




EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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

Ms Pia Eberhardt
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Bruxelles

Advance copy by email:
ask+request-4068-8e1fa6c2@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2017/1467

Dear Ms Eberhardt,

I refer to your request of 7 March 2017 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered under the above mentioned reference number.

Please accept our apologies for the delay in answering to your request. This is due to a high number of requests for access to documents being processed at the same time by DG Trade.

1. SCOPE OF YOUR REQUEST

Your request concerns the following:

- 1) a list of market access working groups, which are still active (so, which, for example, had meetings in 2016 or 2017);*

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.

- 2) *minutes and other reports of the meetings of the market access advisory committee (MAAC) which took place between January 2016 and today;*
- 3) *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), in which the "Enhanced Partnership for Implementation" was discussed (since January 2016);*
- 4) *minutes and other reports of these meetings.*

As regards the first bullet point of your request, we would like to inform you that the Market Access Working Groups held between 1 January 2016 and 7 March 2017 are the following:

- Market Access Working Group on Electronics and ICT, on 18 February 2016;
- Market Access Working Group on Motor Vehicles, Parts and Tyres, on 17 March 2016;
- Market Access Working Group on Textiles, on 21 April 2016;
- Market Access Working Group on Alcoholic Beverages, on 22 September 2016;
- Market Access Working Group on Medical Devices, on 15 February 2017.

As regards the remaining bullet points of your request, we have identified 14 documents that fall under the scope of it. 13 are minutes of Market Access Advisory Committee meetings which took place between 1 January 2016 and 7 March 2017 and 1 document is a report from a meeting with Business Europe on FTA implementation, being all listed for ease of reference in Annex 1. For each of the documents the list provides the title and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², 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

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.

Regulation 1049/2001, the institution is required *"to ascertain whether there is any overriding public interest justifying disclosure"*³.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, *"the exceptions to that right [...] must be interpreted and applied strictly"*⁵.

Having examined the requested documents under the applicable legal framework, I am pleased to grant **partial access to all the documents** identified within the scope of your request. Copies of the accessible documents are enclosed.

Parts of the 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 and fourth indent (protection of the public interest as regards international relations and the financial, monetary and economic policy of the Union or a Member State), Article 4(1)(b) (protection of privacy and integrity of the individual) and Article 4(2) first indent (protection of commercial interests of a natural or legal person).

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

2.1 Protection of the public interest as regards international relations and the financial, monetary or economic policy of the Union or a Member State

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"*⁶. 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"*⁷.

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.

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.

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"*⁸. Moreover, *"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 1, 6 and 13 contain assessments, analyses, views and opinions of the EU and representatives of the Member States regarding actions, initiatives and objectives that the EU planned to pursue *vis-à-vis* their counterparts in relation to market access issues. They also reveal details of the tactical and strategic approaches that the EU and individual Member States pursued or planned to pursue with their trading partners in relation to market access issues. Public disclosure of this information would undermine in a reasonably foreseeable manner the international relations of the EU with them as well as with other trading partners by giving out specific elements of its tactical and strategic approaches, interests, objectives and internal considerations. Disclosure of this information would weaken the position of the EU in its commercial relations with its trading partners, and would in general provide trading partners with information that they could exploit to the disadvantage of the EU and its strategic interests. This may ultimately undermine the goals and objectives that the EU may want to achieve in these commercial relations and consequently, the public interest as regards international relations.

Moreover, some passages in documents 1 to 14 are covered by the exception of Article 4(1)(a) fourth indent, of Regulation 1049/200, which also 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 particular, certain passages reveal the positions of Member States, their specific political and commercial interests, their actions and initiatives, and strategic considerations with respect to the positions of trading partners and other relevant actors. 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 trading partners, and ultimately undermining the effectiveness of the economic relations between the trading partners and the EU and its Member States.

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

⁹ *Id.*, paragraph 125.

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 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 data¹⁰.

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”¹¹.

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’”¹² and that “surnames and forenames may be regarded as personal data”¹³, including names of the staff of the institutions¹⁴.

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”¹⁵.

Documents 5, 7, 11 and 14, contain personal information, such as names, that allow the identification of natural persons. In line with the Commission's commitment to ensure transparency and accountability¹⁶, the names of the members of Cabinet are disclosed, as well as the names of the senior management of the Commission (Director level and above). For the private bodies, the names of the CEOs, Presidents, Directors or equivalent are also disclosed.

¹⁰ 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 the free movement of such data, OJ L 8, 12.1.2001, p. 1.

¹¹ 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.

¹² 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.

¹³ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁴ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁵ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

¹⁶ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

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 without including these 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"*.

Certain parts in documents 1 - 13 reveal specific views, concerns and interests of companies and business associations regarding market access and various regulatory issues in the trading partners' countries. They also contain the assessments of the economic situation and market access problems as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in the third country. 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 a potential risk of retaliation. Moreover, there is a reasonably foreseeable and not purely hypothetical risk that the commercial interests of the private entities concerned be undermined by revealing their commercial strategies and priorities pursued in a specific region as well as their commercially sensitive business information.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2) of Regulation 1049/2001 applies 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 1 to 13 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.

In case you would disagree with the assessment contained in this reply, 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.

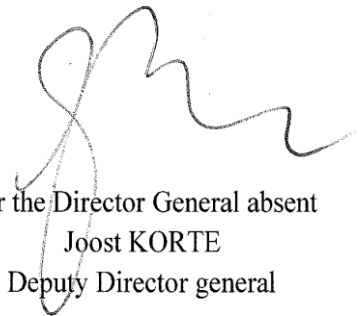
Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

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

Yours sincerely,

Jean-Luc DEMARTY

A handwritten signature in black ink, appearing to be 'Joost Korte', written over the printed name and title.

For the Director General absent
Joost KORTE
Deputy Director general

Encl.:

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