



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

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Brussels, 24 January 2012

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Ref. 12/0004-ls/mf

Dear Mr Stjerna,

Your request of 27 December 2011 for access to document 15856/11 was registered on 3 January 2012 by the "Access to Documents" unit. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion :

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 1/09¹ 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. First, they are politically related to an ongoing decision-making process on the creation of a unitary patent protection,² 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

¹ Opinion 1/09, judgment of 8 March 2011, not yet reported.

² Cf. the Commission proposal for a Regulation of the European Parliament and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection and the Commission proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (Council document 11328/11).

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 rise

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 sensitive³.

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.

In addition, public release of document 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.

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.

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.

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.

³ Judgment of the European Court of Justice of 1 July 2008 in joined cases C-39/05 P and C-52/05 P, *Sweden and Turco / Council*, point 69.

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.

According to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply⁴.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosure

⁴ Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.