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Directorate-General for Financial Stability, Financial Services and Capital Markets Union

Director General

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Mr Fabian Flues
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Subject: your application for access to documents - Ref GestDem 2016/3403 – partial disclosure

Dear Mr Flues,

Thank you for your e-mail of 17 June 2016, requesting access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents. You requested the Commission to disclose documents including: a list of meetings, with their agendas and minutes, correspondence sent and received, and legal advice, on the proposed termination of intra-EU bilateral investment treaties (intra-EU BITs).

As announced in a press release on 18 June 2015, the European Commission initiated infringement proceedings against five Member States requesting them to terminate intra-EU BITs held between them.¹ At the same time, the Commission requested information from, and initiated an administrative dialogue with, the remaining 21 Member States who still have intra-EU BITs in place. These investment treaties are incompatible with EU law in a number of regards, inter alia because they fragment the single market by conferring rights to some EU investors of a given nationality on a bilateral basis.

The scope of your request concerns letters of formal notice sent by the Commission, replies to the letters of formal notice from the Member States concerned, administrative letters exchanged with those Member States, correspondence with different stakeholders, and various documents from meetings with Member States and stakeholders on this particular issue.

¹ http://europa.eu/rapid/press-release_IP-15-5198_en.htm

Having examined all the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we have come to the conclusion that we may disclose the documents referred to in our list of documents provided in Annex 1.

For this reason, you will find attached to this letter documents related to meetings and correspondence with stakeholders on the proposed termination of intra-EU BITs. The disclosed file also contains some documents from meetings with Member States where the termination of intra-EU BITs was discussed only in general terms.

Furthermore, for documents 1, 2, 3, 5, 7, 9, 14, 16 and 17 some parts have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

These documents contain personal data (names of civil servants in our Directorate General below the level of Director and names of representatives of external organizations or companies below the level of general manager). These data have been erased and you have partial access to these documents.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document 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 regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data².

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable³. 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/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 these personal data.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, 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.

With regard to documents concerning the legal assessment of intra-EU BITs, as well as meetings and correspondence specifically on this subject where Member States presented their positions, however, it appears from our examination that, as the documents relate to on-going infringement procedures, they fall within the category of exceptions to disclosure provided for in Article 4(2), third indent, of Regulation No 1049/2001. The Article states

² Official Journal L 8 of 12.1.2001, p. 1

³ Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

that '(t)he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.'

The decision to deny access to the documents that you have requested is based on the negative effects that such disclosure would have on the conduct of the Commission's investigations in the framework of infringement proceedings, under Article 258 of the Treaty on the Functioning of the European Union. This infringement investigation calls for genuine co-operation and an atmosphere of mutual trust between the Commission and the competent administrative body of the concerned Member State. Only in such a climate can both sides aspire to, and reach, a rapid solution of the legal disputes.

This approach has been notably confirmed by the General Court in its recent judgment of 13 September, 2013, in case T-111/11 *ClientEarth*:

'58. First, it must be observed that, in accordance with settled case-law, the Commission may legitimately rely on the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 in order to refuse access to documents relating to investigations of a possible contravention of European Union law which might lead to the initiation of infringement proceedings or which have in fact led to the initiation of such proceedings. In those circumstances, refusal of access has been considered justified because the Member States concerned are entitled to expect the Commission to observe confidentiality as regards investigations, even where a period of time has elapsed since the closure of those investigations (see API v Commission, paragraph 52 above, paragraph 120 and case-law cited).

59. In particular, it is clear from the case-law that the disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement proceedings inasmuch as its purpose, which is, as stated in paragraph 52 above, to induce the Member State concerned to comply voluntarily with Treaty requirements or, if appropriate, to give it an opportunity to justify its position, could be jeopardised. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State concerned regarding the latter's voluntary compliance with Treaty requirements may continue during the court proceedings and up to the delivery of the judgment. The preservation of that objective, namely an amicable settlement of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, therefore justifies refusal of access to those documents (see API v Commission, paragraph 52 above, paragraph 121 and case-law cited).'

The Court specified in paragraph 75 "that in a situation where, when the decision to refuse access was made, the infringement proceedings were ongoing, the Commission was necessarily required to start from the principle that that general presumption applied to the documents concerned in their entirety". This case law thus introduces an exception to the general rule of concrete and individual checking established by earlier jurisprudence.

In examining your request, the possibility of granting partial access to the requested documents has been taken into consideration. However, it turned out that after an examination of the documents, and for the reasons cited above, the documents are covered in their entirety by the aforementioned exception, meaning that the release of parts of the documents cannot be envisaged.

In its judgment in case LPN (C-514/11 P and C-605/11 P), the Court of Justice ruled that general presumption does not exclude the possibility of demonstrating that a given request for document disclosure is not covered by that presumption, or that there is an

overriding public interest. We note that in your application, you do not put forward any arguments demonstrating that the documents requested are not covered by the general presumption, or that there is an overriding public interest in their disclosure.

For these reasons, we regret to inform you that we cannot grant access to some of the documents requested, based on the exception of Article 4(2), third indent, of Regulation 1049/2001. Should you nevertheless wish to seek a review of this position, you may write to the Secretary-General of the Commission at the address below, confirming your initial request. You have 15 days from receipt of this letter in which to do so. After that period, your initial request will be considered as having been withdrawn. The Secretary-General will inform you of the result of his review within 15 working days of receipt of your request, and will either grant you access to the document or confirm the refusal. In the latter event, the Secretary-General will indicate what avenues of appeal are open to you.

Any correspondence should be sent to the following address:

European Commission
Attn. Secretariat-General
Unit SG/B/4, Transparency
Confirmatory request for access to documents
BERL 05/327
B-1049 Brussels

E-mail: sg-acc-doc@ec.europa.eu

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P.P. Guersent', with a long horizontal stroke extending to the right.

Olivier Guersent

Encl.: List of Documents for disclosure, GESTDEM 2016/3403 (Annex 1)