



Απόφαση στην υπόθεση 90/2009/(JD)OV - Ισχυρισμός περί άρνησης πρόσβασης σε έγγραφα σχετικά με τις διαπραγματεύσεις εμπορικής συμφωνίας

Απόφαση

Υπόθεση 90/2009/(JD)OV - **Εκκίνηση έρευνας στις** 25/02/2009 - **Απόφαση στις** 23/07/2010

Ενεργώντας βάσει του κανονισμού 1049/2001/ΕΚ, ο ενδιαφερόμενος, ένα ολλανδικό ίδρυμα για την προάσπιση της διαφάνειας, υπέβαλε αίτημα στο Συμβούλιο της Ευρωπαϊκής Ένωσης ζητώντας πρόσβαση σε διάφορα έγγραφα σχετικά με διαπραγματεύσεις μεταξύ της ΕΕ, των Ηνωμένων Πολιτειών και της Ιαπωνίας για τη νέα εμπορική συμφωνία καταπολέμησης της παραποίησης/απομίμησης (ACTA). Στόχος της ACTA είναι να θεσπιστούν διεθνή πρότυπα για την εφαρμογή των δικαιωμάτων πνευματικής ιδιοκτησίας. Το Συμβούλιο επέτρεψε μερική πρόσβαση σε ορισμένα έγγραφα αλλά την αρνήθηκε στην περίπτωση έξι άλλων εγγράφων. Ανέφερε ότι τρία από αυτά ήταν έγγραφα εργασίας που είχαν συνταχθεί από τις υπηρεσίες της Επιτροπής σχετικά με την ACTA. Δύο ακόμα έγγραφα ήταν υπομνήματα που απηύθυνε η Προεδρία σε αντιπροσωπείες σχετικές με την ACTA. Ένα έκτο έγγραφο, με διαβάθμιση «ΠΕΡΙΟΡΙΣΜΕΝΗΣ ΧΡΗΣΗΣ ΕΕ» ('RESTREINT UE/EU Restricted') περιείχε πληροφορίες σχετικά με την έκβαση της διαβούλευσης των συμβούλων για θέματα δικαιοσύνης και εσωτερικών υποθέσεων της 26ης Σεπτεμβρίου 2008 κατά την τρίτη διαπραγματευτική περίοδο για την ACTA. Το Συμβούλιο ισχυρίστηκε ότι η κοινοποίηση όλων αυτών των εγγράφων θα αποδυνάμωνε τη διαπραγματευτική θέση της ΕΕ ενώ θα μπορούσε να επηρεάσει και τις σχέσεις με ενδιαφερόμενα τρίτα μέρη. Ως εκ τούτου αρνήθηκε την πρόσβαση στα εν λόγω έγγραφα βάσει του άρθρου 4 παράγραφος 1 στοιχείο α) τρίτη περίπτωση του κανονισμού σχετικά με την προστασία του δημόσιου συμφέροντος σε ό,τι αφορά τις διεθνείς σχέσεις. Όσον αφορά τη μερική πρόσβαση, το Συμβούλιο ισχυρίστηκε ότι, εφόσον η εξαίρεση ίσχυε για ολόκληρα τα έγγραφα, δεν θα μπορούσε να παραχωρήσει μερική πρόσβαση. Ο ενδιαφερόμενος υπέβαλε επιβεβαιωτική αίτηση. Το Συμβούλιο επέμεινε στην άρνησή του.

Στην αναφορά του προς τον Διαμεσολαβητή, ο ενδιαφερόμενος ισχυρίστηκε ότι το Συμβούλιο θα έπρεπε να επιτρέψει την πρόσβαση στα έξι αυτά έγγραφα. Το Συμβούλιο εξέδωσε γνώμη στην οποία παρέμεινε αμετακίνητο από τις θέσεις του, απορρίπτοντας το επιχείρημα του ενδιαφερόμενου ότι τα έγγραφα ισοδυναμούσαν με υπό κατάρτιση νομοθεσία.

Οι υπηρεσίες του Διαμεσολαβητή μελέτησαν τα σχετικά έγγραφα. Ο Διαμεσολαβητής κατέληξε στο συμπέρασμα ότι το Συμβούλιο ορθά εφάρμοσε την εξαίρεση με βάση την προστασία του δημόσιου συμφέροντος σε ό,τι αφορά τις διεθνείς σχέσεις. Έκρινε ότι η



κοινολόγηση των εγγράφων θα είχε αρνητικές επιπτώσεις στο κλίμα εμπιστοσύνης που επικρατεί στις εν εξελίξει διαπραγματεύσεις με τις ΗΠΑ και την Ιαπωνία και ότι θα παρεμποδίζονταν ενδεχομένως η μεταξύ τους ανοιχτή και εποικοδομητική συνεργασία. Συμπέρανε επίσης, εξαιρουμένης μίας μόνο περίπτωσης, ότι οι πληροφορίες που περιέχονται στα έξι αυτά έγγραφα αφορούν προτάσεις και παρατηρήσεις επί των θέσεων της ΕΕ, των ΗΠΑ και της Ιαπωνίας, και ότι δεν θα ήταν εφικτό να κοινοποιηθούν αποσπάσματα των εγγράφων χωρίς να υπονομευθεί η προστασία του συμφέροντος που καλύπτεται από το άρθρο 4 παράγραφος 1 στοιχείο α) τρίτη περίπτωση του κανονισμού. Η μοναδική εξαίρεση αφορούσε διάφορες παραγράφους σχετικές με διαδικαστικά θέματα σε έγγραφο με θέμα τις διαπραγματεύσεις από τη σκοπιά της ΕΕ. Ο ενδιαφερόμενος διευκρίνισε ότι δεν ενδιαφερόταν για πληροφορίες καθαρά διαδικαστικού χαρακτήρα. Ο Διαμεσολαβητής έκρινε επομένως ότι το ζήτημα της μερικής πρόσβασης δεν έχρηζε περαιτέρω εξέτασης. Ως εκ τούτου, δεν διαπίστωσε κακοδιοίκηση εκ μέρους του Συμβουλίου και περάτωσε την υπόθεση.

THE BACKGROUND TO THE COMPLAINT

1. On 29 October 2008, the complainant, a Dutch Foundation fighting for transparency, applied, in accordance with Regulation 1049/2001/EC [1] ('the Regulation'), for full access to documents concerning the negotiation of a new Anti-Counterfeiting Trade Agreement ('the ACTA). The aim of the ACTA is to establish international standards on intellectual property rights enforcement. The 12 documents to which the complainant requested full access were the following:

- 1) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement N/A 26-03-2008, 7759/08;
- 2) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement PDF 20-06-2008, 7095/08;
- 3) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement PDF 24-07-2008, 15486/07;
- 4) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement PDF 24-07-2008, 12875/08;
- 5) Anti-Counterfeiting Trade Agreement - Draft EU reaction to Japan/U.S. Joint Proposal on Civil Enforcement N/A 10-09-2008, 15486/07 [2] ;
- 6) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement PDF 10-09-2008, 7095/08 [3] ;



7) Recommendation from the Commission to the Council to authorise the Commission to open negotiations on a multilateral anti-counterfeiting trade agreement PDF 11-09-2008, 13448/08;

8) Anti-Counterfeiting Trade Agreement - Revised draft EU reaction to Japan/U.S. Joint Proposal on Civil Enforcement N/A 24-09-2008, 13382/08;

9) Multilateral Anti-Counterfeiting Trade Agreement (ACTA) - Civil law measures N/A 23-09-2008, 13637/08;

10) Multilateral Anti-Counterfeiting Trade Agreement (ACTA) 3rd negotiating session 8-10 October 2008, Tokyo, Japan Chapter 2: Draft Criminal provisions Japan/U.S. Joint Proposal, dated 12 September 2008 N/A 29-09-2008, 13750/08;

11) Anti-Counterfeiting Trade Agreement (ACTA) - Compilation of all comments provided by ACTA partners on the civil enforcement chapter N/A 02-10-2008, 13949/08;

12) Multilateral Anti-Counterfeiting Trade Agreement (ACTA) 3rd negotiating session, 8-10 October 2008, Tokyo - Civil law measures N/A 08-10-2008.

2. In its reply of 5 November 2008, the Council referred to Council Decision 2001/264/EC of 19 March 2001, adopting the Council's security regulations [4]. The said Decision foresees that the " *RESTREINT UE* " ('EU Restricted') classification is applied to information and material which, in the event of unauthorised disclosure, could harm the interests of the EU, or one or more of its Member States. It argued that documents 7759/08, 15486/07 and 7095/08 were all classified as EU Restricted documents. They contained directives for the negotiation of the ACTA, which was still in progress. Since the disclosure of the information contained in these documents could impede the correct negotiating process, the Council therefore refused access to them on the basis of Article 4(1)(a), third indent, of the Regulation which concerns the protection of the public interest with regard to international relations. It stated, however, that, pursuant to Article 4(6) of the Regulation on partial access, the complainant could have access to those parts of the three documents which were not covered by the exception. These were duly enclosed with its reply.

3. The Council further stated that documents 12875/08, 13448/08 and 13750/08 were working documents, which the Commission's services had drawn up concerning the ACTA. Documents 13382/08 and 13949/08 were notes from the Council Presidency to Delegations concerning the ACTA. Document 13637/08 (classified as EU Restricted) contained information on the outcome of the consultation of the Justice and Home Affairs Counsellors of 26 September 2008 concerning the third negotiating session on the ACTA, which was held from 8 to 10 October 2008 in Tokyo. The Council argued that releasing all the above documents would weaken the EU's position in the negotiations, and negatively affect relations with third parties concerned. It therefore also refused access to these documents on the basis of Article 4(1)(a), third indent, of the Regulation. As regards partial access, the Council argued that, since the exception applied to the documents in their entirety, partial access could not be granted.



4. On 9 November 2008, the complainant made a confirmatory application for access to six documents, namely, documents numbered 12875/08, 13448/08, 13750/08, 13382/08, 13949/08 and 13637/08, and referred to the judgment of the Court of Justice of the European Union in the *Turco* case [5]. The complainant quoted the Court, which ruled that it is a precondition for the effective exercise of citizens' democratic rights that they should be able to find out the considerations underpinning legislative action. It pointed out that the ACTA is a trade agreement and not, therefore, a legislative proposal. The complainant, however, stated that if the ACTA is accepted, this would lead to legislative and executive obligations for the undersigning parties, which would, indirectly, have the same effect as a legislative proposal.

5. By decision of 4 December 2008, the Council rejected the confirmatory application on the basis of the following arguments:

- As regards documents 12875/08, 13448/08, and 13750/08, the Council argued that they were working documents drawn up by the Commission's services concerning the ACTA. It pointed out that the first two documents contained, respectively, the draft EU reaction to the Japan/US Joint Proposal on Civil Enforcement, and the revised draft EU reaction to the same proposal. Document 13750/08 contained a compilation of all the comments provided by the partners negotiating the ACTA with regard to the chapter on civil enforcement. The Council stated that all three documents contained detailed information on the positions of the various partners negotiating the ACTA with regard to the sensitive subject of civil judicial proceedings, and the enforcement of intellectual property rights. They also contained comments concerning the position of other negotiating partners. The Council argued that, given the sensitive content of the documents, their full disclosure would seriously undermine the protection of the public interest as regards EU international relations. This would have a negative effect on the climate of confidence in the on-going negotiations, which, in turn, could hamper open and constructive co-operation. Moreover, if the EU's negotiating partners had reason to believe that the positions they expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse affect on future negotiations. The Council therefore confirmed its refusal to grant full access to these documents on the basis of Article 4(1)(a), third indent, of the Regulation. The Council also stated that it was not possible to grant partial access, since the content of the documents formed an inseparable whole. It further argued that the exception provided for in Article 4(1)(a) of the Regulation is mandatory. Therefore, once it is established that the requested document falls within the sphere of international relations, and that the protection of the interest relied upon would be impaired if the document were to be disclosed, the institution must refuse public access. This interest cannot be outweighed by an overriding public interest in disclosure.

- As regards documents 13382/08, 13637/08 and 13949/08, the Council stated that all three documents contained detailed information on the EU's position in the framework of the negotiations on the ACTA, and that full disclosure of these texts would reveal the EU's strategic objectives to be achieved in these negotiations. It would, therefore, compromise the overall conduct of the on-going negotiations, and thus be prejudicial to the EU's interest in



the efficient conduct of such negotiations. The Council therefore confirmed its refusal to grant access to these documents on the basis of Article 4(1)(a), third indent, of the Regulation. The Council also stated that it was not possible to grant partial access, since the content of the documents formed an inseparable whole.

THE SUBJECT MATTER OF THE INQUIRY

6. In his complaint to the Ombudsman, the complainant claimed that the Council should grant access to documents 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08.

THE INQUIRY

7. On 25 February 2009, the Ombudsman sent the complaint to the Council with a request for an opinion, which it sent on 29 April 2009. It was forwarded to the complainant, which sent its observations on 26 May 2009. The complainant sent further observations on 19 June 2009.

8. In his letter dated 25 February 2009, the Ombudsman also informed the Council that he considered it necessary to inspect the documents which formed the subject of the complaint. On 8 April, 19 May, 12 June, 14 and 21 September, and 18 and 25 November 2009, the Council and the Ombudsman exchanged letters on the procedure to be followed for the inspection in connection with the present complaint, and two other complaints.

9. On 8 December 2009, the inspection was carried out. On 17 December 2009, the Ombudsman sent a copy of the inspection report to the Council. On 18 December 2009, he sent a copy of the inspection report to the complainant with an invitation to submit observations. The complainant did not submit any observations. On 29 May 2010, the complainant sent some further comments. In a telephone conversation with the Ombudsman's Office on 29 June 2010, the complainant provided further clarifications.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. As regards the claim that access should be granted to the six documents

Arguments presented to the Ombudsman

10. In its complaint to the Ombudsman, the complainant claimed that the Council should grant access to documents 12875/08, 13448/08, 13750/08, 13382/08, 13637/08 and 13949/08.

11. The complainant argued that, in practice, the ACTA amounts to legislation. It referred to the Regulation and the *Turco* judgment of the Court of Justice of the EU, both of which stress the importance of making legislative texts available to the public. In the complainant's view, therefore, the ACTA negotiation process must be conducted with transparency. However, it considered that the EU had deliberately agreed to keep the ACTA negotiations secret. The complainant also referred to the European Parliament's resolution of 18 December 2008 (P6-TA-2008-0634), where it was stated that the public interest in disclosure of ACTA preparatory drafts should not be overridden by Article 4 of the Regulation.



12. As regards the Council's refusal to grant access to documents 12875/08, 13448/08, and 13750/08, the complainant argued that preparatory legislative texts are not sensitive in nature. It should, therefore, have been clear to all negotiating partners from the outset that the negotiations had to be open. As regards the Council's refusal to grant partial access, the complainant stated that the Regulation did not refer to something as an "*inseparable whole*". It considered that it is perfectly possible to distinguish between what can and what cannot be made public. It went on to point out that other countries, such as Canada, do so.

13. As regards the Council's refusal to grant access to documents 13382/08, 13637/08 and 13949/08, the complainant stated that the EU's objectives with regard to the ACTA should not be kept secret. The complainant also argued that any position communicated to the other negotiating partners could also be communicated to the public, and that this would not harm international relations.

14. In its opinion, the Council made the following comments:

(i) Protection of international relations

15. The Council pointed out that the exceptions set out in Article 4(1) of the Regulation, including the one relating to the protection of the public interest as regards international relations, are framed in mandatory terms. Therefore, once it is established that the requested document falls within the sphere of international relations, and that the protection of the interest relied upon would be impaired if the document were to be disclosed, the institution must refuse public access [6]. The Council argued that, in the present case, all six documents related to the conduct of negotiations between EU Member States and their partners on a new multilateral ACTA. These negotiations were launched in October 2007, and were still ongoing in April 2009. On 14 April 2008, the Council authorised the Commission to open negotiations on a multilateral ACTA, in coordination with the Council and the Member States. The Council Presidency fully participates in these negotiations, on behalf of Member States, on matters which fall within their competence. The Council stated that the ACTA was still being negotiated and that no consolidated draft had yet been produced containing the views of all the negotiating partners. The Council explained that the six documents in question contained detailed information on the EU's position and that of the different ACTA partners in the framework of the international negotiations. More specifically, it explained that they included draft proposals and concrete initiatives developed by the EU and its negotiating partners with regard to various measures they wished to include in the future ACTA. The Council considered that disclosing the documents in question would seriously prejudice the EU's ability to conduct the negotiations with its partners in a climate of confidence and constructive cooperation, which is essential for a successful outcome to the negotiations.

16. The Council stated that it did not agree that its refusal to release the requested documents hampered the proper application of the Regulation. Once it had determined that the conditions were met for the application of the international relations exception pursuant to Article 4(l)(a), third indent, of the Regulation, the Council considered that it was bound to refuse access to the requested documents, and that it did not need to consider the public



interest aspect, even taking into account the European Parliament resolution of 18 December 2008, on the openness of the negotiating process.

(ii) Legislative character of the requested documents

17. The Council pointed out that its Rules of Procedure, in accordance with the second subparagraph of Article 207(3) of the EC Treaty [7] , define the cases in which it is to be regarded as acting in its legislative capacity for the purposes of laying down detailed provisions on access to its documents. Accordingly, Article 7(1) of the Council's Rules of Procedure provides that "[t] he Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions) ", (emphasis added by the Council). In the present case, the requested documents related specifically to the conduct of international negotiations, in accordance with the negotiating mandate adopted by the Council on 14 April 2008, the aim of which was to adopt a new ACTA. Hence, the requested documents discussed by the Council in the framework of those negotiations may not be considered legislative documents within the terms of the Council's Rules of Procedure. Consequently, the Council considered that the complainant could not rely on the principles laid down by the Court of Justice in its judgment of 1 July 2008 in joined cases C-39/05 P and C-52/05 P. In that judgment, the Court interpreted the legal advice exception, namely, an exception contained in Article 4(2) of the Regulation, in the context of a legislative procedure. In the present case, there was neither a question of the applicability of one of the exceptions contained in Article 4(2) or (3) of the Regulation, both of which are subject to an overriding public interest test, nor of a legislative procedure. As regards the complainant's argument that, in practice, the ACTA amounts to legislation because it will contain a new legal framework, and it will be binding on the Member States, the Council pointed out that all international agreements concluded by the Union are binding on the institutions and the Member States. However, this did not confer a legislative status on all such agreements. In fact, pursuant to Article 7(1) of the Council's Rules of Procedure, acts concerning international relations do not constitute legislative acts.

(iii) Partial access

18. The Council argued that, in its reply to the confirmatory application, it explained that it had considered the possibility of partial disclosure of the documents under Article 4(6) of the Regulation. It had concluded that this would not be possible, since the exception in the third indent of Article 4(l)(a) applied to the requested documents in their entirety. In fact, all the information contained in the documents related to proposals and observations submitted by EU Member States and their negotiating partners during the ACTA negotiations. Disclosure of the sensitive content of these documents would prejudice the EU's ability to properly conduct these negotiations. Furthermore, it would be impossible to release only those parts of the documents containing the EU's position, as suggested by the complainant, without also revealing the positions of the EU's negotiating partners.



19. The Council stated that it appreciated the complainant's concerns about the openness of the ACTA negotiations. In this respect, it noted that the Council Presidency and the Commission had appeared on numerous occasions before the relevant European Parliament committee in order to inform Members of Parliament of how the ACTA negotiations were progressing. Furthermore, documents relating to the ACTA negotiations which were relevant for parliamentary work had been made available to members of the relevant committees. This had been done in accordance with the special conditions which apply regarding the European Parliament's privileged access to documents. Finally, the public was kept informed of the negotiations after each negotiating round, through press releases issued by the Commission, and by the ACTA negotiating partners. Moreover, in a paper which was published shortly after April 2009, the ACTA negotiating partners clarified the objectives of the future agreement, and also provided an overview of the main issues under discussion. For the reasons set out above, the Council considered the complaint to be unfounded.

20. In its observations, the complainant stated that, on numerous occasions, the Commission and the Council had stated that the ACTA would contain a new legal framework. The complainant argued that, in substance, part of the ACTA was legislation, even if it was labelled otherwise. The complainant argued that labelling legislative acts as non-legislative went against the spirit of what used to be Article 207 of the EC Treaty.

21. As regards the Council's reference to the *Sison* judgment, the complainant stated that, in the fight against terrorism, information may be highly sensitive, and its disclosure may seriously damage international relations. However, in a legislative process, information is not sensitive, since the final version will, in any event, be made public, if adopted. Withholding earlier drafts, it claimed, is a disservice to democracy. The complainant pointed out that the non-sensitive character of the ACTA documents was also illustrated by the fact that, in the U.S., many "cleared" advisors (many of them corporate lobbyists) had been given access to them. Therefore, if the US could give access to the documents, the EU should also be able to do so. If certain categories of the public, often multinationals, already have access, other groups should also have access. In the complainant's view, giving access to only some groups leads to biased legislation. The complainant also pointed out the illegality of granting access to documents to lobbyists, but denying it to MEPs. It further pointed out that the Council had refused to answer questions by MEP Jens Holm on whether the final draft of the ACTA would be published prior to the political agreement in the Council, and whether national parliaments would have enough time to scrutinise the ACTA. The complainant referred in this context to the Council's reply, in which the following statement was made: "*Since the stage of the final determination of the legal basis has not yet been reached, it is not possible for the Council to reply in detail to the procedural questions raised by the Honourable Member*".

22. In its additional observations of 19 June 2009, the complainant pointed out that, in December 2007, the Dutch government released the document entitled "*Maintaining Confidentiality of Documents*" produced by the ACTA negotiating parties, and that the accompanying letter stated that, in an informal meeting in December 2007, the ACTA negotiating parties had agreed to maintain confidentiality. The complainant enclosed a copy of that document [8].



The inspection of the documents

23. On 8 December 2009, the Ombudsman's representatives carried out an inspection of the six documents which form the subject of the complaint, one of which, document 13637/08, was classified as "EU Restricted". During the inspection, they were informed that the ACTA was still being negotiated.

24. In further observations dated 29 May 2010, the complainant pointed out that the negotiating parties had released a draft text [9] on 21 April 2010.

The Ombudsman's assessment

25. The Ombudsman would first like to note that the ACTA negotiations appear to be ongoing. The eighth round of negotiations was held in Wellington, New Zealand, from 12 to 16 April 2010, and the ninth round of negotiations was held in Lucerne in Switzerland from 28 June to 1 July 2010. It is foreseen that the negotiations will be concluded in 2010 [10].

26. The complainant and the Council appear to agree that the documents concerned in the present case were not drawn up with a view to preparing an act of EU legislation. Rather, they concern the negotiation and ultimate conclusion of an international agreement, and have nothing to do with an act of EU legislation. In the *Turco* case, the Court of Justice considered that, for citizens to be able to exercise their democratic rights, it is imperative that they should be able to find out what the considerations underpinning the legislative action were [11]. This argument does not, therefore, appear to be immediately applicable in the present case. However, the complainant argues that, in practice, the ACTA has a legislative effect, given that, if it were accepted, the parties to the agreement would be bound by legislative and executive obligations. The ACTA would thus, indirectly, have the same effect as a legislative proposal. The Ombudsman agrees that the conclusion of the ACTA may indeed make it necessary for the EU to propose and enact legislation. In that case, the ACTA would constitute the sole or the major consideration underpinning that legislation, and citizens would have a clear interest in being informed about the ACTA. However, and although it is thus perfectly possible that, in practice, the ACTA could have far-reaching legislative consequences for the EU, this does not mean that the procedure for concluding the ACTA is the same as a legislative procedure, and that the rules governing the latter (including those with regard to public access to documents as set out in the *Turco* case) apply by analogy to the former.

27. The Ombudsman thus has to examine whether the Council properly applied Article 4(1)(a), third indent, of the Regulation to the six documents which form the subject of the complaint. The Court of Justice of the EU has held that "*it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other*



interests " [12] .

28. As regards document 13637/08, which is classified as "EU Restricted", the inspection showed that it contained a note on the outcome of the consultation of the Justice and Home Affairs Counsellors of 26 September 2008 concerning the Japan/U.S. joint proposal on draft criminal law measures to be included in the ACTA, and that it was drafted in preparation for the third round of negotiations in Tokyo from 8 to 10 October 2008. The document contained comments from the delegations on various specific articles contained in the draft ACTA.

29. As regards documents 13382/08 and 13949/08 of 23 September and 8 October 2008 respectively, the inspection showed that they consisted of notes from the Presidency to delegations. Document 13382/08 contained a summary of responses to the civil law measures which Japan and the US proposed to include in the ACTA, and it was drafted on the basis of discussions which took place on 11 September 2008, during the meeting of the Working Party on Intellectual Property (subgroup Patents). The document was drafted in preparation for the third round of negotiations in Tokyo. It contained an overview of some delegations' view of the EU's negotiation position, as well as some amendments and reservations which were made in respect of certain articles. Document 13949/08 contained an exchange of views regarding proposed civil law measures, which took place on 6 October 2008, at the meeting of the Working Party on Intellectual Property (subgroup Copyright). It contained comments on the EU's negotiation position with regard to certain articles.

30. As regards documents 12875/08, 13448/08 and 13750/08 of 10 and 24 September, and 2 October 2008 [13] , respectively, the inspection showed that they were working documents drawn up by the Commission's services [14] , and addressed to the Working Party on Intellectual Property (subgroup Patents) (document 12875/08), and to the delegations (documents 13448/08 and 13750/08). The first two documents contained the draft and the revised draft EU reaction to the Japan/US joint proposal on the civil enforcement section of the ACTA. The documents contained the text of the Japan/US proposal with the Commission's suggested amendments (additions or deletions) marked in track changes. They also contained a statement according to which the negotiating papers were not public documents, and should be treated with reserve. Document 13750/08 contained a compilation (produced by the US and Japan) of all comments provided by the ACTA negotiating partners on the various articles of the civil enforcement section following the second round of negotiations in Washington.

31. As regards the Council's application of the exception provided by Article 4(1)(a), third indent, of the Regulation to the above six documents, the Ombudsman first notes that the parties who negotiated the ACTA apparently agreed that the negotiating documents should be considered confidential. This is also confirmed by the remark which was found in two of the six documents inspected, stating that documents produced during negotiations were not public documents. However, the Council did not base its refusal to grant access to the relevant documents on this particular agreement between the negotiating parties. Accordingly, this argument does not need to be further considered in the present case.

32. As regards documents 12875/08, 13448/08 and 13750/08, the Council argued that they



contained detailed information on the positions of the various ACTA negotiating partners with regard to the sensitive subject of civil judicial proceedings concerning the enforcement of intellectual property rights, as well as comments concerning the other negotiating partners' positions. It stated that the full release of these documents would seriously undermine the protection of the public interest as regards the EU's international relations, since their disclosure would negatively affect the climate of confidence in the on-going negotiations, and could have an adverse effect on future negotiations.

33. The Ombudsman shares the Council's opinion that releasing the documents in question, which reveal the negotiating position of the US and Japan, would be highly likely to be detrimental to the EU's relations with those countries. The Ombudsman also agrees that, as further argued by the Council, it is likely that such disclosure would have a negative affect on the climate of confidence in the on-going negotiations, and that it would hamper open and constructive co-operation.

34. As regards documents 13382/08, 13637/08 and 13949/08, the Council argued that these documents contained detailed information on the EU's position in the framework of the ACTA negotiations, and that their full disclosure would reveal the EU's strategic objectives in the negotiations. This would compromise the overall conduct of the on-going negotiations, and be prejudicial to the EU's interest in the conduct of the negotiations. As a result of his inspection, the Ombudsman can confirm that that these documents do indeed set out in detail the position which the EU intends to adopt during negotiations on the future ACTA. Again, the Ombudsman shares the Council's view that disclosure of documents 13382/08, 13637/08, and 13949/08 would be likely to compromise the overall conduct of the on-going negotiations with the U.S. and Japan, and would thus be detrimental to international relations between the EU and those countries.

35. On the basis of the above arguments, the Ombudsman is of the opinion that the Council was justified in applying Article 4(1)(a), third indent, of the Regulation to the six documents in question. In light of the case-law mentioned above, and the fact that the exception was found to be applicable, it is neither possible nor necessary to balance the interest protected by Article 4(1)(a), third indent, of the Regulation against other interests.

36. As regards the issue of partial access, the General Secretariat of the Council stated, in its decision of 4 December 2008, that it had looked into the possibility of granting partial access to the six documents concerned, but concluded that this was not possible since " *the content of the documents form an inseparable whole* ". In its opinion, the Council added that the exception under Article 4(1)(a), third indent, applied to the requested documents in their entirety. On the basis of his inspection of the documents concerned, the Ombudsman takes the view that the Council's position is justified. With one exception, all the information contained in these documents relates to proposals and observations on the positions adopted by the EU, the U.S. and Japan, and it would not be possible to release parts of the documents without undermining the protection of the interest covered by the exception under Article 4(1)(a), third indent, of the Regulation.

37. The exception concerns document 13949/08, paragraphs 1 to 5 of which concern purely



procedural issues regarding the negotiations from the EU's point of view. In a telephone conversation with the Ombudsman's Office on 29 June 2010, the complainant clarified, however, that it was interested only in those parts of the documents which contained substantive information on the negotiation of the ACTA, and not in parts of documents which contained information on purely procedural aspects. The Ombudsman therefore considers that there is no further need to consider the issue of access to paragraphs 1 to 5 of document 13949/08.

38. In light of the above, the Ombudsman concludes that the Council was entitled to apply the exception foreseen in Article 4(1)(a), third indent, of the Regulation in order to refuse access to the documents concerned.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There was no maladministration by the Council.

The complainant and the Council will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 23 July 2010

[1] Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[2] The complainant listed a total of 12 documents, some of which, however, appear to concern the same document. In its opinion, the Council stated that the complainant had requested access to nine documents. The Council granted partial access to three of them, and refused access to the other six which are the subject of the present complaint.

[3] See footnote 2.

[4] OJ 2001 L 101, p. 1.

[5] Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para. 46.

[6] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, par. 46.

[7] This subparagraph no longer appears in the new Article 240 of the Treaty on the Functioning of the European Union.



[8] The first paragraph of the document "Maintaining Confidentiality of Documents" reads as follows: " *We agree that documents relating to the proposed Anti-Counterfeiting Trade Agreement (ACTA) will be held in confidence. This means that the documents may be given only to government officials or persons outside government who participate in the party's domestic consultation process and have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorised to see them...* " The third paragraph states: " *all parties will mark the documents they create in a manner that makes clear that the documents will be held in confidence. The United States plans to mark documents generated by us as "Confidential, Foreign Government Information - Modified Handling Authorized" ...* "

[9] http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf

[10]

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/437&format=HTML&aged=0&language=>

[11] See footnote 5.

[12] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, par. 46; see also Case T-264/04 *WWF v Council* [2007] ECR II-911, par. 44.

[13] The dates of these documents do not correspond to the dates mentioned by the complainant.

[14] The Ombudsman notes that the three documents 12875/08, 13448/08 and 13750/08 were working documents from the Commission services and therefore third party documents in the sense of Article 4(4) of the Regulation which foresees that the institution shall consult the third party with a view of assessing whether an exception in paragraph 1 or 2 is applicable, " *unless it is clear that the document shall or shall not be disclosed* ". The Ombudsman notes that the Council did not mention that it had consulted the Commission as regards possible access to these three documents. He therefore presumes that, in the Council's view, it was clear that the documents should not be disclosed and that it therefore did not need to consult the Commission.