



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 29 November 2013
(OR. en)**

17177/13

LIMITE

**JUR 619
INF 225
API 116**

NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee
Subject: Public access to documents

1. In the light of judgment of the Court of Justice in Case C-280/11P (Access Info)¹, it is necessary for Coreper to revisit the Council's current practice as agreed by the 1954th meeting of Coreper in March 2002:

"As regards the treatment of documents relating to legislative acts for which discussions are still on-going, which contain delegations' positions, Coreper agrees to disclose the content of such documents, including the text of footnotes and other references to delegations' positions, whilst withholding the identity of the delegations whose positions are recorded and excluding all those parts covered by the exceptions of Article 4 of the Regulation."²

¹ Judgment of the Court of Justice (First Chamber) of 17 October 2013 in Case C-280/11 P (Council v Access Info Europe), summarised in the Information note from the Legal Service contained in document 15911/13.

² See documents 6203/22, 6898/02, p. 2, point 22, and 10425/03.

2. The above litigation concerned the application, in on-going legislative procedures, of Article 4(3), first sub-paragraph, of Regulation 1049/2001 on public access to documents. This requires access to be refused in an on-going procedure where access would seriously undermine an institution's decision-making procedure (and there is no overriding interest in disclosure). The Council had argued that the public disclosure from an early stage of the negotiating positions taken from by individually identified Member States from would deprive such delegations of the flexibility needed to ensure the effectiveness of the Council's decision-making process. The Court however held that Council had not proved that the disclosure of Member States' identities would give rise to a genuine risk of undermining the Council's decision-making procedures.
3. Coreper is therefore invited to determine whether the practice of the Council should now be either:
 - a) to give access as a matter of course to references to the identities of individual Member State when giving access to documents recording the positions taken in on-going legislative procedures; or
 - b) In view of the impact on Member States' negotiating flexibility, to cease recording the identities of individual Member States in such documents.
4. Coreper is also asked to confirm the Council's position that, in relation to on-going legislative procedures, public access should be granted as matter of course to all preparatory documents circulated to members of the Council (including Coreper and it preparatory groups) either automatically on circulation or upon request (where such documents are marked "LIMITE") save where such documents, in whole or part, fall within the scope of the Article 4 of Regulation 1049/2001. In such cases any decision to grant or withhold access shall be determined in accordance with the requirements of the Regulation.

5. In this regard it is noted that the above judgment of the Court does not exclude that there could be circumstances where access may continue to be required to be withheld, in whole or part, where this would seriously undermine the decision-making process in accordance with Article 4(3) of the Regulation. This might also include specific instances where the names of individual Member States were withheld. However such cases would be exceptional and would of course need to be clearly justified.
6. Subject to Coreper's confirmation of the above points and on the basis of Coreper's decision in relation to paragraph 3 above, the necessary amendments to Annex II of the Council's Rules of Procedure would need to be prepared and submitted to the Council for agreement.
7. Coreper's attention is also drawn to the fact that requests for access to existing documents identifying individual Member States will also now fall to be considered in accordance with the above case-law. It is proposed that save where there may be exceptional cases which would still engage Article 4(3), access to such the parts of such documents should not be refused. Coreper is asked to endorse this position.
