By e-mail to access@consilium.europa.eu
Council of the European Union
General Secretariat
Directorate-General F

Rue de la Loi, 175
1048 Brussels
Belgium

Rechtsanwalt
Dr. Ingve Björn Stjerna
[redacted]
E ingve.stjerna@[redacted]

Düsseldorf, 31 January 2012

Your reference 12/0004-ls/mf

Request of full access to document 15856/11 – Confirmatory application

Dear Mr. Thomsen,

I confirm receipt of your e-mail with your letter dated 24 January 2012 in which you reject my request to be granted full access to document 15856/11 based on Regulation (EC) No 1049/2001.

I hereby file a

confirmatory application

under Artt. 7 (2), 8 of Regulation (EC) No 1049/2001, requesting you to reconsider your position against the aspects set out below and to grant me full access to document 15856/11.

Reasons:

For the denial, you have relied on the exceptions of a protection of international relations (Art. 4 (1) (a), third indent of Regulation (EC) No 1049/2001; afterwards abbreviated "R"), a protection of legal advice (Art. 4 (2), second indent R) and - as far as I understand - a protection of the Council's decision-making process (Art. 4 (3) subparagraph 1 R).

It is not apparent from your letter how these provisions should justify a denial of full access to the requested document.

I.

No or inadequate reasons for denial of full access

1. It is already unclear why you consider the three mentioned exceptions applicable in the present case. On p. 1 and 2 of your letter, you make some general statements, ending on p. 2, sixth paragraph with the statement that "*in view of the foregoing*" the cited exceptions would oppose full access to document 15856/11.

2. Regulation (EC) No 1049/2001 intends to give the fullest possible effect to the right of public access to documents of the institutions (*Sweden and MyTravel Group plc v Commission*, C-506/08, para. 73; *Sweden and Turco v Council*, C-39/05 and C-52/05, para. 33; *Commission v Technische Glaswerke Ilmenau*, Case C-139/07, para. 51; *Sweden and Others v API and Commission*, C-514/07, para. 69). With regard to this principle of widest possible public access to documents, any exceptions have to be interpreted narrowly (*Sweden and MyTravel Group plc v Commission*, para. 73; *Sison v Council*, C-266/05, para. 63; *Sweden and Turco v Council*, para. 36; *Sweden and Others v API and Commission*, para. 73).

3. Against this background, the Court of Justice has clearly defined the requirements for an institution wanting to deny access to a document:

> "*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).*"
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> (*Sweden and MyTravel Group plc v Commission*, para. 76;
> cf. also *Sweden and Turco v Council*, para. 49;
> *Commission v Technische Glaswerke Ilmenau*, para. 53)

4. In your letter of 24 January 2012 (afterwards abbreviated "L"), these requirements are not met. With regard to none of the cited exceptions, it is specified how a disclosure could specifically and effectively undermine the interests protected in each of the

exceptions relied on. Consequently, it is also not explained why the alleged danger to the respective interests is considered to be reasonably foreseeable.

5. You rather provide some general statements and assumptions allegedly opposing a full disclosure of the document in question. Bearing in mind the mentioned principle of fullest possible effect to the right of public access to documents, it cannot be seen why "*politically and legally particularly complex and sensitive deliberations*" (p. 1, last para. L), a "*controversial debate*" (p. 1, last para. L), "*complex legal considerations*" (p. 1/2 L) or the fact that the "*participating Member States would have to implement a political agreement by means of ratification of an instrument of international law*" which "*could give raise to further political and legal debate in the ratifying Member States*" (p. 2, first two paragraphs L) and a possibility to "*ultimately delay or put into question the entry into force of the envisaged international agreement*." (p. 2, fifth para. L) should specifically and effectively undermine the interests protected by the cited exceptions in Art. 4 (1) (a) third indent R, Art. 4 (2), second indent R and Art. 4 (3) subparagraph 1 R.

6. Despite the fact that it is already not clear which of the cited statements, according to your opinion, justifies the application of which of the raised exceptions, all these considerations appears to be rather inherent in a democratic legislative process implying that they cannot justify an exception to the general right of public access to documents.

II.

Protection of legal advice (Art. 4 (2), second indent R

7. According to the Court of Justice, the exception relating to legal advice laid down in second indent of Article 4 (2) R must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice (*Sweden and Turco v Council*, para. 42).

(1)

8. The argument that disclosure of legal advice may allegedly lead to "*external pressure*" being imposed on the Legal Service has already been rejected by the Court of Justice (*Sweden and Turco v Council*, para. 64).

9. As to the allegations that a disclosure would cause the Legal Service to display caution and would affect its ability of an "*effective intervention in court proceedings*" no reasons

are stated why this should be the case (cf. *Sweden and Turco v Council*, para. 65; *Sweden and MyTravel Group plc v Commission*, para. 115 f. specifically requesting a substantiation of these reasons).

10. You furthermore state that the Court of Justice had recognized the possibility to withhold legal advice that is particularly sensitive, referring to para. 69 of the *Sweden and Turco* judgment (p. 2, para. 2 L). This statement of the Court of Justice expressly refers to legal opinions given in the context of a legislative process being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question (*Sweden and Turco v Council*, para. 36). Although the court has expressly stated that in such a case, the institution denying access would have to give a detailed statement of reasons for the refusal, it is presently not even substantiated sufficiently clear why document 15856/11 should be particularly sensitive. Already for this reason, the cited statement does not apply.

(2)

11. In any case, a disclosure would be justified by an overriding public interest in the sense of Art. 4 (2), last sentence R. The Court of Justice has stated with universal applicability how this assessment of an overriding public interest has to be executed:

> "*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.*
>
> ***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.*"
>
> (*Sweden and Turco v Council*, para. 44 f. (emphasis added))

The Court goes on:

> "*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*.
>
> ***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.****"*

(*Sweden and Turco v Council*, para. 67 f. (emphasis added))

12. In your letter of 24 January 2012, there is no reasoned examination of an overriding public interest whatsoever. On p. 2, last para. L you merely state that no such interest would be given, again without any further reasoning and without even specifying to which exception this statement refers.

13. Thus, a disclosure of document 15856/11 cannot be denied on the basis of Article 4 (2), second indent R.

III.

Protection of the Council's decision-making process (Art. 4 (3) subparagraph 1 R

14. On p. 3, sixth para. L, you state that you also cannot provide full access to the document in question with regard to "*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*". As set out above, it is assumed that you mean Art. 4 (3) subpara. 1 R. under which a disclosure can be denied if a disclosure of the document would "*seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

15. However, also insofar you do already not specify adequately why a disclosure should cause a serious undermining in the sense of Art. 4 (3) subpara. 1 R. Again, there is no detailed argumentation or reasoning why this should be the case.

16. Also in terms of Art. 4 (3) subpara. 1 R a disclosure can be justified by an overriding public interest. Also here, such assessment appears not to have taken place. At least, it does not satisfy the requirements defined by the Court of Justice (cf. above marginal

number 11) As already indicated with regard to Art. 4 (2), second indent R, your letter only contains a statement that such interest would not be present, without stating to which article this refers and without providing any substantiated reasons for this opinion.

17. For these reasons, also Art. 4 (3) subpara. 1 R cannot justify a non-disclosure of document 15856/11.

IV.
Protection of international relations (Art. 4 (1) (a), third indent R)

18. Finally, you state that a denial of full access would be demanded by a protection of international relations (Art. 4 (1) (a), third indent R). Also insofar, your letter lacks any substantiated reasoning why this should be the case and which aspects of international relations you regard as endangered by a full disclosure of document 15856/11.

19. As already indicated above (cf. mn. 5 f.), the general considerations brought forward on p. 1 and 2 L cannot justify a non-disclosure to protect international relations. The mentioned considerations, should they be directed to Art. 4 (1) (a), third indent R, are characterized by the interest in proceeding with the plans to establish a unitary patent protection system as quickly as possible and to finalize these plans with as little public debate as possible. The fact that a disclosure "*could give rise to further political and legal debate in the ratifying Member States*" (p. 2, paras. 1 and 2 L) has nothing to do with a protection of international relations, as this debate is - or at least should be - inherent in a system of a parliamentary democracy. If you really mean what you write, this would come down to the opinion that the member states of the European Union need to be protected from democratic debate on controversial legislative proposals. It can only be hoped that this is not what you mean.

20. The same applies to the statement a disclosure of the document "*to the public could equally affect the ratification process in the Member States willing to participate in the envisaged agreement*" as this would "*ultimately delay or put into question the entry into force of the envisaged international agreement*" (p. 2, fifth para. L). If there should be a democratic state interested in such a fast-track legislative procedure aiming at keeping public debate to a minimum and preferring a quick legislative enactment of possibly defective proposals over a democratic process characterized by transparency, openness and participation - I still hope there is no such state in the European Union -, such desire

would be anti-democratic and would certainly not be a valid consideration which could demand a protection of international relations.

21. Such understanding is necessary already in order to avoid a circumvention of the principle obligation to disclose the opinions of the Council's legal service relating to a legislative process stipulated by the Court of Justice (see above mn. 11).

22. Thus, also Art. 4 (1) (a), third indent R cannot justify a non-disclosure of document 15856/11.

For these reasons, the mentioned provisions cannot justify a rejection of my application of 27 December 2011. I request you to reconsider your decision.

Please treat this confirmatory application confidential, i. e. please do not make it public.

Yours sincerely

Dr. Ingve Stjerna
Rechtsanwalt