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Directorate-General for Trade

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By registered letter with acknowledgment of receipt

Lora Verheecke
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Subject: Your application for access to documents – Ref GestDem No 2015/1011

Dear Ms Verheecke,

I refer to your e-mail dated 19 February 2015 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on the same date under the above mentioned reference number.

Please accept our apologies for the delay in replying to your application.

1. SCOPE OF YOUR REQUEST

You request access to the following documents:

"on the topic of regulatory cooperation in TTIP, all correspondence (including emails), the list of meetings with detailed minutes and any other reports of such meetings between DG Trade's officials (including the Commissioner and his Cabinet members) and representatives of the following organisations:

- CEFIC
- European Crop Protection Association (ECPA)

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- *Bayer*
- *BASF*
- *Syngenta*
- *Cosmetics Europe*
- *Business Europe*
- *American Chamber of Commerce to the European Union (AmCham EU)*
- *USA Government*
- *UK Government*
- *German Government*
- *French Government*
- *Spanish Government*

(between December 2013 and December 2014)"

For the purpose of processing this request, we have grouped the documents concerned into three categories according to their common characteristics, namely:

- (1) documents concerning meetings and correspondence with stakeholders (*i.e.* CEFIC, ECPA, Bayer, BASF, Syngenta, Cosmetics Europe, BusinessEurope, AmCham EU);
- (2) documents concerning meetings and correspondence with the EU governments (*i.e.* UK, German, French, and Spanish governments);
- (3) documents concerning meetings and correspondence with the US government.

In particular:

- As regards category (1), we have identified 16 meetings that took place during the relevant period with the stakeholders identified in your request, and 14 corresponding meeting reports. These meetings and reports are listed and described in **Annex I**.
- As regards category (2), we have identified 8 documents containing notes sent by the German, Spanish, French and UK Governments to the Commission and/or Trade Policy Committee (TPC), and 34 documents consisting of EU legal text proposals, EU position papers and other documents (*e.g.* drafts, non-papers, reports, studies) relating to regulatory issues in the TTIP which were shared by the Commission with the Member States in the context of the TPC. These documents are listed in **Annex II**.
- As regards your request for the documents under category (3), I note that correspondence, minutes and other reports with the US government on regulatory cooperation in TTIP represent a major portion of the documents of the negotiation falling within the period identified above. Regulatory cooperation is one of three pillars of the envisaged TTIP agreement which among horizontal regulatory issues covers also specific sectors, such as

chemicals, cosmetics, pharmaceuticals, medical devices, textiles. Moreover, some of these documents are very voluminous.

Given the number and volume of the documents concerned, we could not perform a specific examination of each document individually. Such an examination would have involved an inappropriate and disproportionate burden for the administration. In this respect, the Court of Justice has recognised that *"[...] it flows from the principle of proportionality that the institution may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration"*.²

We have therefore assessed the documents under category (3) together in a global manner and considered that in view of their similar nature and common characteristics, they are all entirely covered by the exception set out in Article 4.1(a) third indent (protection of international relations).

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

After careful examination of your request in light of the applicable legal framework:

- I am pleased to inform you that **partial access is granted to the 14 documents identified under category (1)**.³ These documents are enclosed in **Annex III**.

In particular, in 9 of these documents only personal data (*e.g.* names, positions) have been redacted, pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001").⁴ Hence, the main content of these documents is accessible. Moreover, the names of Commissioners, members of Cabinet, and senior management of the Commission as from the Director level, have all been disclosed.⁵

² *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 27; see also *Council v Hautala*, C-353/99 P, EU:C:2001:661, paragraph 30.

³ Certain parts of these documents have been considered to fall outside the scope of your request as they concern matters that do not relate to TTIP. These parts are marked either as "not relevant" or "outside the scope of the request".

⁴ Regulation (EC) No 45/2001 of the European Parliament and the of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

⁵ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014 on the publication of information on meetings held between Members and Directors-General of the Commission and organisations or self-employed individuals, respectively available at http://ec.europa.eu/news/2014/docs/c_2014_9051_en.pdf and http://ec.europa.eu/news/2014/docs/c_2014_9048_en.pdf

In 5 of these documents, in addition to personal data covered by the exception of Article 4.1(b) of Regulation 1049/2001, other information has been redacted as it is covered by the exceptions set out in Articles 4.1(a) third indent and 4.2 first indent of Regulation 1049/2001.

- **As regards the documents identified under category (2), I am pleased to inform you that 16 out of the 34 documents** consisting of EU legal text proposals, EU position papers and other documents (*e.g.* drafts, non-papers, reports, studies) on regulatory issues in the TTIP, **are publicly available on the website of DG Trade.**

This publication is based on a commitment from the Commission to publish on a regular basis textual proposals and other related TTIP documents in areas of the negotiations covering regulatory and rules pillars as soon as the consultation process with MS has been finalised and the documents have been shared with the US.⁶ Please note that the documents prepared by the Commission and shared with the European Parliament and the Council since the start of the TTIP negotiations are listed in a publicly available list⁷ as a part of the Commission's transparency initiative. The list contains links to the publicly available documents.

- I regret to inform you that **no access can be granted to the remaining documents under category (2) and to the documents under category (3)**, as these are covered entirely by the exception to the right of access to documents set out in Article 4.1(a) third indent of Regulation 1049/2001.

2.1. Protection of international relations

Article 4.1(a) third indent, of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations.”

The Court of Justice has acknowledged that the institutions enjoy “a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest”.⁸

In that same judgment,⁹ the Court added that the success of negotiations depends on the protection of objectives, tactics and fallback positions of the parties involved and “that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations”.¹⁰

⁶ See http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf

⁷ http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153263.pdf

⁸ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁹ *Id.*, paragraph 109.

¹⁰ *Id.*, paragraph 102.

In addition, the General Court stated that “[...] *the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion*” and that “*any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust*”.¹¹ Hence, “*it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations*” and “*have a negative effect on the negotiating position of the European Union*” as well as “*reveal, indirectly, those of other parties to the negotiations*”.¹² Moreover, “*in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. [...] establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise.*”¹³

We have reviewed individually the documents under category (2) which relate to EU legal text proposals, EU position papers and other documents (e.g. drafts, non-papers, reports, studies) on regulatory issues in the TTIP which are currently not publically available, and came to the conclusion that disclosure of these documents would undermine the position of the Commission in these and other trade negotiations. In particular, it would provide indications regarding the negotiation approach and tactics followed by the EU, the discussions within the EU to come to common positions in its negotiations with the US, and would hence weaken the EU's position in these and its other, ongoing and future, bilateral negotiations.

The same considerations apply to the 8 documents under category (2) that concern notes sent by the German, Spanish, French and UK Governments to the Commission and/or Trade Policy Committee. Regarding the negotiating positions and/or the opinions of the German, Spanish, French and UK authorities, I should add that when submitting its positions to DG Trade, Member States make direct references to the negotiating positions of the EU and/or the US in various negotiating areas currently under negotiation. Release of these positions would indicate aspects of the EU internal discussions in order to reach a common position with Member States on a particular negotiating area and would thus undermine the position of the Commission in TTIP negotiations. Only by safeguarding this information can the Commission preserve the room for manoeuvre required to lead the negotiations to a conclusion which promotes EU interests.

As regards the documents under category (3), it should be noted that in the context of the TTIP negotiations, the Commission is in regular contacts with their US counterparts to

¹¹ Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 119.

¹² *Id*, paragraphs 123-125.

¹³ *Id*, paragraph 126.

discuss different technical issues of the negotiation. In particular, the EU and the US exchange negotiating texts, proposals, accompanying explanatory material, discussion papers, e-mails. They are all related to the substance of the negotiations and their release would undermine relations between the negotiating parties contrary to Article 4.1(a) third indent of Regulation 1049/2001.

Indeed, the success of the negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. When closing her own initiative inquiry on transparency in TTIP, the European Ombudsman recognised that *"the Commission needs to create a context in which it can negotiate effectively with the US on TTIP, so as to deliver the best possible deal for the Union and its citizens. This may mean that the Commission can legitimately keep confidential certain information and documents, at least during certain stages of the negotiations."*¹⁴

Furthermore, I would like to draw your attention to the fact that at the start of the TTIP negotiations both parties arranged for a special care and handling of documents on both sides through an exchange of letters¹⁵ between chief negotiators. While the Commission is highly committed to the principle of transparency, as is witnessed by the large number of background, explanatory and negotiating documents published on the internet, a certain level of discretion and special care in handling remaining negotiating documents of both parties is essential. In addition, disclosing documents originating from the US would go counter to the position of the US that their documents shall not be circulated and would undermine the mutual trust between the negotiating parties necessary to lead this negotiation to a successful conclusion.

Please note that as long as these negotiations are ongoing it is premature to disclose any documents relevant to these exchanges (under category (3)) and drawing up a list would represent a disproportionate burden on the administration, as none of these documents could be released.

Moreover, as regards documents 1, 7 and 12 under category (1), we refer to Annex 1, which contains specific reasons as to why certain passages are covered by the exception set out in Article 4.1(a) third indent.

2.2. Protection of privacy and integrity of the individual

Article 4.1 (b) of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."*

¹⁴ <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>

¹⁵ http://www.ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter_0.pdf and http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf

The Court of Justice has ruled that "*where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data*" "*the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety*".¹⁶

Article 2(a) of Regulation 45/2001 provides that "*personal data*' shall mean any information relating to an identified or identifiable natural person [...]". The Court of Justice has confirmed that "*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*"¹⁷ and that "*surnames and forenames may be regarded as personal data*",¹⁸ including names of the staff of the institutions.¹⁹

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish "*the necessity of having the data transferred*" and additionally "*if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced*". The Court of Justice has clarified that "*it is for the person applying for access to establish the necessity of transferring that data*".²⁰

The documents under category (1) contain names, job titles and other personal information that allows the identification of natural persons.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, personal data have been removed in order to preserve the privacy and integrity of the individual concerned.

2.3. Protection of commercial interests of a natural or legal person

Article 4.2 first indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person [...] unless there is an overriding public interest in disclosure".

While clearly not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4.2 first indent,²¹ it appears that the type

¹⁶ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

¹⁷ Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁸ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁹ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

²⁰ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

²¹ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.²² Accordingly, it must be information that is *"known only to a limited number of persons", "whose disclosure is liable to cause serious harm to the person who has provided it or to third parties"* and for which *"the interests liable to be harmed by disclosure must, objectively, be worthy of protection."*²³

A detailed assessment of the reasons why parts of the documents 4 and 12 are covered by the exceptions of Article 4.2 first indent of the Regulation is explained in Annex I.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4.2 first indent, of Regulation 1049/2001 applies unless there is an overriding public interest in the disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest.²⁴

The presence of an overriding public interest in disclosure has been assessed. In the present case, there is no such evidence. On the contrary, the prevailing interest in this case rather lies in protecting commercial interest of the companies who have been willing to share the commercially sensitive information with the Commission in order to define EU negotiating position and to defend EU interests in negotiating process.

4. PARTIAL ACCESS

Pursuant to Article 4.6 of Regulation (EC) No 1049/2001 *"[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released"*. We have also considered whether partial access can be granted to the documents currently not available to the public, pursuant to Article 4(6) of Regulation 1049/2001. However, the requested documents are entirely covered under the aforementioned exception as it is impossible to disclose any parts without undermining the protection the EU's international relations, as explained above.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

²² See Article 339 of the Treaty on the Functioning of the European Union.

²³ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

²⁴ Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 45.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu



Yours sincerely,

Jean-Luc DEMARTY

Encl.

- Annex I: list of documents under category (1)
- Annex II: list of documents under category (2)
- Annex III: documents disclosed under category (1).