



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels, 13 August 2014
Trade/dga2.e.1 (2014) 2863262

Mr Gregorio Abascal Galan
Bº El Camino nº50, casa nº5
Ampuero, Cantabria
España
C.P. 39840

By email: ask+request-1421-3cf4bfb9@asktheeu.org

Subject: Document request pursuant to Regulation (EC) No 1049/2001 (GESTDEM 2014/3586)

Dear Mr Galan,

Thank you for your request Gestdem 2014/3586, received on 4 August 2014, for access to documents under Regulation No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents ("the Regulation").

We understand from your request that you would like to have access to the following TTIP documents:

Consolidated text proposals, non-papers and draft text proposals in the following areas:

- Chapter on Energy and Raw Materials*
- Chapter on "Financial Services"*
- Chapter on Services and Investments, Intellectual Property and Public Procurement Services*

Before I go into the details of your requests, let me draw your attention to the General Court rulings concerning the access to documents of international agreements.

As you know, the success of the negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. While the Commission is

¹ OJ L 145, 31.5.2001, p. 43.

highly committed to the principle of transparency, a certain level of discretion and special care in handling its negotiating documents is essential. Only by safeguarding this discretion can the Commission preserve the room for manoeuvre required to lead the negotiations to a conclusion which promotes the EU interest.

Indeed, as the General Court recognised in case T-301/10², *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. [...] [A]ny 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.*

The General Court acknowledged furthermore that *[i]n the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. [...] [T]he formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.*³

Furthermore, such discretion is also required to safeguard the mutual trust between the negotiating parties, which is an essential precondition for the success of the negotiations. Indeed, some of the documents requested include direct and indirect references to the negotiation positions of the US. Release of the latter position would undermine the trust of the US in the confidentiality of the negotiations, and therefore also the chances of reaching successful negotiation results. The fact that both negotiating partners have pledged to respect the confidentiality of the negotiations within the limits of their respective access to documents rules only reinforces this conclusion⁴.

In the above-mentioned judgment⁵, the General Court confirmed that *in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and,*

² Judgment of the General Court of 19 March 2013 in case T-301/10, *Sophie in 't Veld v European Commission*, paragraph 119.

³ *Ibid*, paragraph 125.

⁴ Arrangement on TTIP negotiating documents

-EU letter to the US available in http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf

-US letter to the EU available in http://www.ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter_0.pdf

⁵ Paragraph 126.

moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. As the Commission emphasises, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise.

Your request concerning TTIP documents

We have identified 22 documents (see Annex I) falling under the scope of your request out of which

- 1 document concerns the EU draft text proposal on public procurement, with security classification as "EU Restricted" sent by the European Commission to the Member States and the INTA Committee in the European Parliament, and
- 21 papers (consisting of initial position papers, papers or non-papers⁶), out of which
 - 18 papers, with security classification as "EU Restricted" or "EU Limited" as sent by the European Commission to the Member States and the INTA Committee in the European Parliament; and
 - 3 public documents.

Concerning the status of EU draft text proposal in the areas of your request, ahead of the 6th TTIP negotiating round the Commission published a summary of the state of play⁷ of the negotiations, and progress achieved by the negotiators to date in all the areas of the negotiations. As you can see in the document, in only one area⁸ falling under the scope of your request the negotiations have reached the stage in which discussions are based on consolidated texts. In the area of public procurement, discussions have only recently started to take place on the basis of consolidated texts.

The three public documents referred to above, concern the initial EU position papers presented to the US during the negotiations. In the areas of your interest the following papers are available:

-Energy & Raw Materials - http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf
-Financial Services - <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1018>
-Public Procurement - http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf

⁶ For the purpose of negotiations documents shared by the Commission with the EU Member States and the European Parliament/INTA Committee are all considered papers irrespective of whether the title refers of initial position papers, non-papers or concept papers.

⁷ TTIP state of play available in <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1126>

⁸ Energy and Raw Materials, Financial Services, Services and Investment, Intellectual Property, Public Procurement

Unfortunately, I regret to inform you that disclosure of the draft EU public procurement text proposal and of the remaining 18 papers is prevented by exceptions to the right of access laid down in Article 4 of this Regulation. Putting the requested documents at this point in time into the public domain would undermine the position of the Commission in the negotiations and, more generally, its relations with the US and other negotiating partners as it would provide indications regarding the negotiation approach and tactics followed by the EU in its negotiations with the US, and would hence weaken the EU's position in these and its other, ongoing and future, bilateral negotiations.

For these reasons, access to these 19 documents has to be refused based on the exception defined in Article 4(1)(a), third indent of Regulation, and the above mentioned case law, as their release would result in a real and non-hypothetical risk to the international relations protected by that provision.

We have also considered whether partial access can be granted to the documents, pursuant to Article 4(6) of the Regulation. 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.

Finally, I take note of your comments concerning transparency in the TTIP negotiations as well as on the letter from the European Ombudsman to President Barroso, asking for more effort on TTIP transparency. Let me reassure you that the EU is committed to providing a maximum of information available in the public domain for review of citizens, the media, and the many stakeholders as we move through the negotiations. That is why the Commission has taken the unprecedented step of making available in the public domain a number of EU's position papers in most areas of the negotiations⁹. Further initiatives to ensure transparency in this respect may be considered by the new Commission.

If you would like the position taken by our service to be reviewed, you should write to the Commission's Secretary-General at the address below, confirming your initial request. In accordance with Article 7.2 of the Regulation, you have fifteen working days in which to do so from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen working days from the registration of your confirmatory request, either granting you access to the document or confirming the refusal. In the latter case, you will be informed of how you can take further action.

⁹ Position papers available in <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1080&serie=775&langId=es> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943>

All correspondence should be sent to the following address:

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

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

Yours sincerely,



Jean-Luc DEMARTY

Enclosures:

ANNEX I - list of documents exchanged with Member States and European Parliament/INTA committee on the topics falling under the scope of the request