



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

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***By registered mail with acknowledgment
of receipt***

Ms Stephanie Ghislain
29 Rue Ducale
1000 Brussels

Advance copy by email
ask+request-7860-493e6957@asktheeu.org

**Subject: Reply to your access to documents requests registered under
Gestdem 2020/2297**

Dear Ms Ghislain,

I refer to your request for access to documents under Regulation (EC) No. 1049/2001 ('Regulation 1049/2001')¹ dated 17 April 2020, and registered under the above-mentioned reference number.

1. SCOPE OF THE REQUEST

You request access to the following documents:

- *All correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including representatives of companies, business associations, law firms and individual arbitrators, in which the EU proposals for provisions on sustainable development in the EU-China CAI negotiations were discussed (between 01 July 2018 and today);*
- *Minutes of meetings (internal or with stakeholders) discussing sustainable development in the context of EU-China negotiations towards a CAI;*
- *EU proposals to China on "Investment and Sustainable Development" in the context of the CAI negotiations.*

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.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², 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 pose 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 documents⁴, "*the exceptions to that right [...] must be interpreted and applied strictly*"⁵.

We identified **8 documents** that fall within the scope of your request:

- (1) Note on EU-China negotiations on a Comprehensive Agreement on Investment (CAI) - 23rd Round, 23-24 September 2019, Beijing (**document 1**);
- (2) Note on EU-China negotiations on a Comprehensive Agreement on Investment (CAI) – 22nd Round, 15-19 July 2019, Brussels (**document 2**);
- (3) Note on EU-China negotiations on CAI - 21st round, 10-14 June 2019, Beijing (**document 3**);
- (4) Note on College discussion on China on 6 March 2019 (**document 4**);
- (5) Note on EU-China Negotiations on a Comprehensive Agreement on Investment (CAI) – 20th Round, 25-27 February 2019, Brussels (**document 5**);
- (6) Note on EU-China negotiations on a Comprehensive Agreement on Investment (CAI) – 24th Round, 5-8 November 2019, Beijing (**document 6**);
- (7) E-mail exchange dated 4 October 2019 (**document 7**);
- (8) Draft EU text proposal to China, 18 December 2014 (**document 8**).

A list of these documents has been created for the purpose of your request and provided in Annex I to this letter.

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).

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

Having carefully examined the documents that you requested in light of the applicable legal framework, I regret to inform you that **documents 1 to 6** and **document 8** cannot be released.

Indeed, the relevant information contained in the identified documents is entirely covered by Article 4.1(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations). In addition, **documents 1-7** personal data should be withheld, in accordance with Article 4(1)(b) of Regulation 1049/2001.

Document 7 can be partially released. Names and other personal data have been removed from it pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No. 2018/1725 ('Regulation 2018/1725'). Hence, the main content of this document relevant to your request is accessible.

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

2.1. Protection of the public interest as regard international relations (documents 1-6 and 8)

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*'.⁶ More specifically, the General Court has stated that '*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*'.

Documents 1, 2, 3, 4, 5, 6 and **8** cannot be released since they are entirely covered by Article 4.1(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations).

In particular:

Document 1 discloses EU negotiating tactics and the assessment of China's position on labour and environmental rules related to investment.

Document 2 describes China's position and the main policy gaps related to labour and environmental standards.

Documents 3, 5 and 6 reveal the EU assessment as regards the state of play and perspectives of the ongoing negotiations on various issues related to sustainable development based on China's position expressed during the negotiations.

Document 4 contains strategic considerations contributing to Commission's internal reflections on the EU-China relationship.

⁶ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

Document 8 contains specific information that could risk to undermine the dialogue, trust and relations with China if they were disclosed.

Disclosure of **documents 1, 2, 3, 4, 5 and 6** would reveal the strategic reflection and the legal considerations underpinning the Commission's negotiating proposals in the ongoing negotiations on a CAI with the People's Republic of China. This would weaken the Commission's negotiating position by giving to the Commission's negotiating partner an insider look into the Union's strategy, negotiating margin of manoeuvre and concessions.

Moreover, the disclosure of these documents may also jeopardise the mutual trust between the EU and other third country partners, as they may fear that in the future their positions during negotiations or otherwise would be exposed and they may as a result refrain from engaging with the EU. Third country partners need to be able to confide in each other's discretion and to trust that they can engage in open and frank exchanges of views without having to fear that these views and positions may in the future be publicly revealed. As the Court recognised in Case T-301/10 *in't Veld v Commission*, "[...] *establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise*"⁷.

The disclosure of **document 8** could reveal the EU's strategies and consequently have an adverse impact on the negotiations and on on-going and future relations with China. The disclosure of the draft EU text proposal is likely to upset the mutual trust between the Parties and thus have a negative effect on the negotiating position of the EU, especially when considering the advanced stage of the negotiating process.

Thus, the disclosure of **documents 1 to 6 and 8** would undermine the protection of the public interest as regards international relations by weakening EU negotiating position and by undermining EU relationships with third countries.

2.2. Protection of the privacy and the integrity of the individual

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725').

Documents 1-7 contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data '*means any information relating to an identified or identifiable natural person [...]*'. The Court of Justice has specified that any information, which by reason of its content, purpose or

⁷ Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

effect, is linked to a particular person is to be considered as personal data⁸. Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.⁹

In its judgment in Case C-28/08 P (Bavarian Lager)¹⁰, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.¹¹

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if *'[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'*. Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

⁸ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case [C-434/16](#), *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

⁹ Judgment of the General Court of 19 September 2018 in case [T-39/17](#), *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

¹⁰ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹¹ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. PARTIAL ACCESS

In accordance with article 4(6) of Regulation 1049/2001, the possibility of granting partial access to the concerned documents has also been examined. However, it is considered that, as all parts of these documents are covered by the invoked exceptions, no such partial access can be granted.

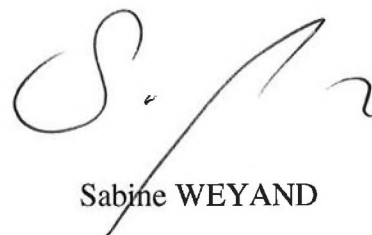
In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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

Secretariat-General
European Commission
Transparency, Document Management & Access to Documents (SG.C.1)
Rue de la Loi 200/Wetstraat 200
BERL 7/076
1049 Brussels

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

Yours sincerely,



Sabine WEYAND

Enclosures:

- Annex I: List of documents
- Annex II: Partially released **document 7**