

EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Lora Verheecke
Corporate Europe Observatory (CEO)
26 rue d'Edimbourg
1050 Brussels
Belgium

Advance copy by email:
ask+request-2566-6bb42de0@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2016/0649

Dear Ms Verheecke,

I refer to your e-mail dated 11 February 2016 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on the same date under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

You requested access to the following documents:

"all communication, including emails, and documents (agenda, minutes, list of participants, etc) related to the meeting between Maria Asenius and Miguel Ceballos Baron and INTERBEV, Alinea, Avocats à la Cour and SELARL (AAC) on 26th January 2016."

We have identified the following documents falling under the scope of your request:

- an e-mail dated 16 December 2015 from Alinea to the Cabinet of Commissioner Malmström, requesting a meeting on behalf of Interbev (Ares(2015)5906765) ("**document 1**");

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.

- an email dated 19 January 2016 from Alinea to the Cabinet of Commissioner Malmström (Ares (2016)276402) ("**document 2**"), enclosing three documents in French language, all saved under the same Ares number and respectively named:
 - TTIPVoletSocietal131115.pdf ("**document 2.a**");
 - TTIP-VoletEmploi101115.pdf ("**document 2.b**");
 - TTIPVoletTarifaire-INTERBEV131115_FR.pdf ("**document 2.c**");
- an email dated 22 January 2016 from Alinea to the Cabinet of Commissioner Malmström (Ares (2016)365222) ("**document 3**"), enclosing the English translations of documents 2.a, 2.b and 2.c above, all saved under the same Ares number and respectively named:
 - TTIPVoletSocietal131115EN.pdf ("**document 3.a**");
 - TTIP-VoletEmploi101115_EN.pdf ("**document 3.b**");
 - TTIPVoletTarifaire-INTERBEV131115_EN.pdf ("**document 3.c**").
- the report of the meeting between members of the Commission staff and representatives of Interbev on 26 January 2016 (Ares (2016)720911) ("**document 4**").

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² 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*".³

² 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.

³ *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.

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

Having carefully examined the documents identified above in light of the applicable legal framework, **we are pleased to release documents 2.a, 2.b, 3.a, 3.b in full and grant partial release of documents 1, 2, 3 and 4.** Copies of the accessible documents are enclosed in Annex I.

Only names and other personal data have been redacted in documents 1, 2 and 3 pursuant to Article 4.1(b) of Regulation 1049/2001. As regards document 4, in addition to personal data falling under the exception of Article 4.1(b), other information has been redacted as it falls under the exceptions of Article 4.1(a) third indent, 4.2 first indent and 4.3 first subparagraph of Regulation 1049/2001.

I regret to inform you that unfortunately access cannot be granted to documents 2.c and 3.c, as these documents fall entirely under the exceptions set out in Articles 4.1(a) third indent, 4.2 first indent and 4.3 first subparagraph of Regulation 1049/2001.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 2.1, 2.2, 2.3 and 2.4. Section 3 provides an assessment of whether there exists an overriding public interest in the disclosure.

2.1. Protection of international relations (documents 2.c, 3.c and 4)

Article 4.1(a) third indent, of Regulation 1049/2001 stipulates that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations."*

In accordance with 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"*.⁶ In this context, the Court of Justice 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

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*

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

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

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

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

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".⁸ In particular, 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 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".⁹

Documents 2.c and 3.c are essentially the same document, the latter being the English translation of the former. These documents contain Interbev's proposals for possible strategies, options and solutions that the EU could pursue in the TTIP negotiations, and input on specific items that the stakeholders would like to be reflected in a possible future agreement. Document 4 is the report of the meeting held on 26 January 2016 between the Commission and Interbev. Certain redacted passages reveal specific concerns of Interbev in relation to the expected impact of any future trade concessions on the meat market in Europe, and indirect suggestions regarding positions that the EU could adopt in the negotiations.

As the TTIP negotiations are not yet finalised, the positions of the EU are constantly subject to change depending on the concessions and compromises made with the US. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and fall back positions in function of how the discussions evolve. The documents and information concerned reveal strategic interests and positions that the EU may or may not pursue in the negotiations. Their disclosure at the current stage would weaken the negotiating capacity of the EU and reduce its bargaining power. This would negatively affect the overall outcome of the negotiations, thus undermining in a reasonably foreseeable manner the protection of the public interest as regards international relations.

Moreover, some of the redacted passages in document 4 contain comments and views of the participants at the meeting regarding the expected impact of other trade agreements for which negotiations are currently open. Their disclosure could reduce the negotiating power of the EU in these other ongoing negotiations. Moreover, this information could be exploited either by the US or other trading partners of the EU in order to support certain positions and obtain specific concessions in the TTIP or other current or future negotiations.

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

⁹ *Id.*, paragraph 125.

2.2. Protection of the privacy and the integrity of the individual (documents 1, 2, 3 and 4)

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".¹⁰

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'"¹¹ and that "surnames and forenames may be regarded as personal data",¹² including names of the staff of the institutions.¹³

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".¹⁴

Documents 1, 2, 3 and 4 contain names and other personal information that allow the identification of natural persons.

I note that 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 in the documents released the names of Commissioners, members of Cabinet, and of the Director General and President of Interbev.

¹⁰ 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.

¹¹ 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.

¹² Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

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

¹⁴ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

2.3. Protection of commercial interests (documents 2.c, 3.c and 4)

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”.

Documents 2.c, 3.c and certain redacted parts in document 4 reveal specific interests and concerns raised by Interbev in relation to the TTIP negotiations, and sensitive commercial data regarding the performance of the sector and the expected consequences of trade liberalisation with the US and other third countries. They also contain assessments of the economic situation in the US and other third countries, as well as information on the commercial priorities, strategies and sensitive interests of the stakeholders concerned in the negotiations.

This information was shared in confidence with the Commission in order to support the EU objectives in the ongoing TTIP negotiations. There exists a reasonably foreseeable risk that if disclosed this information could be exploited by competitors to the detriment of the commercial interests of the members of Interbev, and harm the relations of these operators with regulators and other relevant actors on the market. Moreover the commercial interests of the stakeholders involved 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.

2.4. Protection of the decision-making process (documents 2.c, 3.c and 4)

Article 4(3) 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”.¹⁵

Documents 2.c and 3.c and 4 are documents either received or drawn up by the Commission which relate to a matter, the TTIP negotiations, where a decision has not yet been taken by the institutions. As the negotiations unfold, the EU will be constantly be making decisions as to whether or not to pursue certain interests and positions, and this decision-making process needs to be preserved from external pressure and unfounded conclusions in order to ensure that decisions are taken free of external constraints with a view to achieve the best possible outcome in the interest of the EU and its citizens.

¹⁵ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

Moreover, 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 involved and give rise to a risk of self-censorship of the participants, which would in turn undermine the quality of the internal consultation and decision making process.

Therefore, disclosure of certain information contained in these documents pose a “*reasonably foreseeable and not purely hypothetical*” risk of seriously harming the Commission's decision-making process.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Article 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. The Court of Justice has acknowledged that it is for institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution “*is acting in its legislative capacity*”¹⁶ as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.¹⁷

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*”.¹⁸ Documents 2.c, 3.c and 4 all pertain to the domain of the executive functions of the EU as they concern the negotiation and conclusion of international agreements.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making in the context of the TTIP negotiations and the commercial interests of the stakeholders involved prevail over transparency in this specific case. In particular, disclosure at this stage of documents 2.c, 3.c and parts of document 4 would undermine the possibility of achieving the best possible outcome in the public interest. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making processes in question without external pressure.

¹⁶ Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

¹⁷ *Id.*, paragraph 67.

¹⁸ 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.

Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding either the Commission's decision making process or the commercial interests of Interbev in this case.

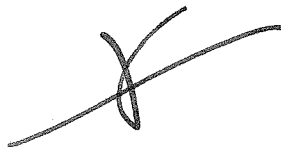
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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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
sg-acc-doc@ec.europa.eu

Yours sincerely,

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

Jean-Luc DEMARTY

Encl.:

Annex I: documents disclosed