



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels, **27 SEP. 2016**
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By registered letter with acknowledgment of receipt

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Subject: Your application for access to documents – Ref GestDem No 2016/2682

Dear Ms Masse,

I refer to your e-mail dated 10 May 2016 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on 13 May 2016 under the above mentioned reference number.

Please accept our apologies for the delay in answering to your request. This is mainly due to a high number of requests for access to documents being processed at the same time by DG Trade. Moreover, we had to consult another institution on some of the documents covered by your application.

1. SCOPE OF YOUR REQUEST

You request access to the background paper titled: "*A Digital Trade Initiative in the WTO*" prepared by DG Trade and any relevant communications and documents related to its preparation, including:

- *"the original background paper as sent to the Council;*
- *all drafts and documents related to the background paper;*

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.

- *the draft as well as actual agenda and minutes from internal and external meetings where the background paper was discussed;*
- *notes from DG Trade and others EU Commission's DGs on the background paper;*
- *the exchange of e-mails between the industry and/or industry associations and the Commission on the background paper;*
- *the exchange of e-mails between external experts and the Commission on the background paper;*
- *the exchange of e-mails between foreign state representatives and the Commission on the background paper."*

We have identified the following documents in relation to your request:

- a note for the attention of the Trade Policy Committee (Council of the EU) and of the INTA Committee (European Parliament), dated 27 April 2016 and enclosing a document entitled "Background Paper – A Digital Trade Initiative in the WTO" (Ares(2016)2004961) ("**document 1**");
- the draft annotated agenda of the Trade Policy Committee (Full Members) of 28 April 2016 (Ares(2016)3950612) ("**document 2**");
- the internal report of the Trade Policy Committee (Full Members) of 28 April 2016 (Ares(2016)3952672) ("**document 3**");
- the draft annotated agenda of the Trade Policy Committee (Services and Investment) of 25 May 2016 (Ares(2016)3923238) ("**document 4**");
- the internal report of the Trade Policy Committee (Services and Investment) of 25 May 2016 (Ares(2016)5177943) ("**document 5**").

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

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.

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"*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 documents identified above in light of the applicable legal framework, **we are pleased to release parts of documents 2, 4 and 5**. Large parts of these documents concern subject-matters other than digital trade and have therefore been marked as out of scope of your request. Some parts of document 5 fall under the exceptions set out in Articles 4(1)(a) third and fourth indents, 4(1)(b) and 4(3) first subparagraph of Regulation 1049/2001. Copies of the accessible documents are enclosed.

I regret to inform you that unfortunately access cannot be granted to documents 1 and 3. Document 1 falls entirely under the exceptions set out in Articles 4(1)(a) third and fourth indents, 4(1)(b) and 4(3) first subparagraph of Regulation 1049/2001. The same exceptions – except for Article 4(1)(b) – apply to the parts of document 3 that concern the topic of digital trade⁶.

As you will notice, while document 5 is partially released, no access can be granted to document 3 as the latter report, in contrast with document 5, records in greater detail the views expressed by the Member States at the meeting of 28 April 2016. It also contains a more political assessment by the Member States of the issues discussed in relation to digital trade and detailed comments by the Commission on such assessment. As explained above, under Regulation 1049/2001 each document is individually assessed, which entails that the outcome of such an assessment may be different for documents of a similar type by reason of their specific contents, circumstances, context and risks associated with their release.

The reasons justifying the application of the abovementioned 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.

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 Similar to document 5, large parts of document 3 fall outside the scope of your request as they concern subject-matters other than digital trade.

2.1. Protection of international relations and of the financial, monetary or economic policy of the Union or a Member State (documents 1, 3 and 5)

Article 4(1)(a) third indent, of Regulation 1049/2001 stipulates that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations”.

In accordance with 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"*⁷. In this context, the Court of Justice 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"*⁸.

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"*⁹. In particular, the *"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"*¹⁰.

Document 1 contains a background note on "A Digital Trade initiative in the WTO", which was meant to set out reflections on a Digital Trade initiative in the WTO in the post-Nairobi context as a basis for discussions with the Member State, and proposals and ideas for next steps which may be taken in the framework of WTO negotiations. The paper outlines the topics that could be addressed in the multilateral discussions, the options, positions and tactical approaches that the EU could adopt in this context, and expectations regarding the positions of other WTO members. Documents 3 and 5 contain reports of internal debates and discussions which took place between the Commission and the Member States in the context of meetings of the Trade Policy Committee on 28

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

⁸ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁹ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

¹⁰ *Id.*, paragraph 125.

April 2016, and of the Trade Policy Committee (Services and Investment) on 25 May 2016.

These three documents reveal ideas, opinions, assessments and proposals regarding the manner in which the Commission may conduct negotiations in the context of possible future multilateral discussions. More specifically, the paper contained in document 1 serves as background for the establishment of a future Union position. Documents 3 and 5 record the positions and reactions of Member States regarding the initiative, including substantive discussions and exchange of views with the Commission.

Disclosure of document 1 at the current stage would weaken the negotiating capacity of the EU and reduce its bargaining power. Moreover, it would negatively affect the outcome of possible future negotiations, thus undermining in a reasonably foreseeable manner the protection of the public interest as regards international relations. Document 3 and the redacted passages of document 5 contain comments and views of the participants at the meeting regarding possible tactical approaches and strategies of the EU, the expected impact of the digital trade initiative, and perceptions and assessments regarding the positions of other WTO members. The disclosure of this information would reduce the negotiating power of the EU and could be exploited by other trading partners to support certain positions and obtain specific concessions in future negotiations.

In addition, documents 1, 3 and the redacted parts of document 5 are covered by the exception of Article 4(1) (a) fourth indent, of Regulation 1049/200, which 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 its judgement in Case T-264/04,¹¹ the General Court found that the exception set out in Article 4.1(a) fourth indent could be relied on to protect ongoing WTO negotiations that were taking place “in a sensitive context” and were “characterised by resistance on the part of both the developing and the developed countries and the difficulty in reaching an agreement”.¹²

Public disclosure of documents 1, 3 and the redacted parts of document 5 would seriously undermine the positions that may be adopted by the EU and its Member States in the context of future negotiations within the WTO, thus reducing the room for manoeuvre and compromise which is needed in order to conclude successfully multilateral talks and ultimately undermining the effectiveness of the economic relations of the Union and its Member States.

2.2. Protection of the privacy and the integrity of the individual (documents 1 and 5)

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

¹¹ Judgment in *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114.

¹² *Id.* paragraph 41.

and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

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"*¹³.

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'"*¹⁴ and that *"surnames and forenames may be regarded as personal data"*,¹⁵ including names of the staff of the institutions.¹⁶

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"*¹⁷.

Documents 1 and 5 contain names and other personal information which allows the identification of natural persons. I note that 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 be removed in order to ensure the protection of the privacy and integrity of the individuals concerned.

2.3. Protection of the decision-making process (documents 1, 3 and 5)

Article 4(3) first subparagraph 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"*.

¹³ 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.

¹⁴ 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.

¹⁵ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁶ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁷ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

The jurisprudence of the EU Courts has 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"*¹⁸ and that the capacity of its staff to express their opinions freely must be preserved¹⁹ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, 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 [...]"*.²⁰

Documents 1, 3 and 5 relate to a matter, the digital trade initiative, where a position has not yet been taken by the EU and an agreement has not yet been reached at the multilateral level. Moreover, document 3 and parts of document 5 contain individual positions of Commission staff members, Member States and exchange of views between them.

As the initiative has not been yet presented and therefore the negotiations have yet not started, the EU will be making decisions as to whether or not to pursue certain interests and positions as the multilateral discussions unfold. This decision-making process needs to be preserved from external pressure and unfounded conclusions in order to ensure that decisions are taken free of external constraints with a view to achieve the best possible outcome in the interest of the EU and its citizens.

Moreover, the information contained in these documents was meant for internal use of the institutions as a basis to inform the preliminary steps of the decision-making process in relation to the establishment of the EU position on the digital trade initiative. Exposing these preliminary considerations to the public would be premature at this stage of the multilateral talks and would subject the Commission and the Member States to external pressure. Moreover, releasing the internal opinions of Commission staff members and the positions of the Member States in reaction to those, would pose a *"reasonably foreseeable and not purely hypothetical"* risk of undermining the protection of the decision-making process by unduly exposing it to potential manipulation and unfounded conclusions. It would also restrict the free exchange of views within the Commission staff and between the Commission and the Member States. Moreover, the disclosure of these passages would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and strategic approach.

Protecting the confidentiality of these documents allows for the individuals involved in the decision-making process to speak frankly and freely, and in this way, the Commission is able to collect more accurate information to feed into its decision-making process. Reducing this degree of protection would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that *"constructive form of*

¹⁸ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹⁹ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

²⁰ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

*internal criticism, given free of all external constraints and pressures" which is "designed to facilitate the taking of decisions".*²¹ Ultimately, this would affect the quality of the internal consultations and deliberations, and seriously undermine the Commission's decision making process.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(3) 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. The Court of Justice has acknowledged that it is for 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"*²² 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 act²³.

Documents 1, 3 and 5 all pertain to the domain of the executive functions of the EU as they concern possible future trade negotiation. 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."*²⁴

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 1, 3 and 5 would undermine the possibility of achieving the best possible outcome in the public interest. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making process in question without external pressure.

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 carefully analysed the content of documents 1

²¹ See *supra*, case-law cited in footnote 20.

²² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

²³ *Id*, paragraph 67.

²⁴ Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.

and the parts of 3 concerning digital trade, with a view to determining whether parts of these documents could be released.

We have concluded that document 1 is entirely covered by the exceptions described above as it is impossible to disclose any parts of this document without undermining the protection the interests identified in this reply. Moreover, the passages related to digital trade in document 3²⁵ are almost entirely covered by the exceptions described above. After careful review, we have come to the conclusion that the releasable content of this document 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"*²⁶.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled 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
sg-acc-doc@ec.europa.eu

Yours sincerely,



Jean-Luc DEMARTY

Encl.: documents released

²⁵ See footnote 6.

²⁶ Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.