for reasons of convenience, in view of the close link between the envisaged draft Agreement and the draft Regulations implementing enhanced cooperation in the area of unitary patent protection, currently pending before the EU legislator.

This being said, bilateral discussions on the draft Agreement are currently being conducted at a high political level, entirely outside the Council's decision-making structures. Their aim is to secure a political agreement on the patent "package", i.e. the draft Agreement, and the two draft Regulations referred to above. While the compromise was broadly accepted in substance, further work is still needed before an agreement can be reached on all aspects. The aim is to find agreement on the last outstanding issue in the negotiating package, at the latest in June 2012. The patent package has most recently been referred to in the statement of the Members of the European Council at their informal meeting on 30 January 2012. As is normal in the context of complex negotiations, the various aspects of the package are closely inter-linked, which renders progress on the remaining issue - without re-opening already settled issues - very challenging."

aa) "Turco" case law not applicable

First of all, the Council declared inapplicable the mentioned "Turco" case law of the CJEU with its far-reaching requirements as to transparency, since document 15856/11 would not belong to a legislative procedure (Reply II, p. 4, para. 14, underlining added):

"The document has been requested by the Competitiveness Council on 29 September 2011. It should be recalled that, since it was not provided in the course of a legislative procedure, the Turco-case law invoked by the applicant is not applicable. However, the interest of transparency, openness and public participation has been duly taken into account by the Council when making its assessment."

This understanding is again surprising, as the "Turco" decision is by no way limited to documents from legislative procedures. The CJEU has, on the one hand, stated that its considerations would be *"of particular relevance"* in the mentioned situation (*Turco v Council* [ibidem], para. 44, cited above), but not that they would only apply there. On the other hand, in its "Turco" decision, the Court of Justice did not refer to documents from a legislative procedure, but to documents relating to legal questions *"arising when legislative initiatives are being debated"* (*Turco v Council* [ibidem], para. 67, cited above) – this applies to all statements that have a connection with a legislative procedure.

That the contents of document 15856/11 – as mentioned, an opinion of the Council Legal Service on the intergovernmental Agreement for the creation of the "unitary patent" court system – concern such legal questions and have a relation to a legislative procedure is obvious from the fact that the Agreement on the court system together with the Regulations on the "unitary patent" and the language regime, according to the will of all EU institutions involved, is meant to form a "legislative package". In its reply, the Council itself repeatedly emphasized this "package character" of the legislative proposal (cf. Reply II, para.s 11, 16, 20). Irrespective of this, according to the CJEU, Regulation No 1049/2001 *"imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process."* (*Turco v Council* [ibidem], para. 68) – note: "relating to" a legislative process, not "originating" from it.

bb) Refusal of access for the "protection of international relations"

In substance, the Council first explained why a refusal of access is required for a "protection of international relations" (Reply II, p. 4, para. 16, underlining added):

> *"With respect to the protection of the public interest as regards international relations under Article 4(1)(a), third indent of the Regulation, it follows from the above description of the context that bilateral negotiations between Member States on this complex and highly sensitive file are at a stage where there is for the first time a reasonable chance for an agreement between contracting Member States.*
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> *Nevertheless, it remains that the close connection between the various aspects of the package renders progress very challenging and there is a risk that already settled issues could be reopened if the legal advice in question was made public during the negotiating process. This is particularly true in case of the said draft Agreement. Its subject matter requires political decisions which are necessarily strongly shaped by and conditional upon complex and contested legal considerations.*
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> *Even in the framework of international negotiations which traditionally provide for a higher degree of confidential debate, it appears exceptionally hard to find an agreement. Therefore disclosure of the legal advice risks to negatively affect ongoing international negotiations between the contracting Member States."*

On the argument advanced in the confirmatory application, that the Member States would not need to be protected against a democratic debate of controversial legislative proposals, the Council commented as follows (Reply II, p. 5, para. 17):

> *"With respect to the applicant's argument that there is no need to protect contracting Member States from democratic debate on controversial legislative proposals, the Council would like to underline two separate aspects:*
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> *First, it is clear that the legal advice was neither requested nor provided with respect to a legislative procedure within the Union's institutions but with respect to international negotiations between contracting Member States.*
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> *Second, it must be noted that Article 4(1)(a) of the Regulation contains a mandatory exception for the protection the public interest as regards international relations. 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. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests. As it has been set out above, there is a concrete risk that the publication of the legal advice negatively affects international negotiations between the contracting Member States. That is why the exception under Article 4(1)(a) of the Regulations must be applied."*

Here again, reference was made to the contention advanced for the purported inapplicability of the „Turco" case law, that document 15856/11 would not belong to a legislative procedure, but would relate to *"international negotiations"* between contracting Member States. The repeatedly emphasized "package character" of the legislative project was ignored.

cc) Refusal of access for the "protection of legal advice "

Furthermore, a denial of access was regarded necessary for the purpose of "protection of legal advice" for the following reasons (Reply II, p. 5, para. 18 f.):

> *"As explained above, the ongoing international negotiations are at a critical stage, strongly conditional upon und* [sic] *shaped by contested legal considerations, and could be negatively affected by the release of the legal advice. This makes the requested legal advice exceptionally sensitive. Following a contentious political process, there is, in addition, a concrete risk that the draft Agreement or the draft Regu-*

lations implementing enhanced cooperation in the area of unitary patent protection will be contested before Union Courts.

Release of the Legal Service's opinion could therefore negatively affect its capacity to defend its position in court. Finally, there is a risk that Member States and the Council would be deterred from requesting such sensitive legal advice in similar situations in the future."

Again, the Council moved away from the initially alleged "danger" of an exertion of "external pressure" on the Legal Service, this reason had been rejected by the CJEU in the past anyhow (*Turco v Council* [ibidem], para. 64). Instead, it was indicated that a disclosure of the document could, in case of the expected legal disputes about "*the draft Agreement or the draft Regulations*" could limit the options of the Legal Service to defend *"its position"* in the Union courts, thus apparently to enable it to take positions inconsistent with those communicated in the opinion.

dd) Refusal of access for the "protection of Council's decision-making process "

The refusal of access was also justified with the "protection of Council's decision-making process" (Reply II, p. 6, para. 20), essentially repeating what was said in the reply to the initial application.

ee) No overriding public interest

Finally, the presence of probably overriding public interests in a disclosure was addressed and held not to be given (Reply II, p. 6, para. 21, underlining added):

"With respect to these two exceptions, the Council has carefully weighed the interests at stake. While the Council would underline that the Turco case-law invoked by the applicant applies only to legislative procedures, it has in any event thoroughly taken into account the interest of transparency, openness and public participation. Nevertheless, the Council is convinced that, in a context where the negotiations on the patent package involve exceptionally sensitive and essential interests, the public interests invoked by the applicant do not establish an overriding public interest in disclosure."

Primary reference was made to the allegedly inapplicable "Turco" case law of the CJEU. Nonetheless, the Council said that, following a *"thorough"* consideration of "*the interest of transparency, openness and public participation"*, they were *"convinced"* that no overriding public interest are given as *"exceptionally sensitive and essential interests"* would be affected. Again, the reasons for this *"conviction"*, especially what the mentioned interests are and why they are *"exceptionally sensitive"* and *"essential"*, were not substantiated further.

Although the reasoning for the denial of access was as unconvincing as in the reply to the initial application, I did not pursue the access request further (the complete or partial rejection of a confirmatory application entitles to start court proceedings against the institution at the General Court and/or to make a complaint to the Ombudsman (Art. 8 (1), (3) R in connection with Art. 263 (4), 256 (1) TFEU)).

b) The consultations in the Council on the reply to the confirmatory application

Very informative is an insight into the consultations held in the Council with regard to the reply. There are documents showing that voices from the Council itself indicated the contradiction in the line of argumentation with regard to the alleged inapplicability of the CJEU's "Turco" case law.

Council document 5926/12 of 2 March 2012 (accessible at www.stjerna.de) directed to a "Group Information" contains a draft reply to the confirmatory application which is apparently identical with the reply finally adopted, as it is described in more detail above. While the majority of delegations agreed to the draft reply, the Danish, Estonian, Slovenian, Finnish and Swedish delegations indicated that they would vote against it for the mentioned contradiction in the argument with regard to the allegedly missing relation of document 15856/11 to a legislative procedure. These Member States regarded a right to unlimited access as given, at least on the basis of an overriding public interest in a disclosure, and provided the following statement (document 5926/12, p. 1/2):

"Denmark, Estonia, Slovenia, Finland and Sweden cannot concur with the reasoning in the draft reply, which seems contradictory in first arguing that the negotiations are entirely outside the Council's decision-making structures but that there still is a need to protect the Council's decision-making process (because the draft Agreement and the two draft Regulations form a "package").

As regards the contents of the opinion, it would seem that even if a possible harm to decision-making or to the protection of legal advice could be demonstrated, there would be an overriding public interest in handing out the information, or at least more significant parts of it in line with Article 4(6) of Regulation 1049/2001."

In its meeting on 8 March 2012, the majority of the Council nonetheless adopted the draft version of the reply, while in addition to the mentioned Member States also Great Britain voted against the adoption (cf. Council document 7308/12 of 8 March 2012, p. 18, accessible at www.stjerna.de). The obvious contradiction in the reasoning underlying the rejection of the confirmatory application was accepted in order to prevent a complete disclosure of document 15856/11.

4. Further applications for access to document 15856/11

An access request can be filed repeatedly.

a) June 2013: Access refused

Horns filed a new request for access on 25 April 2013, thus at a time when the legislative process for the Regulations on the "unitary patent" and language regime was completed and the intergovernmental Agreement on the court system signed. With reply of 13 June 2013, the Council nonetheless refused access again (the reply is accessible at www.stjerna.de).

Now, the denial of access was now no longer based on the "protection of international relations" and the "protection of the Council's decision-making process", but only on the "protection of legal advice", especially in view of the nullity actions of Spain, currently pending at the CJEU against the Regulations on the "unitary patent" and the language regime (docket no. C-146/13 und C-147/13). Interesting is the fact that a "protection of international relations" was now no longer claimed, although the ratification of the Court Agreement by 13 Member States including Germany, France and the UK (cf. Art. 89 (1) of the Agreement) as it is required for the "unitary patent" package to enter into force, has not yet taken place, so that the danger initially described by the Council, namely that a full disclosure of document 15856/11 could *"ultimately delay or put into question the entry into force of the envisaged international agreement"*, should still be present.

b) November 2013: Access partially granted

On 22 October 2013, I also repeated my request for access to document 15856/11. With reply of 13 November 2013, the Council granted wider access and made the document accessible, apart from a large footnote (the reply and the released version of document 15856/11 are accessible at www.stjerna.de).

For the sake of brevity, the newly publicized contents of the document will not be presented in this article. Suffice it to say here that, as a result of their assessment, the Legal Service considers that the amendments made to the structure of the "unitary patent" court system since should suffice to overcome the shortcomings identified by the CJEU in opinion 1/09. However, they also note the possibility that the amended structure could still be found incompatible with European law by the CJEU, especially in terms of the relationship between the CJEU and the national courts of the Member States (document 15856/11, mn. 44):

> *"In the absence of precedents from case law, it is difficult to dispel all doubt as to whether the amendments that have been introduced are sufficient for the Court to consider the current draft agreement compliant with its Opinion. Indeed, as long as the UPC will remain formally separate from the national courts, it may still be considered by the Court as affecting "the very nature of the law established by the Treaties"."*

This clearly shows the basis of the Council's concerns, according to which a complete publication of the document could *"affect the ratification process in the Member States willing to participate in the envisaged agreement"* and *"ultimately delay or put into question the entry into force of the envisaged international agreement"* and why they did everything to keep it under wraps. At the same time, this again confirms that the legal viability of the "unitary patent" system is doubtful.

These doubts could have been clarified rather easily if one had been prepared to request, under article 218(11) TFEU, a further opinion from the CJEU on the compatibility of the amended structure with European law, as it had been suggested at an early stage (e. g. *de Visscher*, GRURInt 2012, 214 (220); *Stjerna*, Mitt 2012, 54 (59)). Apparently, another rejection of the plans by the CJEU was feared as this would have meant, pursuant to article 218(11) sentence 2 TFEU, a necessity for further revision or even the end of the project. Therefore, it was preferred to adopt a system the legal viability of which is – even according to the position of the Legal Service – at best unclear. It is self-explanatory that such approach does not foster the users' trust in the "unitary patent".

IV. Conclusion

The fact that a project of – according to the unanimous opinion of all circles involved – such fundamental importance for the European industry as that of a creation of a Community patent and related court system is carried out in such doubtful manner and in ignorance of fundamental democratic standards, is unsatisfactory.

Characteristic of the political protagonist's low sensitivity in relation to the importance which the system's legal solidity has for the users, is a statement of the Legal Affairs Committee's Chairman and rapporteur on the "unitary patent" court system, *Klaus-Heiner Lehne*, who, in addition, also is a lawyer and partner in the Düsseldorf office of the international law firm Taylor Wessing. In an interview for the German legal magazine „JUVE Rechtsmarkt" in January 2013, he was asked about the transparency deficits in the legislative process for the "unitary patent" which were criticized in the German professional public and commented as follows („JUVE Rechtsmarkt", issue 1/2013, p. 89, translated from German):

> *"In my opinion, this is rubbish* [in German: Stuss]. *There is no legislative procedure which is more transparent than that at the European level."*

The ratification process will reveal whether the Member States are equally convinced of this so-called „transparency" of the European legislative process and also how they will deal with the fact that – apart from the Regulations on the "unitary patent" and the language regime – also the court system's legal compatibility with European law is unclear.

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