Dear Ms Verheecke,

I refer to your access to documents application received on 7 May 2018 and registered on 8 May 2018 under the above mentioned reference number. I also refer to our holding reply dated 1 June 2018, our reference Ares(2018)2874846, whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation (EC) No 1049/2001 on public access to documents (hereinafter 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

In your application, you request:

(i) A list of meetings that European Commissioner for Digital Single Market and Vice President of the European Commission, Mr. Andrus Ansip and European Commissioner for Digital Economy and Society, Ms. Mariya Gabriel and her Cabinet or representatives of the Directorate-General for Communications Networks, Content and Technology, (hereinafter, ‘DG CNECT’) had between March 2013 and the day you submitted your application, insofar as these meetings related to ecommerce in the EU-Japan trade deal;

(ii) Minutes and any other reports of these meetings;

(iii) All correspondence, including emails, (from March 2013 till the day you submitted your application) between the parties on the topic stated above.
2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

Your application concerns the following documents:

1. Email received from the Japanese Authorities on 28 June 2017 as a follow up to meetings held in Japan on the ecommerce part of the EU-Japan Economic Partnership Agreement (hereinafter, 'the Agreement') in June 2017 (our ref. Ares(2018)3228958);

2. Email received from the Japanese Authorities on 23 June 2017 concerning the ecommerce text of the Agreement following meetings held in Japan in June 2017. The Email includes two attachments: (i) a working document reflecting some of the outstanding issues in the negotiations on the Agreement and (ii) a draft text of the e-commerce part of the Agreement (our ref. Ares(2018)3229341);

3. Email received from the Directorate General for Trade on 5 January 2017 reporting on discussions held with Japan on inter alia the ecommerce part of the Agreement in December 2017 (our ref. Ares(2018)3170651);

3. ASSESSMENT UNDER REGULATION 1049/2001

Concerning the first part of your request which concerns the list of meetings held by the mentioned Commissioners, their Cabinets and representatives of DG CNECT in relation to ecommerce in the EU-Japan trade deal, we regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. Given that no such document, corresponding to the description given in your application, is held by the Commission, it is not in a position to handle this part of your request.

With respect to the other parts of your request, we have identified the documents outlined in Section 2 as falling within the scope of your application. Since documents 1 and 2 originate from third parties, the latter have been consulted pursuant to Article 4(4) of Regulation 1049/2001.

Having examined the identified documents under the provisions of Regulation (EC) No. 1049/2001 regarding public access to documents, I regret to inform you that disclosure of these documents is prevented in its entirety by the exceptions to the right of access laid down under Article 4(1)(a), third indent of Regulation 1049/2001 concerning the protection of international relations and Article 4(3) of Regulation 1049/2001 which concerns the protection of the institution's ongoing decision making process.

The content of documents 1 and 2 relates to exchanges with Japan following rounds of negotiations between the European Commission and Japan on the Agreement which is currently still awaiting signature. Document 2 also contains a working document reflecting some of the
outstanding issues in the negotiations on the Agreement and a draft text of the ecommerce part of the Agreement following negotiations held in June 2017. Document 3 relates to an exchange between different services of the European Commission reporting on discussions held with Japan on *inter alia* the ecommerce part of the Agreement, in December 2017.

With regard to documents 1 and 2 (email and attachments), the third country involved in these negotiations has objected to their disclosure. More generally, it indicated that it opposes the disclosure of any record of the aforementioned negotiations, especially when it includes its arguments or draft texts of the Agreement.

### 3.1 Protection of the public interest as regards 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*.”

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 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*.” 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*.”

The information included in the identified documents was in general meant for internal use as a basis to establish EU positions, strategies, objectives and ways forward on specific aspects of the negotiations. There is a concrete risk that its public disclosure would undermine and weaken the position of the EU in its ongoing trade negotiations with other third countries.

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4. *Id.*, paragraph 125.
Indeed, the information that the EU’s trading partners may collect on the basis of the public disclosure of certain detailed positions, concerns, views and strategies of the Commission may allow them to extract specific concessions from the EU in the context of the ongoing negotiations, thus to the disadvantage of the EU’s international relations, and the interests of its citizens, consumers and economic operators. Third countries may also anticipate or deduce certain negotiating positions of the EU ahead of the trade talks on the basis of the information contained in these documents.

The EU needs to retain a certain margin of manoeuvre to shape and adjust its positions in function of how the discussions evolve in its trade negotiations. Exposing internal views and considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partner to obtain specific results, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations. Moreover, the disclosure of internal views, comments and positions of individual staff members on issues on which an official position has not been adopted would weaken the credibility of the Commission in the negotiations as well as lead the EU’s negotiating partners to potential misleading conclusions, thus jeopardising the public interest as regards the EU’s international relations.

Furthermore, some of these documents reveal, even if indirectly, the position of Japan. Such disclosure is likely to upset the mutual trust between the EU and Japan and thus undermine their relations. This is even more so in view of the aforementioned outcome of the consultation with Japan on Documents 1 and 2. The disclosure of the identified documents may also jeopardise the mutual trust between the EU and other trading partners as they may fear that in the future their positions would be exposed and they may as a result refrain from engaging with the EU. Negotiating partners need to be able to confide in 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 publicly revealed. 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".

3.2 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”.

Furthermore, 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" and that

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the capacity of its staff to express their opinions freely must be preserved\(^7\) 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 [...].\(^8\)

The documents identified as falling within the scope of this application relate to negotiations of the Agreement which is currently still awaiting its signature. Such documents contain views, opinions and remarks of both the European Commission and Japan regarding specific content of various drafts of the ecommerce part of the Agreement. Disclosing the identified documents would seriously undermine the decision-making process of the institution as it would generally restrict the decision-makers' "space to think" and their room for manoeuvre, and undermine the necessary atmosphere of trust during discussion and negotiation processes which take place in the context of such international agreements. Moreover, the disclosure of such documents 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 trade partner.

### 3.3 Conclusion on the disclosure assessment under Regulation 1049/2001

Following an examination of the identified documents and taking into account the consultation of the aforementioned third country and the reasons outlined above, we regret to inform you that your application cannot be granted for these documents, as disclosure is indeed prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

### 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 identified documents.

After a careful review, we have concluded that considering the amount of content covered by the invoked exceptions, the releasable content of these documents would be meaningless. According to the General Court, the Commission is entitled "to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant"\(^9\).

### 5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in disclosure of the documents. Such an interest must, firstly, be a

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\(^7\) Judgment in Muñiz v Commission, T-144/05, EU:T:2008:596, paragraph 89.

\(^8\) Judgment in MyTravel v Commission, T-403/05, EU:T:2008:316, paragraph 52.

public interest 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 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" 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 identified documents all pertain to the domain of the executive functions of the EU as they concern trade 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 the identified documents would undermine the possibility of achieving the best possible outcome in the public interest. Disclosing the documents 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 trade 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.

6. CONFIRMATORY APPLICATION

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

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 5/288
1049 Bruxelles

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

Yours sincerely,

Roberto Viola

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11 Id., paragraph 67.