



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Mr Vincent Harmsen
c/o Simon de Bergeyck
Rue au Bois 216
1150 Brussels

Advance copy by email: ask+request-4515-1e74cbca@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2017/4400

Dear Mr Harmsen,

I refer to your application dated 27 July 2017 in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

Please accept our apologies for the delay in answering to your request, which – even if your request at the end does not cover too many documents – is mainly due to a high number of access to documents requests being processed at the same time by DG TRADE.

1. SCOPE OF YOUR REQUEST

Your request, according to your initial application and to the clarifications provided on 9 August 2017, covers the following:

"All communications (including, but not limited to, letters, emails, Whatsapp messages, sms, minutes of meetings and any other reports of such meetings) where the TTIP (Transatlantic Trade and Investment Partnership) was discussed/mentioned between officials of DG TRADE (including Commissioner Malmström and her Cabinet) and officials/representatives of (one or more of) the following DGs/organizations:

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.

United States government, United States Trade Representative (USTR, United States Environmental Protection Agency (US EPA), United States Department of Agriculture (USDA), United States Mission to the WTO, American Chamber of Commerce (AmCham), Delegation of the European Union to the United States

(between 1 February 2017 and 27 July 2017).

When 'officials' are mentioned in this request this includes Commissioner Malmström and the Cabinet members".

We have identified the following documents in DG TRADE:

- A letter from AmCham EU to the Commissioner Malmström together with their report “The transatlantic economy 2017: annual survey of jobs, trade and investment between the United States and Europe” (Ares(2017)1541339) ("document 1");
- A report of a meeting between the Head of Cabinet of Commissioner Malmström and AmCham EU on 05/04/2017 (Ares(2017)1875748) ("document 2");
- A report of the visit of Commissioner Malmström in Washington, April 23-25, in which she had meetings with the new US administration and the US Senate (Ares(2017)4567909) ("document 3").

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question poses a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2) and 4(3) of Regulation 1049/2001, the institution is required “*to ascertain whether there is any overriding public interest justifying disclosure*”.³

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁴ “*the exceptions to that right [...] must be interpreted and applied strictly*”.⁵

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Regulation (EC) No 1049/2001, recital (4).

Having examined the documents in light of the applicable legal framework, I am pleased to partially release document 1 and document 2. A copy of these documents is enclosed.

In documents 1 and 2, only personal data have been removed pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001")⁶. Please notice that the annex to document 1, the AmCham report "*The transatlantic economy 2017: annual survey of jobs, trade and investment between the United States and Europe*" is already public on their website: http://www.amchameu.eu/sites/default/files/170227_full-book.pdf. In relation to document 2, parts of this document have been marked as falling outside the scope of your request as they concern topics different from those mentioned in your request.

As regards document 3, I regret to inform you that access cannot be granted. Large parts of this document fall outside the scope of your request. The remaining parts, which are relevant to your request, are covered by the exceptions set out in Articles 4(1)(a) third indent and 4(1)(b) of Regulation 1049/2001 or are meaningless.

The reasons justifying the application of these exceptions are set out below in Sections 2.1, 2.2 and 3.

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".⁷ In that same judgment, the Court added that the success of negotiations depends on the protection of objectives, tactics and fall-back 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".⁸

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

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁶ 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.

⁷ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁸ *Id.*, paragraph 102.

between the parties depends to a large extent on the existence of a climate of mutual trust".⁹ 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".¹⁰ 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".¹¹

Document 3 contains internal views, opinions, impressions and speculations of Commission staff regarding the US trade policy in general, including TTIP. They also contain internal strategic assessments and tactical considerations, and reveal indirectly concerns and priorities of the EU in the context of its political and trade relations with the US. Some passages contain judgments and assessments of individual staff members regarding the political situation in the US, and report on the views of other interlocutors regarding the impact of the new administration on the US trade policy.

The TTIP negotiations were stopped until further notice at the end of 2016 and both parties need to clarify if there is a sufficient level of shared ambition and common ground before deciding whether and how to proceed with new negotiations. Therefore, preserving the negotiating position of the EU, its margin of manoeuvre and tactical approaches is important in order not to jeopardise the results achieved so far in the TTIP negotiations, nor any further discussions which may take place in the future between the EU and the US on commercial issues.

Public disclosure of this information would undermine in a reasonably foreseeable manner the public interest as regards international relations, by revealing strategic and tactical elements that could weaken the position of the EU in the context of its commercial relations with the US. Moreover, putting in the public domain internal views and considerations of Commission staff members regarding the political climate in the US would jeopardise the relationship and the mutual trust between the EU and the US.

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".

⁹ Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 119.

¹⁰ *Id*, paragraphs 123-125.

¹¹ *Id*, paragraph 126.

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"*¹².

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'"*¹³ and that *"surnames and forenames may be regarded as personal data"*¹⁴, including names of the staff of the institutions¹⁵.

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"*¹⁶.

Documents 1, 2 and 3 contain names and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

However, in line with the Commission's commitments to ensure transparency and accountability, the names of the members of Cabinet (not occupying administrative positions) are disclosed. For AmCham EU, the names of the CEO and of the Acting Policy Director are also disclosed.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, we have also considered whether partial access could be granted to document 3, but we have concluded that the parts of the document falling within the scope of the request are either covered by the above-mentioned exceptions or would be meaningless. According to the General Court,

¹² 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.

¹³ 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.

¹⁴ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁵ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁶ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

the Commission is entitled "*to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant*"¹⁷.

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.

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 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

¹⁷ Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69