Subject: Your application for access to documents – Ref. GestDem No 2017/2738

Dear Ms Maskell,

I refer to your application of 8 May 2017 in which you made a request for access to documents in accordance with Regulation (EC) No 1049/2001, registered on the same date under the abovementioned reference number.

You would like to receive access to:

"all communication, including emails, and documents (agenda, minutes, list of participants, etc.) related to the meeting listed in the news from the Energy Charter Treaty (http://www.energycharter.org/media/news/article/secretary-general-rusnak-meets-with-the-european-commissioner-for-trade-mr-karel-de-gucht/) between former Commissioner Karel de Gucht and Secretary General of the Energy Charter, Mr. Urban Rusnák, on the 22nd of April 2014".

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

- A request for meeting with Commissioner De Gucht by the Energy Charter Secretariat made on 7 March 2014 (Ares(2014)621458) ("document 1");
- A summary report of the meeting between Commissioner De Gucht and Secretary-General Urban Rusnák, which includes a document in attachment (Ares(2017)3062081) ("document 2").

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

In accordance with settled case law, 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".

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

Having examined the requested documents under the applicable legal framework, **partial access is granted to documents 1 and 2.** In particular, as regards document 1, only personal data have been redacted, pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001").

As regards document 2, in addition to personal data, additional information was redacted in accordance with articles 4(1)(a) third indent (protection of the public interest as regards international relations) and 4(3) first subparagraph (protection of the institution's decision-making process) of Regulation 1049/2001.

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

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”.

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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.


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". 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".

The Energy Charter is an international organization, which aims to find balanced solutions to key energy challenges among a diverse range of member countries across Europe and Asia, including producers, consumers and transit states, participating in the Charter on an equal basis. Fifty-two European and Asian countries have signed or acceded to the Energy Charter Treaty. All EU Member States are individual signatories, but the Treaty has also been signed collectively by the European Community and Euratom so the total number of parties to the Treaty is fifty-four.

Document 2 is a meeting report of the meeting between Commissioner Karel De Gucht and Urban Rusnák, Secretary-General of the Energy Charter, on 22 April 2014. Parts of this document have been redacted as they reflect views and concerns expressed for internal use, regarding negotiations with third countries or concerning the political or economic situation in third countries. Annex to document 2 has been withheld as it reveals the position of the EU as regards the Energy Charter proposal on the revision of the rules on investment. Public release of those comments would seriously undermine the EU's objectives in the area of trade and energy policy, and ultimately would undermine the protection of the international relations of the EU.

More specifically, some of the redacted passages in document 2 are related to the TITP negotiations with the US. Although the TTIP negotiations have now come to a pause, exposing internal views and considerations would weaken the negotiating capacity of the EU more generally, reduce its margin of manoeuvre and be exploited by our trading partners to obtain specific results. With respect to TTIP in particular, preserving the negotiating position of the EU and tactical approaches is important in order not to jeopardise the results achieved so far in these negotiations. It should be noted that some of the withheld passages also reveal, although indirectly, the position of the US. Such disclosure is likely to upset the mutual trust between the EU and the US and thus undermine the relations of the EU with this partner.

Similarly, the attachment to document 2 represents a comparative table of the position of the EU and the position of the Energy Charter as regards the reform of the investment rules under the Energy Charter Treaty. Revealing the position of the EU and preliminary

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7 Judgment in Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 36
The proposal of the Energy Charter on the reform of the Energy Charter Treaty would break the climate of confidence and trust between the two institutions, therefore undermining the protection of the international relations of the EU.

Even if the information contained in some of the redacted passages of document 2 or in the attachment to document 2 was related specifically to the TTIP negotiations or to the Energy Charter Treaty reform, there is a reasonably foreseeable risk that its public disclosure would undermine and weaken the position of the EU in its ongoing trade negotiations with other third countries in which similar topics are being discussed.

Furthermore, some of the redacted passages in document 2 describe in a very detailed way the open discussion between Commissioner De Gucht and Secretary-General Rusnák on different issues and concerns vis-à-vis the Energy Charter and its individual members. The disclosure of the EU position on these issues would undermine in a reasonably foreseeable manner the climate of confidence and trust between the EU and its partners. Preserving a certain level of discretion and special care in handling documents that reflect the positions of our partners and internal views, impressions and characterisations of these positions is essential in order not to jeopardise the international relations of the EU. International partners need to be able to rely on each other's discretion and to trust that they can engage in open and frank exchanges of views without having to fear that these views and positions may in the future be exposed. As the Court recognised 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”.

2.2 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 45/2001. In this respect, the Court of Justice has ruled that “the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data”.

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’” and that “surnames and

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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.
forenames may be regarded as personal data\textsuperscript{12}, including names of the staff of the institutions\textsuperscript{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\textsuperscript{14}.

Documents 1 and 2 contain personal information, such as names, email addresses or telephone numbers that allow the identification of natural persons. The name of Commissioner De Gucht and of the Secretary-General of the Energy Charter are disclosed.

I note 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 remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

2.3 Protection of the institution's decision-making process

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 also 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\textsuperscript{15} and that the capacity of its staff to express their opinions freely must be preserved\textsuperscript{16} so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court put it, 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 [...]"\textsuperscript{17}.

\textsuperscript{12} Judgment in Commission v Bavarian Lager, C-28/08 P, EU:C:2010:378, paragraph 68.
\textsuperscript{13} Judgment in Guido Strack v Commission, C-127/13 P, EU:C:2014:2250, paragraph 111.
\textsuperscript{14} Id., paragraph 107; see also judgment in Commission v Bavarian Lager, C-28/08 P, EU:C:2010:378, paragraph 77.
\textsuperscript{16} Judgment in Muñiz v Commission, T-144/05, EU:T:2008:596, paragraph 89.
\textsuperscript{17} Judgment in MyTravel v Commission, T-403/05, EU:T:2008:316, paragraph 52.
Annex to document 2 includes a comparative table of the position of the EU and the position of the Energy Charter as regards this topic that was drafted for internal purposes of the discussions at the moment of the meeting between Commissioner De Gucht and Secretary-General Rusnák. The discussions on the reform of the ISDS rules are still ongoing and the positions of the EU and of the Energy Charter may have evolved in the process of the negotiations and may not reflect the position of both institutions at this moment.

Disclosing the withheld attachment would seriously undermine the decision-making process of the institution in this specific case, as it would reduce the free exchange of views between the Commission staff by exposing views and considerations to undue pressure and unfounded conclusions both from external stakeholders and from our negotiating partners. It would also have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches. Protecting the confidentiality of internal views and opinions allows for the parties involved to speak freely and frankly. Reducing this degree of confidentiality would lessen the trust of the parties involved and give risk of self-censorship, which would in turn undermine the quality of the discussions and the decision-making process.

3. **OVERRIDING PUBLIC INTEREST**

The exception laid down in article 4(3) first subparagraph of Regulation 1049/2001 applies unless there is an overriding public interest in the 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 the institution concerned by the request for access to balance the particular interest to be protected by nondisclosure 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” as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.

The documents withheld under article 4(3) all pertain to the domain of the executive functions of the EU as they concern trade negotiations. In this context, the Court has acknowledged 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”.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making prevails over transparency in this specific case. In particular, disclosure at this stage of documents withheld under article 4(3) of Regulation

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19 Id., paragraph 67.

1049/2001 would undermine the possibility of achieving the best possible outcome in the public interest. Disclosing the withheld attachment would expose the EU to have to justify preliminary positions which eventually evolved in the decision-making process and which may endanger the relationship with an important institutional partner.

Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding the Commission’s decision making process.

4. **PARTIAL ACCESS**

Pursuant to Article 4(6) of Regulation 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". Accordingly, we have also considered whether partial access can be granted to the annex to document 2.

After a careful review, we have concluded that this attachment is entirely covered by the exceptions described above as it is impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply.

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In case you would disagree with the assessment provided 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  
1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Jean-Luc DEMARTY

Encl.: released documents