



EUROPEAN COMMISSION  
Directorate-General for Trade

The Director General

Brussels, **26 JUL. 2016**  
trade.a.3.dir(2016)809703

***By registered letter with acknowledgment of receipt***

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**Subject: Your application for access to documents – Ref GestDem No 2015/5228**

Dear Ms Eberhardt,

I refer to your request of 2 October 2015 for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> ("Regulation 1049/2001"), registered under the above mentioned reference number.

**1. SCOPE OF YOUR REQUEST**

You requested access to the following documents from the EU Delegation to China from 1 January to 2 October 2015, date of your request:

- 1) *"minutes and other reports of the meetings of the trade counsellors in China;*
- 2) *a list of meetings of staff in the China delegation with individual companies, industry associations, law firms, think tanks and lobby consultancies in which EU-China investment relations, including the ongoing negotiations for an EU-China investment agreement, were being discussed;*
- 3) *minutes and other reports of these meetings."*

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<sup>1</sup> 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.

By letter of 13 January 2016 (with reference number Ares(2015)5528957) we responded to points 2 and 3 of your request by providing you with a list of meetings, full access to 6 documents and partial access to 18 documents. In the same letter we informed you that the documents containing the minutes and other reports of the meetings of the trade counsellors in China (point 1 of your request) would be the subject of a separate assessment by the EU Delegation in Beijing. This reply covers the latter documents.

Please accept our apologies for the delaying in answering to the second part of your request. This is due to a high number of requests for access to documents being processed at the same time by DG Trade. Moreover, your request was complex and voluminous. It entailed the review and assessment of a large number of documents by staff of both the EU delegation in China and DG Trade.

We have identified 54 documents that fall under point 1 of your request. 18 documents are the minutes or other reports of the trade counsellors meetings taking place both in Beijing and Shanghai, and 36 documents are related annexes. Where meeting documents for both Beijing and Shanghai include identical annexes these annexes have only been included in respect of the earlier meeting. A list of the documents is enclosed in Annex 1.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

In accordance with settled case law,<sup>2</sup> 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*”.<sup>3</sup>

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,<sup>4</sup> “*the exceptions to that right [...] must be interpreted and applied strictly*”.<sup>5</sup>

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<sup>2</sup> 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.

<sup>3</sup> *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.

<sup>4</sup> Regulation (EC) No 1049/2001, recital (4).

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

Having examined the requested documents under the applicable legal framework, I am pleased to grant **full access to 10 documents** and **partial access to 41 documents** (see Annex 1). I regret to inform you that access cannot be granted to documents 9.2, 14.3 and 15.4.

These documents as well as parts of the 41 partially accessible documents are covered by the exceptions to the right of access to documents set out in Article 4 of Regulation 1049/2001, namely Article 4.1(a) third indent (protection of the public interest as regards international relations), Article 4.1(a) fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State), Article 4.1(b) (protection of privacy and integrity of the individual), Article 4.2 first indent (protection of commercial interests of a natural or legal person) and Article 4.3 first subparagraph (protection of the decision making process).

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2, 2.3, 2.4 and 2.5. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure. The documents released are attached in Annex 2.

## **2.1 Protection of international relations**

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.”

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*.<sup>6</sup> In this context, 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"*.<sup>7</sup>

The General Court found 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"*.<sup>8</sup> Moreover, the *"the positions taken by the 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. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the*

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<sup>6</sup> Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

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

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

*Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union".*<sup>9</sup>

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Documents 1, 1.2, 2, 3, 4, 5, 6, 7, 7.2, 8, 9, 9.2, 9.3, 10, 11, 12, 13, 14, 14.3, 15, 15.4, 16, 17 and 18 contain elements of the EU's assessment of the political and economic situation in China, including assessments on specific aspects of China's investment policy in the context of ongoing negotiations with the EU and market access problems. They also contain information regarding the tactical approaches of the EU towards ongoing negotiations both at the multilateral and bilateral level, which if released, would give out elements of the EU's strategy, thus reducing its negotiating capacity. Disclosing these 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 in the context of trading negotiations all possible options free of external pressure.

Moreover, the disclosure of these tactical and strategic elements would weaken the EU's position in its other, ongoing and future, bilateral negotiations as it would provide other negotiating partners with indications on the EU's approach. This would allow them to exploit to their advantage the knowledge that they would have of the approaches and tactics of the EU, thus undermining the goals and objectives that the EU may want to achieve in these negotiations and consequently, the public interest as regards international relations.

Disclosure of certain elements would also indirectly reveal the negotiating position of China and its approach to certain matters. In particular some documents contain detailed information on discussions between EU and Chinese authorities, such as document 9.3 which contains a detailed report on discussions in the EU China Economic and Trade working group. Disclosure of this information would undermine in a reasonably foreseeable manner the climate of confidence and trust between the EU and Chinese authorities which is necessary for the successful outcome of the ongoing negotiations and more in general for the working relationship and cooperation between EU and China. Trading 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 that these views and positions may in the future be exposed. As the General Court acknowledged 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*".<sup>10</sup>

Furthermore, some of the passages removed contain internal considerations and assessments of the EU and the Member States with regard to certain legislative and administrative measures of China, and in relation to ongoing trade defence instruments proceedings. Disclosure of this information would have a detrimental impact of the working relationship between the EU and its Chinese commercial partners, upsetting their cooperation and

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<sup>9</sup> *Id.*, paragraph 125.

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

possibly prejudging efforts between the parties to resolve amicably through diplomatic means any potential issues arising in their commercial relations.

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## **2.2 Protection of the financial, monetary or economic policy of the Community or a Member State**

Article 4.1(a) fourth 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: [...] the financial, monetary or economic policy of the Community or a Member State.”

In its judgement in Case T-264/04,<sup>11</sup> the General Court found that the exception set out in Article 4.1(a) fourth indent could be relied on to protect ongoing WTO negotiations that were taking place “*in a sensitive context*” and were “*characterised by resistance on the part of both the developing and the developed countries and the difficulty in reaching an agreement*”.<sup>12</sup>

Certain redacted passages in documents 1, 1.2, 2, 3, 4, 5, 6, 7, 8, 9, 9.2, 10, 12, 14, 15 and 16 contain internal views and strategic considerations with regard to ongoing WTO negotiations, information about the position of China and other countries in this context, and internal assessments regarding the compatibility of certain Chinese measures with WTO rules. Certain passages reveal also the positions of Member States, their specific political and commercial interests in China and strategic considerations with respect to Chinese positions. Public disclosure of this information would undermine the economic policy of both the EU and the Member States in a reasonably foreseeable manner by upsetting the mutual trust established between the negotiating partners, reducing the room for manoeuvre and compromise which is needed to order to conclude successfully ongoing bilateral and multilateral talks and ultimately undermining the effectiveness of the economic relations between China, the EU and the Member States.

## **2.3 Protection of privacy and integrity of the individual**

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*

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<sup>11</sup> Judgment in *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114.

<sup>12</sup> *Id.* paragraph 41.

45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety".<sup>13</sup>

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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'"*<sup>14</sup> and that *"surnames and forenames may be regarded as personal data"*,<sup>15</sup> including names of the staff of the institutions.<sup>16</sup>

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 prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*.<sup>17</sup>

Documents 1, 1.1, 1.2, 1.3, 1.4, 2, 2.1, 3, 3.1, 3.2, 4, 4.1, 4.2, 5, 5.1, 6, 7, 7.1, 7.2, 8, 8.1, 9, 9.1, 10, 10.1, 11, 11.2, 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 16.1, 17, 17.1, 18, 18.1, all contain personal information such as names, phone numbers or email addresses that allows the identification of natural persons.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or 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 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.

## **2.4 Protection of commercial interests**

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"*.

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<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>16</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>17</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

Certain redacted parts in documents 3, 4, 14, 15 and 16 reveal specific views, concerns and interests raised by business associations in relation to investment and regulatory issues in China. They also contain the assessments of the economic situation and market access problems in China as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in China. This information, if released, would harm the relations that these organisations have with the governments and regulators, at the same time exposing EU investors to the risk of retaliation. 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 as well as their commercially sensitive business information.

## **2.5 Protection of the institution's decision-making process**

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"*<sup>18</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>19</sup> 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 [...]"*.<sup>20</sup>

Parts of documents 3, 4, 5, 6, 7, 7.2, 8, 9, 9.2, 9.3, 10, 11, 12, 13, 14, 14.3, 15, 15.4, 16, 17 and 18 contain internal views, analyses, opinions and impressions of those who participated at the meetings on ongoing proposals, negotiations, and initiatives between the EU and China. It also contains internal considerations on the political situation in China, and views on the goals and objectives that the EU should pursue in its relationship with China. They also contain individual positions of Commission staff members, positions of Member States and exchange of views between the participants. In addition, certain parts of these documents contain information about strategic approaches used by the Commission in the decision making process. Release would prejudice the institution's ability to reach its objectives.

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<sup>18</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

<sup>19</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

All this information was meant for internal use of the Commission as a basis to inform its decision-making process in relation to its relationship and trade negotiations with China both at the multilateral and bilateral level. This deliberative process is not concluded. As the investment and trade negotiations with China unfold both the bilateral and multilateral level, the Commission will continuously be making decisions with regard to these negotiations. Exposing internal considerations to the public would expose the Commission and the Member States to external pressure. Moreover, publicly releasing the internal opinions of Commission staff members and the positions of the Member States in reaction to those, would pose a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the Commission's decision-making process. In particular, public disclosure 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 and between the Commission and the Member States. Moreover, the disclosure of these passages would have a negative impact on decisions still to be taken by the EU regarding possible future investment negotiations by giving elements of the Commission's assessment. This would consequently undermine the decision-making process of the EU institutions by revealing specific elements taken into account for the negotiations.

Protecting the confidentiality of these passages allows for the individuals involved in the decision-making process to speak frankly and freely, and in this way, the Commission is able to collect more accurate information to feed into its decision-making process. Reducing this degree of protection 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*”.<sup>21</sup> 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 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. Accordingly, we have also considered whether the risks attached to the release of the withheld parts of documents 3, 4, 5, 6, 7, 7.2, 8, 9, 9.2, 9.3, 10, 11, 12, 13, 14, 14.3, 15, 15.4, 16, 17 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 concerned and the protection of the EU's ongoing decision-making process.

### **4. PARTIAL ACCESS**

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<sup>20</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

<sup>21</sup> See *supra*, case-law cited in footnote 20.



Pursuant to Article 4.6 of Regulation (EC) No 1049/2001 "*[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*". We have also considered, pursuant to Article 4(6) of Regulation 1049/2001, whether partial access can be granted to the documents 9.2, 14.3 and 15.4. However, we have concluded that the requested documents are entirely covered by the exceptions set out in Articles 4.1(a) third and fourth indents and 4.3 first subparagraph, and it is impossible to disclose any parts of the documents without undermining the protection the interests protected by these provisions, as explained above.

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In case you would disagree with my assessment, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, 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  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'X' or 'V' shape with a long horizontal stroke extending to the right.

Jean-Luc DEMARTY

Encl.:

- Annex 1: List of documents and annexes
- Annex 2: (Partially) released documents