



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Mr Olivier Hoedeman
Corporate Europe Observatory (CEO)
Rue d'Edimbourg, 26
1050 Brussels

Advance copy by email:
ask+request-1842-3786658a@asktheeu.org

Dear Mr Hoedeman,

Subject: Your application for access to documents – Ref GestDem No 2015/1635

We refer to your e-mail dated 13/03/2015 in which you make a request for access to documents, registered on 16/03/2015 under the above mentioned reference number.

Your application concerns the following documents:

- *a list of meetings between DG Trade officials and representatives of the tobacco industry (including tobacco companies and tobacco industry groups, but also lobby consultancies, law firms and others working for tobacco industry clients or otherwise representing the tobacco industry) in the period between January 1st 2014 and March 13th 2015 (date of the request);*
- *minutes and other reports of these meetings;*
- *all correspondence (including emails) between DG Trade officials and representatives of the tobacco industry (including tobacco companies and tobacco industry groups, but also lobby consultancies, law firms and others working for tobacco industry clients or otherwise representing the tobacco industry) between January 1st 2014 and March 13th 2015.*

1. SCOPE OF YOUR REQUEST

We have identified six documents that fall under the scope of your request:

- (1) A meeting request from Japan Tobacco International addressed to many DG Trade officials with the exact same content;
- (2) An internal email between officials of DG Trade dated 7 November 2014 and containing the report of that meeting which took place on 6 November 2014 between representatives of DG Trade and the Japan Tobacco International on certain trade restrictive policies in respect of tobacco;
- (3) Letter from DG TRADE to British American Tobacco (BAT) of 4 February 2014;
- (4) Minutes from a meeting between representatives of BAT with DG TRADE of 6 June 2015;
- (5) Letter from BAT to DG TRADE of 15 May 2015. The letter is marked by the sender as confidential; and
- (6) Minutes from a meeting between Philip Morris and DG TRADE of 5 June 2015 (Organiser: DG ENTR).

Having examined these documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents¹, I have come to the conclusion that documents (1) and (2) may be partially disclosed. Some parts of the documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

In particular, the expunged words in document number 2 relate to tobacco-related negotiating positions in our ongoing bilateral negotiations for a free trade agreement with the USA (sentence deleted in the middle of the document) and with Japan (last sentence deleted). Their disclosure at this stage could undermine the protection of the public interest as regards international relations set out in Article 4.1 (a), third indent, of Regulation (EC) No 1049/2001. The latter provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] international relations.” In this context, the General Court has ruled that in a context where the formulation of negotiating positions may involve “a number of tactical considerations of the negotiators [...] it is possible that the disclosure by the European Union, to the public, of its own negotiating position, 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”.²

In addition, the remaining expunged parts of the documents contain names of the Commission staff members and representatives of JTI which are covered by the exception to right of access to documents set out in Article 4.1 (b) of Regulation (EC) No 1049/2001. Pursuant to Article 4.1 (b) of Regulation (EC) No 1049/2001, access to a document, or part of it, has to be refused if its 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.

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

¹ OJ L 145, 31.5.2001, p. 43.

² Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 125.

regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data³. When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable⁴. 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. Therefore, we are disclosing the documents requested expunged from this personal data.

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

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law, 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 of the institutions set out in Article 4 of Regulation No 1049/2001.⁵ Such assessment is carried out in a multi-stage 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 would undermine the protection of the interest covered by the exception; third, the risk of that interest being undermined must be “*reasonably foreseeable and not purely hypothetical*”.⁶

After a careful, individual assessment of documents (3), (4), (5) and (6), we have concluded that those documents cannot be disclosed on the grounds given below.

2.1. 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 recent judgment of 3 July 2014 in case C-350/12 P the Court found that transparency ‘*could not be ruled out in international affairs*’, especially where the negotiations ‘*may have an impact on an area of the European Union’s legislative activity*’, nevertheless 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*

³ OJ L 8, 12.1.2001, p. 1

⁴ Judgment in *European Commission v The Bavarian Lager Co. Ltd.*, C-28/08 P, EU:C:2010:378.

⁵ Judgment in *Kingdom of Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

⁶ *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.

agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations'.

Documents (3), (4), (5) and (6) contain elements relative to the EU tactical approach in the ongoing negotiations with Japan. The disclosure of elements of the EU tactical approach would weaken the EU's position in its ongoing negotiations as it would provide Japan with indications on the EU's approach.

It is essential for negotiations like the ones at stake to ensure a level of confidentiality for the negotiating parties, as the General Court recognised in its in 't Veld judgment. 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.* It continued considering that *any form of negotiation necessarily entails a number of tactical considerations of the negotiators.* Disclosing the documents in question would reveal certain tactical considerations on the side of the Commission and thus would undermine the margin of manoeuvre of the Commission in the context of the FTA negotiations.

Subsequently, the negotiation power of the EU would be affected and the EU position in these negotiations would be weakened, which in turn would complicate these negotiations and damage the protection of the public interest as regards international relations.

2.2. 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.

Documents (3), (4), (5) and (6) contain an assessment of an economic situation and market access problems in Japan, as well as commercial priorities, strategies and concerns that the companies pursue. These were shared with the Commission in confidence. This information, if released, will reveal commercial strategies, priorities and sensitive business information and thus may undermine the protection of the commercial interests of the companies. It may also harm the relations that these companies have with the Japanese government and regulators and expose them to the risk of retaliation by regulators and officials are responsible for the policies under discussion.

Further indications of the sensitive character of the commercial information revealed to the Commission by BAT is the fact that BAT itself marked document (5) as "confidential", as well as the encrypted format used by the Commission to send the minutes from the meeting with BAT (document 4).

2.3. EU 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.

We consider that documents (3), (4) and (5) cannot be released as their disclosure would have an impact on decisions still to be taken by the EU regarding possible future demarches by giving elements of the Commission's assessment of the situation in question. Disclosure of the documents would prejudice the institution's margin of manoeuvre and would severely reduce its capacity to contribute to reaching its objectives. This would consequently undermine the protection of the decision-making process of the EU institution.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Articles 4.2 and 4.3 of the Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. Accordingly, we have considered whether the risks attached to the release of the withheld documents are outweighed by the public interest in accessing the requested documents. We do not believe this to be the case

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 5/327
B-1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY