



EUROPEAN COMMISSION

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Mr Nicolas Roux  
Les Amis de la Terre  
47 Avenue Pasteur  
93100 Montreuil  
France

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/3840**

Dear Mr Roux,

I refer to your letter of 15 August 2019, registered on 16 August 2019, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 3 July 2019, addressed to the Directorate-General for Trade, you requested access to '[t]he negotiating directives for the EU-Mercosur trade agreement'.

The European Commission has identified the following document as falling under the scope of your request:

- Negotiating directives for an Inter-Regional Association Agreement with Mercosur, a document originated by the Council of the European Union, addressed to Delegations of the Member States of the European Union, date: 23 January 2017, reference 5384/17 (hereafter 'the requested document').

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<sup>1</sup> OJ L 345 of 29.12.2001, p. 94.

<sup>2</sup> OJ L 145 of 31.5.2001, p. 43.

In its initial reply of 6 August 2019, Directorate-General for Trade refused access to the requested document based on the exception of the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You support your request with detailed arguments, which I will address to the extent necessary in the corresponding sections below.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Trade to refuse access, based on the exception of the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001 and the first paragraph of Article 4(3) (protection of the institution's decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

### **2.1. Consultation of third parties**

The requested document originated from the Council of the European Union (hereafter the 'Council'), which is to be considered as a third party. The European Commission consulted the Council under Article 4(4) of Regulation (EC) No 1049/2001 with a view to assessing whether any exceptions in paragraphs 1, 2 or 3 of Article 4 of Regulation (EC) No 1049/2001 are applicable and if yes, which part(s) of the requested document should be redacted.

The Council suggested that access to the document be fully refused by applying the third paragraph of Article 4(1)(a) of Regulation (EC) No 1049/2001 and indicated that the requested document had been classified under Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU)<sup>3</sup> (hereafter the 'Council Security Rules').

### **2.2. Protection of the public interest as regards international relations**

The third indent of Article 4(1)(a) of Regulation (EC) No 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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<sup>3</sup> OJ L 274 of 15.10.2013, p. 1.

It must be noted in the outset that the Court of Justice confirmed that the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a particular regime as compared to the other exceptions included in Article 4 of that Regulation: '[a]s regards the interests protected by Article 4(1)(a) of Regulation No 1049/2001, it must be accepted that the particularly sensitive and fundamental nature of those interests [...] confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care'<sup>4</sup>.

This is exemplified by, on one hand, the fact that the institution concerned enjoys a wide margin of appreciation in assessing whether the disclosure of a document could undermine any of the public interest exceptions under Article 4(1) of Regulation (EC) No 1049/2001: '... the [institution] must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest'<sup>5</sup>.

On the other hand, '... the exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms, in that the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist, and there is no need to weigh the protection of the public interest against the protection of other interests'<sup>6</sup>.

Therefore, the European Commission enjoys a wide discretion in assessing the probable impact of the release of the requested document; however, once it is convinced that such release would have harmful consequences for the public interest, it is not entitled to weigh these consequences against any other overriding public interest. Consequently, it must refuse access to the requested document.

Despite the wide discretion and the restricted weighing of public interests, the European Commission is not exempted from its obligation 'to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical'<sup>7</sup>.

The requested document contains the consolidated version of the negotiating directives for an Inter-Regional Association Agreement with Mercosur, adopted by the Council in September 1999.

On this file, the Council is now entering a particularly sensitive phase in its decision-making process, as well as in Member States' national parliaments and in the Mercosur countries.

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<sup>4</sup> Judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 23.

<sup>5</sup> Judgment of the Court of 1 February 2007, *Jose Maria Sison v Council of the European Union*, C-266/05 P, EU:C:2007:75, paragraph 34.

<sup>6</sup> Judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 23.

<sup>7</sup> Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 64.

As a result, making these directives public at this stage would indeed undermine the interests of the EU in international relations and could be heavily criticised by Member States.

Hence, releasing the negotiating directives in question to the wide public would prejudice the outcome of any present or future negotiations on a similar important matter with other countries, as it would give clear indications on what the intended scope of the Agreement was in all details, and what was the margin of manoeuvre of the EU in these and previous negotiations.

In fact, such a disclosure would reveal the EU's strategic objectives to be achieved in any negotiations on a similar matter, and would allow third states to ascertain to what extent the Union was willing to compromise during the negotiations. This would, in turn, hinder the negotiation capacity of the Union and would put it in a weaker negotiating position in any future negotiations. This risk is reasonably foreseeable, since agreements of the same kind may be envisaged with other countries and/or countries organisations, and the policy framework concerned is very important for the EU and its Member States.

This view is confirmed by the case law of the Court of Justice, which states that, first, 'disclosure of the Union's positions in international negotiations might undermine the protection of the public interest as regards international relations'<sup>8</sup> and second, '... [i]t must be emphasised that the consideration that knowledge of the negotiating directives might have been exploited by the other parties to the negotiations is sufficient to establish a risk that the interest of the Union as regards international relations might be undermined'<sup>9</sup>

Consequently, I am of the opinion that the requested document cannot be released currently without undermining the protection of the public interest as regards international relations as per the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and that access to the requested document must be refused in its entirety.

### **2.3. Protection of the ongoing decision-making process**

The first paragraph of Article 4(3) of Regulation (EC) No 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.'

In your confirmatory request, you state that the negotiations have been finished between Mercosur and the European Union on 28 June 2019.<sup>10</sup>

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<sup>8</sup> Judgment of the General Court of 12 September 2013, *Leonard Besselink v Council of the European Union*, T-331/11, EU:T:2013:419, paragraph 70.

<sup>9</sup> *Idem*, paragraph 71.

<sup>10</sup> Press release: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>

You also state that in the case that was invoked by the Directorate-General for Trade in the initial decision<sup>11</sup> the negotiations were still ongoing.

However, the press release indicates that the new trade framework is part of a wider Association Agreement between the two regions and it was confirmed for the Secretariat-General in the process of reviewing the initial decision of Directorate-General for Trade that the negotiations in other parts of the Association Agreement are still continuing. In particular, not all the horizontal provisions have been finally agreed, which might have an impact on the agreement on trade.

Therefore, the Association Agreement between Mercosur and the European Union, in its current form, is still a draft agreement, where there are active negotiations at this stage on certain parts of the document. Therefore, disclosure of the requested document at this stage would seriously undermine the institution's decision-making process since disclosing the Union's negotiation directives before the complete finalisation of the text of the Association Agreement would still allow the other negotiating parties to drive the legal finalisation process into a direction that is not preferred by the European Union.

Thus, I conclude that access cannot be granted to the requested document also due to the reason that its disclosure would undermine the protection of an ongoing decision-making process pursuant to the first paragraph of Article 4(3) of Regulation (EC) No 1049/2001.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that although the first paragraph of Article 4(3) of Regulation (EC) No 1049/2001 refers to an overriding public interest that might be capable to set aside the application of that exception, Article 4(1)(a) of Regulation (EC) No 1049/2001 do not include this possibility.

### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, further to the consultation with the Council as third party originator of the document, the Commission has been informed that the document requested is classified RESTREINT UE – EU RESTRICTED and the Council's view is that no meaningful partial access is possible without undermining the interests described above and that the content of the document. Therefore, in accordance with Article 3(1) and (2) of the Council Security Rules, the requested document cannot be declassified or downgraded without the prior written consent of the originator.

Consequently, in these circumstances, the European Commission is not in a position to release any part of the requested document.

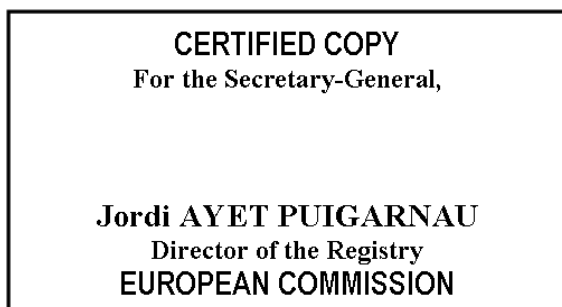
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<sup>11</sup> Judgment of the General Court of 19 March 2013, *In 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraph 125.

## **5. MEANS OF REDRESS**

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



*For the Commission*  
*Ilze JUHANSONE*  
*Secretary-General*