

EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels, **13 JAN. 2016**
Ares C1PB/MM/lg (2015)5528957

Ms Pia Eberhardt
Corporate Europe Observatory
Rue d'Édimbourg 26
1050 Brussels
Belgium

Subject: Request for access to documents – Ref: 2015/5228

Dear Ms Eberhardt,

I am writing in reply to your request for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (Regulation 1049/2001).

We understand from your request of 2 October 2015 that you would like to have access to the documents which contain the following information from the EU Delegation to China from 1 January 2015 to the 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 discussed;
- 3) minutes and other reports of these meetings.

With regard to (1) documents related to these meetings are currently the subject of a separate assessment by the EU Delegation in Beijing. We will communicate the results of this assessment to you as soon as possible.

With regard to (2) please see the attached list of meetings (Annex 1).

With regard to (3) please see the attached list of minutes and other reports (Annex 2). Please note that minutes or reports do not exist for all meetings listed in Annex 1. We have

¹ OJ L145, 31.05.2001, page 43

identified 24 documents. The parts of the documents that do not relate to your request have been removed.

1. Examination and Conclusions under Regulation 1049/2001

Having examined the requested documents under the provisions of Regulation 1049/2001 we are pleased to grant you:

- Full access to 6 documents (see Annex 2) falling under point 3 of your request.
- Partial access to 18 documents (see Annex 2) falling under point 3 of your request.

1.1 Context of the documents

As a part of the EU common commercial policy, the Commission is negotiating investment rules in the context of free trade agreements with third countries. The EU's investment policy is focused 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 ongoing negotiations and reflections on the EU investment policy, the Commission is meeting with different stakeholders in order to better understand their interests and concerns in China. The documents covered by this request were all drawn up in the course of this process, and with a view to reaching the objectives set by the EU in its investment negotiations with this country.

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

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 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*'², especially where the negotiations '*may have an impact on an area of the European Union's legislative activity*'³, 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*

² 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.

³ Ibid, paragraph 76.

*conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations*⁴.

Documents 5, 7, 9, 11, 18 and 23 are released in full.

Documents 1, 2, 3, 8, 13, 15, 19, 22 and 24 contain elements of the **EU's assessment of the political and economic situation in China** and/or information regarding the tactical approach towards ongoing negotiations. Releasing this assessment could harm EU's international relations with the country concerned.

Some of the documents contain the EU's assessment of **particular aspects of investment policy in the context of the ongoing negotiations with China**, which if released, would give out elements of the EU's tactical approach and which would have an impact on the EU's negotiating position given that it would reveal the EU's assessment of an economic situation and market access problems in China.

Certain of the documents contain information regarding **the tactical approach towards ongoing negotiations**. Putting this information in the public domain would harm the EU's international relations as it would disclose elements of the EU's strategic approach in the ongoing investment negotiations.

The disclosure of elements of the negotiation approach and tactics followed by the EU in its investment negotiations would weaken the EU's position in its other, ongoing and future, bilateral negotiations as it would provide our negotiating partners 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.⁵ 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*.⁶ It continued considering that *any form of negotiation necessarily entails a number of tactical considerations of the negotiators*.⁷ 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 free of external pressure.

Subsequently, the negotiation power of the EU would be affected and the EU's position in these negotiations would be weakened, which in turn would complicate these negotiations by

⁴ Ibid, paragraph 102.

⁵ 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).

⁶ Ibid, paragraph 119.

⁷ Ibid.

allowing our negotiating partners to know our stance to the negotiations. This would damage the protection of the public interest with regard to international relations.⁸

1.3 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.

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 data⁹.

When access is requested to documents containing personal data Regulation (EC) No 45/2001 becomes fully applicable¹⁰. 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 partially disclosing the requested documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 with this personal data expunged.

If you wish to receive the removed 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.

1.4 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.

Certain withheld parts of documents 1, 2, 3, 8 and 19 contain assessments of the economic situation and market access problems in China as well as commercial priorities, strategies

⁸ Ibid, paragraph 123.

⁹ OJ L 8 of 12.1.2001, p. 1

¹⁰ 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

and concerns that a company or the members of a business association pursue in the third country markets. These were shared with the Commission in confidence in order to support EU's objectives in the ongoing investment negotiations. This information, if released, would harm relations that these organisations have with the government and regulators, at the same time exposing EU exporters to the risk of retaliation by regulators and officials who are responsible for the policies under discussion.

The specific risks that we have identified are the following:

- 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 China as well as exposing EU investors to the risk of retaliation by regulators and officials who are responsible for the policies under discussion (documents 1, 2, 3, 8 and 19);
- 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 China (documents 1, 2, 3, 8 and 19);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing positions taken by the industry in the course of negotiations. The commercial interests of EU investors in conclusion, implementation and enforcement of trade agreements as well as negotiation of future agreements could be undermined by revealing the positions taken in the course of negotiations of such agreements (documents 1, 2, 3, 8 and 19);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing commercial strategies and priorities as well as commercially sensitive business information (documents 1, 2, 3, 8 and 19);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing concerns shared by industry on possible impact on their commercial situation (documents 1, 2, 3, 8 and 19).

1.5 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.

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

We consider that parts of documents 1, 2, 3, 8, 13, 15, 19 and 24 cannot be released as the disclosure would have an impact on decisions still to be taken by the EU regarding possible future investment negotiations by giving elements of the Commission's assessment consequently undermining the protection of the decision-making process of the EU institution.

In addition, parts of certain of these documents cannot be released as they 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. This would consequently undermine the decision-making process of the EU institution by revealing the elements taken into account for the negotiations.

Protecting the confidentiality of meetings such as the ones subject to your request allows for all parties to speak freely and frankly, and in this way, the Commission is able to collect more accurate information to feed into its decision-making process. Reducing this degree of confidentiality would lessen the trust of the parties consulted and give rise to a risk of self-censorship of those involved, which would in turn undermine the quality of the internal consultation and decision making process.

2. 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. 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.

If 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 any review within fifteen working days from the registration of your request either granting you access to the document or confirming the refusal.

You may reuse the information disclosed in the documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you

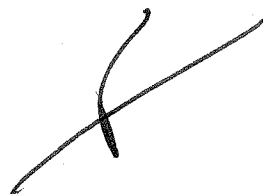
do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from any reuse.

All correspondence should be sent to the following address:

European Commission
Secretary-General
Access to Documents
B-1049 Brussels

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

Enclosures

Annex 1: List of meetings

Annex 2: List of documents