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**COUNCIL OF THE EUROPEAN UNION**

***GENERAL SECRETARIAT***

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Brussels, **09 MARS 2012**

**Mr Ingve Björn Stjerna**
[redacted]

**e-mail: ingve.stjerna@**[redacted]

**Ref. 2/c/01/12**

Dear Mr Stjerna,

Please find enclosed the reply from the Council to your confirmatory application dated 31 January 2012.

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court or to make a complaint to the Ombudsman. The conditions for doing so are laid down in Articles 228 and 263 of the Treaty on the Functioning of the European Union.

Yours sincerely,

Reijo KEMPPINEN

Enclosure

**ANNEX**

**REPLY ADOPTED BY THE COUNCIL ON 8 MARCH 2012**
**TO CONFIRMATORY APPLICATION No 02/c/01/12,**
**made by e-mail on 31 January 2012,**
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**
**for public access to document 15856/11**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 15856/11 which contains an opinion of the Council's Legal Service setting out its views on the compatibility of the draft Agreement on the European Union Patent Jurisdiction with Opinion 1/09 of the European Court of Justice of the EU.

2. In its initial reply dated 24 January 2012, the General Secretariat refused full public access to the document pursuant to Article 4(1)(a), third indent (protection of international relations), Article 4(2), second indent (protection of legal advice) and the first subparagraph of Article 4(3) (protection of an ongoing decision-making process) of the Regulation. Pursuant to Article 4(6) of the Regulation, partial access was granted to paragraphs 1, 2 (first sentence) and 4 to 15 of document 15856/11.

3. In his confirmatory application dated 31 January 2011, the applicant claims that the General Secretariat could not have relied on the above three exceptions for the protection of the public interest. He alleges that it has failed to provide sufficiently specific reasons for its decision and that the reply does not comply with the findings of the Court of Justice in joined Cases C-39/05 P and C-52/05P[1] (the "Turco case"). Finally, the applicant argues that insufficient weight has been placed on the countervailing public interest in disclosure.

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[1] Cases C-39/05 P and C-52/05 P, *Sweden and Turco vs Council*, [2008] ECR I-4723.

4. The Council has examined the above-mentioned document in the light of the applicant's arguments and has come to the following conclusion:

**The context of the requested legal advice**

5. To begin with, the Council would like to provide a more detailed account of the context in which the requested legal advice has been provided.

6. Work on a unified patent litigation system within the EU was resumed in 2007, following the Commission Communication entitled "Enhancing the patent system in Europe"[2] of April 2007. In its communication, the Commission focused on the need to create a single Community patent and on the urgent need for an integrated system of patent litigation in Europe.

7. After intensive work since mid-2007, a draft international agreement creating a European and Community Patents Court was drawn up in March 2009. The envisaged agreement was designed to set up a unified and specialised patent court which should enjoy exclusive jurisdiction on litigation related to both European and future EU patents, to be concluded on the one hand by the EU and its Member States and on the other hand by third States, parties to the European Patent Convention. In March 2009, the Commission presented to the Council a recommendation to authorise the Commission to open negotiations for the adoption of an international agreement creating a Unified Patent Litigation System.

8. On the basis of the progress made in the discussions, the Council requested on 25 June 2009 the opinion of the Court of Justice on the compatibility of the envisaged agreement with the Treaties. The Court of Justice rendered its Opinion 1/09 on 8 March 2011 and considered that the envisaged agreement as it stood was not compatible with the Treaties.

9. In May 2011, the Council re-started the discussion for the creation of a unified patent litigation system on the basis of a document presented by the Commission which took into account that Opinion.

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2 Document 8302/07.

10. In September 2011, the Presidency of the Council elaborated a draft Agreement on the European Union Patent Jurisdiction ("the draft Agreement").

11. 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[3].

12. 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[4].
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.

**Assessment of the requested document**

13. The requested document analyses whether the amendments to the current draft Agreement address the concerns voiced by the Court of Justice in Opinion 1/09. It therefore contains legal advice, except for its paragraphs 1, 2 (first sentence) and 4 to 15.

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3 Documents 9224/11 and 9226/11.

4 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/127599.pdf, pt. 4.

14. 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.

15. The Council is conscious that the purpose of Regulation (EC) No 1049/2001 is to ensure the widest possible access to documents for citizens. It remains, however, that the third indent of Article 4(1)(a), the second indent of Article 4(2) and the first subparagraph of Article 4(3) of the Regulation provide for exceptions to the right of public access to documents in cases where such public access would undermine, respectively, the protection of international relations, legal advice and the institution's decision-making process, unless there is, in the latter two cases, an overriding public interest in disclosure.

**The exception relating to the protection of international relations**

16. 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.
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 re-opened 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.
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.

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,[5] the Council would like to underline two separate aspects: 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. 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.

**The exceptions relating to the protection of legal advice and of an ongoing decision-making process**

18. As explained above, the ongoing international negotiations are at a critical stage, strongly conditional upon und 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 Regulations implementing enhanced cooperation in the area of unitary patent protection will be contested before Union Courts.

19. 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.

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5 Point 19 of the confirmatory application.

20. Moreover, since the negotiating package comprises, next to the draft Agreement, two draft Regulations for the creation of unitary patent protection and the applicable translation arrangements, where the European Parliament is yet to adopt its position at first reading/opinion, disclosure of the requested document risks having a substantial impact on the outcome of those decision-making processes, and accordingly, would seriously prejudice the Council's decision-making process (Article 4(3), second subparagraph of Regulation 1049/2001).

21. 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.

22. For the above-mentioned reasons, the Council concluded that full public access to document 15856/11 has to be refused pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations), the second indent of Article 4(2) (protection of the public interest as regards legal advice) and the first subparagraph of Article 4(3) of 1049/2001 Regulation (protection of the Council's ongoing decision making-process).

23. The Council also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the document under scrutiny. The Council concluded that it was not possible to grant more extensive public access to the document than initially granted, since the various issues addressed in the document are closely inter-linked and exceptionally sensitive, and consequently, need to be protected against disclosure under the above-mentioned exceptions.