

EUROPEAN COMMISSION
Directorate-General for Trade
The Director General

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By registered letter with acknowledgment of receipt

Ms Pia Eberhardt
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Subject: Your application for access to documents – Ref GestDem No 2015/4987

Dear Ms Eberhardt,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered under the above mentioned reference number. Please accept our apologies for the delay in answering to your request.

1. SCOPE OF YOUR REQUEST

You requested access to the following documents:

- 1) *a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies and/or industry federations such as BusinessEurope, the European Services Forum (ESF), the Federation of German Industries (BDI) and/or law firms such as Freshfields, White & Case, Herbert Smith and Sidley, in which the EU's foreign investment policy, including the EU-US and EU-Canada investment policy was discussed (since October 2014);*
- 2) *minutes and other reports of these meetings;*

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.

- 3) *all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies, business associations and law firms, in which the EU's foreign investment policy, including the EU-US and EU-Canada investment policy was discussed (since October 2014).*

We have identified the following 15 documents that fall within the scope of your request:

- the report of a meeting with the British Medical Association on 11 December 2014 (Ares(2016)2911520) ("**document 1**");
- the report of a meeting with the company Philip Morris, held on 18 December 2014 (Ares(2016)2911780) ("**document 2**");
- the report of a meeting with the company Heineken, held on 4 February 2015 (Ares(2016)2911845) ("**document 3**");
- the report of a meeting with the company Chevron, held on 3 March 2015 (Ares(2016)2911884) ("**document 4**");
- the report of a meeting with BusinessEurope, held on 6 March 2015 (Ares(2016)2911918) ("**document 5**");
- the report of a meeting with BusinessEurope, held on 27 March 2015 (Ares(2016)1396296), ("**document 6**");
- the report of a meeting with Heineken, held on 1 April 2015 (Ares(2016)2911959) ("**document 7**");
- the report of a meeting organised by the British Chamber of Commerce in Denmark, held on 16 April 2015 (Ares(2016)2912062) ("**document 8**");
- the report of a meeting with Digital Europe, held on 29 April 2015, (Ares(2016)2912097) ("**document 9**");
- the report of a meeting with the US Chamber of Commerce, held on 3 September 2015 (Ares(2016)2912128) ("**document 10**");
- the report of a meeting with Confederation of Netherlands Industry and employers, held on 24 September 2015 (Ares(2016)2912201) ("**document 11**");
- a letter from BusinessEurope on BusinessEurope roadmap for the Commission, dated 4 November 2014 (Ares(2014)3676597) ("**document 12**");
- an email from APCO Worldwide on behalf of Etihad Airways, dated 22 December 2014 (Ares(2016)2912201) ("**document 13**");

- a letter from BusinessEurope to the European Parliament, dated 16 March 2015 (Ares(2016)2912201) ("**document 14**");
- a document transmitted by The City UK, dated 27 July 2015 (Ares(2016)2912201) ("**document 15**").

We enclose for ease of reference a list of these meetings and documents in Annex I.² For each of the documents, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed in Annex II.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,³ 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*".⁴

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁵ "*the exceptions to that right [...] must be interpreted and applied strictly*".⁶

Having carefully examined the documents identified above in light of the applicable legal framework, we are pleased to grant **full access to documents 12, 14, 15 and partial access to documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13.**

The information removed in documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13 fall under the exceptions set out in Articles 4.1(a) third indent, 4.1(b), 4.2 first indent and 4.3 first subparagraph of Regulation 1049/2001.

² This list is provided under the Code of Good Administrative Behaviour (OJ L 267, 20.10.2000, p. 64).

³ 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.

⁴ *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.

⁵ See Regulation (EC) No 1049/2001, recital (4).

⁶ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 1.2, 1.3, 1.4 and 1.5. Section 2 contains an assessment of whether there exists an overriding public interest in the disclosure.

Please note that some information in documents 6 and 13 has been removed as they do not concern the subject-matter of your request, hence they fall outside the scope of your application. Some parts of document 12 are also out of scope but they are released as they form part of an already public document.

Documents that have already been provided to you in reply to your requests with GestDem references numbers 2014/6204, 2015/3817, 2015/4087, and 2015/5130, have not been included in the present reply.

1.1. Context of the documents

As part of the EU common commercial policy, the Commission negotiates investment rules in the context of free trade agreements with third countries. The EU's investment policy focuses on providing EU investors and investments with market access, legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business.

In the context of these negotiations and reflections on the EU investment policy the Commission meets with, and seeks input from, a wide range of stakeholders, including civil society, NGOs, trade unions, consumer groups, companies and trade associations. This process allows the Commission to better understand the stakeholders' interests and concerns in the third country markets, and to identify strategic objectives to pursue in the negotiations, thus obtaining positive outcomes in the agreements in the public interest. The documents covered by this request were drawn up in the course of this process, and with a view of reaching the objectives set by the EU in its investment negotiations with third countries.

1.2. Protection of international relations (documents 9 and 10)

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 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

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

negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations".⁸

One sentence has been removed from document 9 as it contains internal assessments of specific aspects of ongoing negotiations and views on their comparison to existing rules. The public disclosure of this information would weaken the negotiating position of the EU by exposing internal assessments which may have an impact on the ongoing discussions. This would undermine the position of the EU in the international negotiations thus ultimately affecting their final outcome.

Two sentences have been removed from document 10 as they contain the position of a negotiating partner on a specific issue currently being negotiated. Revealing this position could have an impact on EU's relations with the country and hence undermine the protection of EU's international relations.

1.3. Protection of the privacy and the integrity of the individual (documents 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13)

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."*

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".⁹*

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'"¹⁰* and that *"surnames and forenames may be regarded as personal data",¹¹* including names of the staff of the institutions.¹²

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*

⁸ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ 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.

¹⁰ 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.

¹¹ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹² Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

prejudiced". The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*.¹³

Documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 contain names and other personal information that allow 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 be removed in order to ensure the protection of the privacy and integrity of the individuals concerned.

We do however disclose the names of senior management of the Commission starting from the Director level (included), members of Cabinet, senior representatives of external stakeholders, and public figures.

1.4. Protection of commercial interests (documents 1, 2, 3, 4, 5, 7, 9, 10)

Article 4.2 first indent, of Regulation 1049/2001 provides that *"[t]he 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"*.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4.2 first indent,¹⁴ it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.¹⁵ Accordingly, it must be information that is *"known only to a limited number of persons"*, *"whose disclosure is liable to cause serious harm to the person who has provided it or to third parties"* and for which *"the interests liable to be harmed by disclosure must, objectively, be worthy of protection."*¹⁶

Some parts in documents 3, 7 and 9 contain the specific views, concerns and interests raised by companies and business associations in relation to investment and regulatory issues in foreign markets. They also contain the assessments of the economic situation and market access problems in third countries as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in the third country markets. Moreover, document 2 contains details regarding ongoing arbitration proceedings involving a company. Documents 1, 4, 5 and 10 reveal specific views and concerns of stakeholders in relation to the external investment policy of the EU, or details

¹³ *Id.*, paragraph 107; see also judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

¹⁴ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁵ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁶ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

regarding the relationship of business organisations with other actors in the market, or their perceptions of others' positions.

This information was shared with the Commission in confidence in order to support the EU's objectives in the ongoing investment negotiations. Its public release would harm the relations that the organisations concerned have with the governments, regulators, the public and other relevant actors at the same time exposing EU investors to a risk of retaliation and of damage to their position in the market. Moreover, the commercial interests of the EU investors in the conclusion, implementation and enforcement of trade agreements as well as the negotiation of future agreements could be undermined by revealing the positions taken in the course of the negotiations of such agreements. Finally, there is a reasonably foreseeable and not purely hypothetical risk that the commercial interests of the members of the business association be undermined by revealing their commercial strategies and priorities, ongoing litigation as well as their commercially sensitive business information.

1.5. Protection of the institution's decision-making process (document 1, 5, 10, 11)

Article 4.3 first subparagraph, of Regulation 1049/2001 provides that “[a]ccess 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.”

The jurisprudence of the EU Courts has recognized that “the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process”¹⁷ and that the capacity of its staff to express their opinions freely must be preserved¹⁸ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, the result of such self-censorship “would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]”.¹⁹

Certain passages in documents 1, 5, 10 and 11 contain personal views and perceptions of Commission staff members regarding the position of stakeholders on specific aspects related to the EU ongoing investment negotiations, their relationship with other stakeholders as well as internal comments regarding Commission's actions and initiatives in the context of ongoing negotiations. This information was meant for internal use as a basis to inform the Commission's ongoing decision-making process in relation to trade and investment negotiations. Disclosing at this stage the internal options, views, perceptions of those who

¹⁷ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

¹⁸ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

¹⁹ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

drafted the reports would unduly expose the Commission's deliberative process to external pressure, potential manipulation and unfounded conclusions and would restrict the free exchange of views within the Commission staff. Protecting the confidentiality of these passages allows for the individuals involved in the decision-making process to speak frankly and freely. Reducing this degree of confidentiality would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that "*constructive form of internal criticism, given free of all external constraints and pressures*" which is "*designed to facilitate the taking of decisions*". Ultimately, this would affect the quality of the internal consultations and deliberations, and seriously undermine the Commission's decision making process.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Articles 4.2 first indent and 4.3 of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

The negotiations of international agreements as such "*fall within the domain of the executive*", which entails 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*".²⁰ Documents 1, 2, 3, 4, 5, 7, 9 and 10, all pertain to the executive functions of the EU, as they concern consultations with the external stakeholders aimed at collecting useful input for the ongoing trade and investment negotiations.

Accordingly, we have also considered whether the risks attached to the release of the withheld parts of documents 1, 2, 3, 4, 5, 7, 9 and 10 are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies and organisations concerned, and the need to preserve the Commission's decision-making from external pressure and risks of self-censorship in the specific circumstances of the ongoing trade and investment negotiations.

You may reuse documents 1-12 and 13 disclosed free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message. The Commission does not assume liability stemming from the reuse.

Documents 12, 14 and 15 were received from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originator. They do not reflect the position of the Commission and cannot be quoted as such.

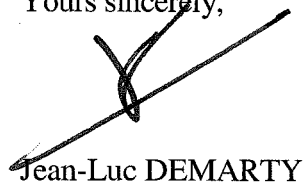
²⁰ Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.

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
B-1049 Bruxelles
sg-acc-doc@ec.europa.eu

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

Annex I: List of meetings and documents

Annex II: documents disclosed