



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 2 March 2012

6051/12

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"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 6050/12

Subject : Public access to documents
- Confirmatory application No 03/c/01/12

Delegations will find enclosed a draft reply from the Council to confirmatory application No 03/c/01/12, approved by the Working Party on Information by written consultation which ended on 29 February 2012.

The Danish, Estonian, Lithuanian, Austrian, Slovenian, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statement was made:

"Denmark, Estonia, Lithuania, Slovenia, Finland and Sweden believe that document 18239/11 should be released in its entirety. Disclosure of the document in its entirety would not undermine the decision-making process or any other interests protected under Article 4 incl. international relations since it is an agreement between 25 member states of the EU. Moreover, large parts of the document relate to information that is already in the public domain".

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Estonian, Lithuanian, Austrian, Slovenian, Finnish and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

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REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 03/c/01/12,
made by e-mail on 1 February 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 18239/11

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 18239/11 which is a note from the Presidency to Delegations concerning the Draft Agreement on the creation of a Unified Patent Court and which contains a Presidency compromise text.
2. In its reply dated 1 February 2012, the General Secretariat refused full public access to the document pursuant to Article 4(3), first subparagraph (protection of the decision-making process of the Council), of Regulation (EC) 1049/2001.
3. In his confirmatory application dated 1st February 2012, the applicant asks the Council to reconsider its opinion arguing that any process which excludes the possibility of public participation risks a loss of acceptance of the whole process. He also argues that he needs access to the requested document due to his work as a researcher at a public university.

4. The Council has thoroughly examined the document concerned. In the light of its examination, the Council has come to the following conclusion.
5. First of all, while the Council understands the applicant's interest in inspecting the document for research purposes, it would like to draw the applicant's attention to the fact that Regulation 1049/2001 does not allow for privileged access, since the institution is obliged, when releasing a document to the public, to do so *erga omnes*¹.
6. It has to be recalled that work on a unified patent litigation system within the EU 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 the opinion of the Court of Justice of the European Union ("Court of Justice") on the compatibility of the envisaged agreement with the Treaties on 25 June 2009. 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.

¹ Article 10(2) of Annex II to the Council's Rules of Procedure, OJ L 325 of 11.12.2009, p. 35.
² Document 8302/07.

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 the Opinion of the Court of Justice.

10. It has to be recalled that the negotiations for an Agreement on a Unified Patent Court 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 decision-making structures, this solution was chosen for reasons of convenience, in view of the close link between the envisaged Agreement and the draft Regulations implementing enhanced cooperation in the area of the creation of unitary patent protection, currently pending before the EU legislator³. This being said, currently bilateral discussions on the draft Agreement are being conducted at a high political level, entirely outside the Council's decision-making structures.

11. The requested document contains a Presidency compromise text which was drawn up by the Presidency for the representatives of the contracting Member States in the Competitiveness Council of 5 December 2011. This document contains compromise proposals on the outstanding issues in the draft Agreement, with a view to securing 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, the debate at the Council showed that further work was still needed before an agreement can be reached on all aspects. Since then, bilateral negotiations have taken place at a high political level, with the ambition that an agreement can be found 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 2012⁴. As 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.

³ Documents 9224/11 and 9226/11.

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

12. In these conditions, the Council considers that at this stage full release of the requested document to the public would undermine the protection of the public interest as regards international relations (Article 4(1)(a) third indent of Regulation 1049/2001), since it would interfere with the proper conduct of the bilateral negotiations between the contracting Member States on some of the issues addressed in the requested document. Given the fact that negotiations on this complex and sensitive file are in a critical stage where there is - for the first time since the beginning of discussions on a single Community patent and on an integrated jurisdictional system for patents - a reasonable chance of an agreement, disclosure to the public of the requested document risks negatively affecting the climate of confidence in the ongoing negotiations and hamper a constructive cooperation, which is essential at this crucial stage of the process.
13. It is recalled 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. In consequence, once it is established that the requested document (or parts of it) 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, such as those invoked by the applicant in his confirmatory application.
14. In addition, in view of the fact that the negotiating package includes, in addition 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), first subparagraph of Regulation 1049/2001). The Council believes that in this context, where the negotiations on the patent package involve particularly sensitive and essential interests, the public interest relating to public participation invoked by the applicant does not establish an overriding public interest in disclosure.

15. For the above-mentioned reasons, the Council concluded that full public access to document 18239/11 has to be refused pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(3), first subparagraph of 1049/2001 Regulation (protection of the Council's ongoing decision making-process).

 16. The Council also carefully examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the document under scrutiny. Consequently, it decided to grant partial access to the titles contained in the Annex of document 18239/11. The Council concluded that it was not possible to grant more extensive public access to the document, since the various issues addressed in the document are closely inter-linked, constituting the different aspects of the same compromise deal, and consequently, need to be protected against disclosure under the above-mentioned exceptions.
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