

Brussels, 9 November 2015

Klaus Welle

Secretary General of the European Parliament

By email: klaus.welle@ep.europa.eu and Registre@europarl.europa.eu

Dear Mr Welle,

RE: A(2015)11910- Confirmatory application for reconsideration of the European Parliament's partial decision to refuse access to documents discussed at the trilogue negotiations regarding the Trade Secrets Directive

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the partial refusal to disclose the requested documents.

On 28 September 2015 ClientEarth wrote to the Parliament requesting access to "the minutes of the trilogue meetings and technical meetings taking place between representatives of the Parliament, the Council and the Commission in connection with the Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [and]...the preparatory documents for the meetings, and any documents which were discussed within the meetings, including position papers sent by industry representatives."

The Parliament sent its response on 19 October 2015 together with a CD-ROM containing the following documents:

1. The agenda for the trilogue meeting on 7 September;
2. A four-column document of 7 September 2015;
3. A four-column document of 24 September with the fourth column entirely redacted and colour coding from other columns removed;
4. A four-column document of 28 September with the fourth column entirely redacted and colour coding from other columns removed.

Apart from the first document, the rest of the information disclosed is already publicly available. All of the information in the four-column documents that is not publicly available was redacted or removed. It represents the comments and compromise proposals made in the fourth column of the documents dates 24 September and 28 September (documents 3 and 4), as well as colour coding which indicates which recitals/articles have been agreed and which are still under discussion.

The Parliament relies on the exception in Article 4(3), first paragraph, to justify its refusal to grant access to the documents in their entirety, and concludes that it is unable to identify an overriding general public interests in disclosure.

The requested documents are legislative documents for the purpose of Article 12 of Regulation 1049/2001

Regulation 1049/2001 gives a right of access to documents held by the EU institutions. This right exists in particular when documents are generated during a legislative procedure. Article 12 of the Regulation first requires the institutions to make documents directly accessible and second creates a specific regime for legislative documents:

- "1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institutions concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."

The processes leading to the adoption of the Trade Secrets Directive is a legislative process.

In joined cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation's preamble to conclude that *"openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights...It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible."* This has been confirmed in case C-280/11P.

The requested documents contain the detail of the discussions between the three institutions within a legislative process. This information must be provided while the process is ongoing to allow transparency and public participation. Disclosing the information once the law is adopted does not comply with Regulation 1049/2001 as interpreted by the EU courts. And, considering the Parliament's limited role in rubber stamping the trilogue compromise, nor does disclosure following the conclusion of the trilogue negotiations.

The trilogue procedure is not provided for by the EU Treaties. Nevertheless, it has become a standard step in the legislative process. Its objective is to reach a compromise first reading position which is then rubber stamped by the European Parliament's vote in plenary and the Council. This makes it even more important that the content of trilogue discussions is disclosed – this is precisely the information that the public needs to have access to at a point in time when they can still participate in the process. Decisions reached following discussion within an exclusive and closed group cannot be considered as having been adopted following a democratic process. Confidence and trust among institutions do not ensure transparency and democracy.

Failure of the Parliament to uphold its own Resolution on Access to Documents

Point 28 of the European Parliament resolution on access to documents calls on the Commission, the Council and Parliament *"to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easy accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation (EC) No 1049/2001"*. Yet the Parliament has refused to provide access to any detail regarding the negotiations. This unwillingness severely undermines the Parliament's resolution, and indeed the status of Parliament Resolutions in general.

Misapplication of Article 4(3), first paragraph, of Regulation 1049/2001

Regulation 1049/2001 provides for some exceptions to the right of access to documents, including Article 4(3). However, according to settled case-law, these exceptions must be interpreted strictly. It is settled case-law that if an institution refuses access it must explain how disclosure of the document could specifically and actually undermine the interest protected by the exception. Moreover, the risk of that interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

In case C-280/11, the Court recalled that within a legislative process *"public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly"*. The same reasoning applies to trilogue documents.

As justification for invoking the exception in Article 4(3), the Parliament states: *"Public disclosure of the contents of column 4, in the case of the documents listed under 3 and 4, with the provisional compromise proposals, would reduce the possibility for the institutions to reach an overall agreement. Such a disclosure would, as a consequence, seriously undermine the Parliament's decision-making process, as well as the inter-institutional decision-making process in the context of the ongoing legislative procedure, as referred to in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001."* The same justification was used for the removal of the colour coding in columns 1, 2 and 3.

Contrary to the Parliament's argument, transparency in the process could in fact enhance the institutions' ability to find a better compromise, one that is nourished by input from civil society. The Parliament does not demonstrate how the process would be undermined and how the chances of reaching an agreement would be jeopardised. It relies on mere assertions which are unsubstantiated by any solid arguments and evidence.

Misapplication of the overriding public interest test of Article 4(3) first paragraph of Regulation 1049/2001 and failure to state reasons

Even if the decision-making process would be undermined, there is a clear overriding public interest in disclosure of the documents, despite the Parliament's claim that it could not identify one.

The adoption of the Trade Secrets Directive will harmonise trade secret protection across the EU for the first time. As such, it will have a profound impact on the lives of EU citizens. The trilogue negotiations will effectively decide the extent and nature of these impacts. The public has the right to know the considerations that influence the positions taken by the institutions and be able to comment,

participate, oppose or support the decisions before they are finalised. This right should be upheld by the institutions involved in this process.

Keeping the outcome of trilogue meetings confidential prevents the organization of democratic debate on the direction that the draft is taking. It also prevents Member State governments and MEPs from being accountable to their electorate with regard to the positions they defend at EU level. We see very clearly that citizens all over the EU require greater transparency and more democratic behaviour from their representatives, in order to maintain confidence in the EU institutions and their activities. The secrecy which the Parliament maintains with regard to the content of trilogue meetings will only increase "Eurosceptic" opinion, to the detriment of the European Parliament and the EU as a whole.

Failure of the Parliament to draw up and retain an adequate record of its activities

The Parliament states that minutes were not drafted at the trilogue and technical meetings that took place.


In Case T-264/04 *WWF European Policy Programme v the Council of the European Union*, the Court of First Instance held that *"it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities."*

The fact that the Parliament representatives failed to take minutes of the discussions is entirely arbitrary and unpredictable in this context, particularly given their duty to report back to the Parliament on trilogue proceedings. It also goes against basic principles of good administration.

In the WWF case, the Court of First Instance held that it could not be concluded that the Council, in claiming that minutes of the first agenda item of its Article 133 Committee meeting did not exist, acted in an arbitrary or unpredictable manner. The Court came to this conclusion owing to the *"purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure"*. However, the same conclusion cannot be applied to the Parliament's failure to draw up and retain documentation relating to what has become a commonplace and important step in the legislative procedure, namely trilogue negotiations.

For all these reasons, ClientEarth hereby requests that the Parliament grants full access to the requested documents.

Yours sincerely,


Lawyer - Environmental justice


rq

