



EUROPEAN COMMISSION
Directorate-General for Trade
The Director General

Brussels, **- 8 MAI 2015**
Trade/B2/Ares (2014)4030001

Ms Pia Eberhardt
Corporate Europe Observatory
Cranachstraße 48
50733 Cologne
Germany
via www.asktheeu.org

Subject: Request for access to documents – Ref GestDem 2014/3817

Dear Ms Eberhardt,

Thank you for your request for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (“Regulation 1049/2001”).

We understand from your request of 26 August 2014 that you would like to have access to the documents created or received by the Commission from 1 January 2014 to 25 September 2014:

- 1) 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) and/or law firms such as Freshfields, White & Case, Herbert Smith and Sidley, in which the EU's foreign investment policy, including the EU-US and EU-Canada investment policy was discussed;
- 2) minutes and other reports of these meetings;
- 3) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies, business associations and law firms, in which the EU's foreign investment policy, including the EU-US and EU-Canada investment policy was discussed.

¹ OJ L145, 31.05.2001, page 43

We do not have a document containing the list of meetings that you have requested in the section 1 of your request, meaning that this request falls outside the purpose of Regulation 1049/2001. Nonetheless, I'm pleased to let you know that we have prepared for you a list of meetings requested, under the Code of Good Administrative behaviour.

In addition, please note that the documents covered by your access to documents request GESTDEM 2014/2573 were not included in this reply. We have identified 34 documents (minutes of meetings and correspondence) as falling under the scope of your request. Please note that the parts of the documents that do not relate to your request have been taken out from the enclosed documents.

1. Examination and Conclusions under Regulation 1049/2001

Having examined the 34 documents under the provisions of Regulation 1049/2001, we are pleased to grant you:

- Full access to 6 documents (20, 24, 25, 27, 32 and 33)
- Partial access to 27 documents (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 22, 23, 26, 28, 29, 30, 31 and 34);

No access can however be granted to 1 document (18).

1.1 Context of the documents

As a part of the EU common commercial policy, the Commission is negotiating investment rules in the context of free trade agreements with third countries. The EU's investment policy is focused on providing EU investors and investments with market access, legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business.

In the context of these ongoing negotiations and reflections on the EU investment policy the Commission is meeting with different stakeholders in order to better understand their interests and concerns in the third country markets. The documents covered by this request were all drawn up or received in the course of this process, and with a view of reaching the objectives set by the EU in its investment negotiations with different partners.

Documents or parts of the requested documents have been withheld on the basis of the following assessment:

1.2 Protection of 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.

In its recent judgment of 3 July 2014 in case C-350/12 P the Court found that transparency '*could not be ruled out in international affairs*'², especially where the negotiations '*may have an impact on an area of the European Union's legislative activity*'³, nevertheless it is important to underline that both, the General Court and the Court (in that same judgement) have agreed '*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*'⁴.

The withheld parts of documents **1, 2, 3, 6, 10, 13 and 15** contain elements of the EU's assessment of the political and economic situation in a negotiating partner country and/or information regarding the tactical approach towards ongoing negotiations. More concretely:

Documents 2, 3, 10, 15 contain EU's assessment of the political and/or economic situation in a third country which, if released, could harm EU's international relations with the country concerned since it would lead to a misleading interpretation of EU's bilateral relations.

Documents 1, 3, 6, 13, 15 contain EU's assessment of the particular aspect of investment policy in the context of the ongoing negotiations with the third country, which if released, would give out elements of the EU's tactical approach in one of its negotiations and would have an impact on the EU's position when tackling the issue.

Document 13 contains information regarding the tactical approach towards ongoing negotiations. Putting this information in the public domain would harm the EU's international relations as it would disclose elements of the EU's strategic approach in the ongoing investment negotiations.

The disclosure of elements of the negotiation approach and tactics followed by the EU in its investment negotiations would weaken the EU's position in its other, ongoing and future, bilateral negotiations as it would provide our negotiating partners with indications on the EU's approach.

It is essential for negotiations like the ones at stake to ensure a level of confidentiality for the negotiating parties, as the General Court recognised in its *in 't Veld* judgment.⁵ In that judgment the General Court decided that *the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow [...] the development of a free and effective discussion*.⁶ It continued considering that *any form of negotiation necessarily entails a number of tactical considerations of the*

² Judgment of the Court of 3 July 2014 in case C-350/12 P, Council of the European Union v Sophie in 't Veld,, paragraph 76.

³ Ibid, paragraph 76.

⁴ Ibid, paragraph 102.

⁵ Judgment of the General Court of 19 March 2013 in case T-301/10, *Sophie in 't Veld v European Commission* (hereinafter T-301/10).

⁶ Ibid, paragraph 119.

negotiators.⁷ Disclosing the redacted parts, and thus revealing certain tactical considerations on the side of the Commission, would undermine the margin of manoeuvre of the Commission that must explore all possible options in the context of these negotiations free of external pressure.

Subsequently, the negotiation power of the EU would be affected and the EU's position in these negotiations would be weakened, which in turn would complicate these negotiations and, through this same mechanism, damage the protection of the public interest as regards international relations.⁸

1.3 Protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that the 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 the EU legislation regarding the protection of personal data.

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of the privacy and integrity of the individual, in particular in accordance with the EU 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 data⁹.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable¹⁰. 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 that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the requested documents (**1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 23, 26, 28, 29, 30, and 31**) expunged from this personal data. However, we are disclosing names of chairmen of the private companies, names of Directors of the European Commission and names of Members of the Cabinet.

⁷ Ibid.

⁸ Ibid, paragraph 123.

⁹ OJ L 8 of 12.1.2001, p. 1

¹⁰ Judgement of CJUE of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, European Data Protection Supervisor, case C-28/08 P, OJ C 79 of 29.03.2008

If you wish to receive the removed 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.

1.4 Protection of commercial interests

Article 4(2), first indent of Regulation 1049/2001 provides that the 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.

The withheld parts of documents **3, 4, 5, 8, 12, 13, 14, 15, 17 and 26** contain the assessments of an economic situation and market access problems in third countries as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in the third country markets. These were shared with the Commission in confidence in order to support EU's objectives in the ongoing investment negotiations. This information, if released, would harm relations that these organisations have with the governments and regulators, at the same time exposing EU exporters to the risk of retaliation by regulators and officials who are responsible for the policies under discussion.

The specific risks that we have identified are the following:

- Risk of undermining the protection of the commercial interests of a company or the members of a business association by releasing information which would harm their relations with the governments and regulators in the countries concerned as well as exposing EU investors to the risk of retaliation by regulators and officials who are responsible for the policies under discussion (4);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association, working with the Commission to effectively support EU exporters in those markets, by sharing in confidence their assessment of political or economic developments in particular countries (3, 12, 13, 14, 15 and 18);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing positions taken by the industry in the course of negotiations. The commercial interests of EU investors in conclusion, implementation and enforcement of trade agreements as well as negotiation of future agreements could be undermined by revealing the positions taken in the course of negotiations of such agreements (5, 8, and 13);
- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing commercial strategies and priorities as well as commercially sensitive business information (4, 5, 12 and 26);

- Risk of undermining the protection of the commercial interests of a company or the members of a business association by revealing concerns shared by industry on possible impact on their commercial situation (5).

1.5 EU decision-making process

Article 4(3) of Regulation 1049/2001 provides that access 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.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

We consider that part of document **1** cannot be released as its disclosure would have an impact on decisions still to be taken by the EU regarding possible future investment negotiations by giving elements of the Commission's assessment consequently undermining the protection of the decision-making process of the EU institution.

In addition, part of document **16** cannot be released as it contains an information about a strategic approach used by the Commission in a decision making process. If released it would prejudice the institution's margin of manoeuvre and severely reduce its capacity to contribute to reaching its objectives consequently undermining the protection of the decision-making process of the EU institution.

2. Overriding public interest

The exceptions laid down in Articles 4.2 and 4.3 of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Accordingly, we have also considered whether the risks attached to the release of the withheld documents or withheld parts of these documents are outweighed by the public interest in accessing the requested documents. We do not believe this to be the case.

Should you wish this position to be reviewed, you should write to the Commission's Secretary-General at the address below, confirming your initial request. Following receipt of this letter you have fifteen working days to do so, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen working days from the registration of your request, either granting you access to the document or confirming the refusal.

All correspondence should be sent to the following address:

European Commission
Secretary-General
Transparency unit SG-B-5
BERL 5/327
B-1049 Bruxelles
sg-acc-doc@ec.europa.eu

Yours sincerely,

A handwritten signature in dark ink, consisting of a series of loops and a long horizontal stroke, positioned above the printed name.

Jean-Luc DEMARTY