



EUROPEAN COMMISSION
Directorate-General for Trade
The Director General

28 JUL. 2015

Brussels,
Trade/B2/Ares (2015) 2664089

Ms Pia Eberhardt
Corporate Europe Observatory
Cranachstraße 48
50733 Cologne
Germany
via www.asktheeu.org

Subject: Request for access to documents – Ref GestDem 2014/6024

Dear Ms Eberhardt,

Thank you for your request for access to documents under Regulation (EC) 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 documents:

- 1) List of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) with stakeholders, including individual companies, law firms, arbitrators and industry associations, in which the EU-China investment negotiations were discussed (between 27 May 2014 and today).
- 2) Minutes and other reports of these meetings.
- 3) 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 individuals arbitrators, in which the EU-China investment negotiations were discussed (between 27 May 2014 and today).

We have identified eleven documents as falling under the scope of your request. You will find enclosed a list. Please note that some documents have already been sent in reply to your previous request (GestDem 2014/3817) and, therefore, are not included in the present reply, namely four meetings included in the "list of meetings" section and three documents included in the "list of documents".

¹ OJ L145, 31.05.2001, page 43

1. Examination and Conclusions under Regulation 1049/2001

Having examined the documents in question under the provisions of the Regulation, we consider that

- One document can be released in full (10).
- Nine documents are partially covered by Article 4 of the Regulation and can only be partially released (1, 2, 4, 5, 6, 7, 8, 9 and 11).
- One document is entirely covered by Article 4 of the Regulation and should be withheld (3).

Please note that some parts of the documents that do not relate to your request have been removed from the enclosed documents and are marked as 'not relevant'.

Documents or parts of the requested documents have been withheld on the basis of the following assessment:

1.1 Protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that the 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 the EU legislation regarding the protection of personal data.

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 the privacy and integrity of the individual, in particular in accordance with the EU legislation regarding the protection of personal data. The applicable legislation in this field is 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 data².

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable³. 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 to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

² OJ L 8 of 12.1.2001, p. 1

³ Judgement of CJUE of 29 June 2010, European Commission v The Bavarian Lager Co. Ltd, European Data Protection Supervisor, case C-28/08 P, OJ C 79 of 29.03.2008

Therefore, we are disclosing documents 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11 expunged from these personal data. We remind you that we disclose names of chairmen of the private companies, names of Directors of the European Commission and names of Members of the Cabinet.

If you wish to receive the deleted personal data, we invite you to provide us with arguments showing the need for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

1.2 Protection of international relations

Article 4(1)(a), third indent of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations.

In its judgment of 3 July 2014 in case C-350/12 P the Court found that transparency '*could not be ruled out in international affairs*⁴, especially where the negotiations '*may have an impact on an area of the European Union's legislative activity*⁵. It is important to underline that both, the General Court and the Court (in that same judgement) have agreed '*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*⁶

We believe that Article 4(1)(a) of the Regulation applies in parts of documents 2, 3, 5, 6, 7 and 9 as following:

- Risk of undermining the protection of international relations of the EU by revealing the EU's assessment of actions of a negotiating partner country or information regarding the tactical approach towards ongoing negotiations.
- Risk of undermining the protection of international relations by revealing information regarding an EU reflection or action on a specific issue.

Public access to the undisclosed parts would reveal positions taken and statements made by participants in the preparatory meetings and other information shared between the participants in view of investment policy of the EU in different ongoing negotiations. It is essential for negotiations like these to ensure a level of confidentiality for the negotiating parties, as the General Court recognised in its *In 't Veld* judgment⁷. In that judgment the General Court decided that *the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow [...] the development of a free and effective discussion*⁸ It continued considering that *any form of*

⁴ Judgment of the Court of 3 July 2014 in case C-350/12 P, Council of the European Union v Sophie in 't Veld, paragraph 76.

⁵ Ibid, paragraph 76.

⁶ Ibid, paragraph 102

⁷ Judgment of the General Court of 19 March 2013 in case T-301/10, *Sophie in 't Veld v European Commission* (hereinafter T-301/10).

⁸ T-301/10, § 119.

*negotiation necessarily entails a number of tactical considerations of the negotiators.*⁹ Disclosing the redacted parts, and thus revealing certain tactical considerations on the side of the Commission, would undermine the margin of manoeuvre of the Commission that must explore all possible options in the context of these negotiations.

1.3 Protection of commercial interests

Article 4(2), first indent of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

We have redacted parts of documents 4, 5, 6, 8, 9 and 11, which we believe fall under Article 4(2) of the Regulation, according to the following assessment:

- Risk of undermining the protection of the commercial interests of a company or the members of a business association by releasing information on their commercial priorities and concerns which are shared in the context of ongoing negotiations. The redacted parts of these documents contain details on the industry's priorities which, if revealed, could adversely affect the industry's commercial interests.
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by releasing information which would harm their relations with the governments and regulators in the country concerned as well as exposing EU investors to the risk of retaliation by regulators and officials who are responsible for the policies under discussion. The same risk exists for some parts of documents which contain assessments of relations with the government representatives of China.
- Risk of undermining the protection of the commercial interests of a company or the members of a business association, working with the Commission to effectively support EU exporters in those markets by sharing in confidence their assessment of political or economic developments in particular countries.

1.4 Protection of the decision-making process

Article 4(3) of Regulation 1049/2001 provides that access to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the

⁹ Ibid.

institution's decision-making process, unless there is an overriding public interest in disclosure.

We believe that Article 4(3) of Regulation applies in parts of documents 4 and 7, as following:

- Risk of undermining the protection of the decision-making process of the EU, during the course and at the end of ongoing investment negotiations, since it would reveal detailed information about negotiation positions. The kind of considerations in question needs to be kept confidential until an acceptable outcome has been found. Moreover, making public the Commission's reflection or action would risk undermining the decisions still to be taken on this issue. It would also reveal details of the Commission's strategy in tackling the matter.

2. Overriding public interest

The exceptions laid down in Articles 4.2 and 4.3 of the Regulation apply unless there is an overriding public interest in disclosure of the documents. Accordingly, we have also considered whether the risks attached to the release of the withheld documents or withheld parts of these documents are outweighed by the public interest in accessing the requested documents. We do not believe this to be the case.

Should you wish this position to be reviewed, you should write to the Commission's Secretary-General at the address below, confirming your initial request. Following receipt of this letter you have fifteen working days to do so, 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 request, either granting you access to the document or confirming the refusal.

All correspondence should be sent to the following address:

European Commission, Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles
sg-acc-doc@ec.europa.eu

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'J' and 'L' followed by a horizontal line.

Jean-Luc DEMARTY