

Brussels, 14 December 2015

European Commission
Secretary-General
Transparency Unit SG-B-4
BERL [REDACTED]
B-1049 Bruxelles
By email: sg-acc-doc@ec.europa.eu

RE: GestDem 2015/5756: Confirmatory application for reconsideration of the European Commission's partial refusal of 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 30 October 2015 ClientEarth wrote to the Commission requesting access to *"all documents connected to 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 which have become available since our request of 28 September 2015"*, including *"the agenda for trilogue meetings, four-column documents, minutes of the meetings, documents used to brief the relevant Commission services/officials about the trilogue meetings, and position papers sent by industry representatives."*

The Commission sent its response on 27 November 2015, identifying the following documents within its possession:

1. The agenda for the 2nd trilogue meeting on 27 October 2015 (Document 1);
2. Three Commission documents used to brief the relevant Commission services/officials about the trilogue meetings (documents 2, 3 and 4)
3. 3 position papers sent by industry representatives (documents 5, 6 and 7)

The Commission granted full access to documents 1, 5, 6 and 7 and partial access to documents 2, 3 and 4.

The Commission invokes the exceptions in the first subparagraph of Article 4(3), the second subparagraph of Article 4(3), the second indent of Article 4(2), and Article 4(1)(b) of Regulation 1049/2001/EC, to justify withholding the information redacted in the requested documents. It concludes that there is no overriding public interest for disclosure of the redacted information.

Exception on the grounds of Article 4(1)(b) of Regulation 1049/2001/EC

ClientEarth does not dispute the redaction of information on the grounds that it consists of personal data.

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

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 redacted documents represent the only record of the institutional discussions which took place at the second trilogue meeting that are in the Commission's possession. They contain valuable information on the Commission's analysis and evaluation of the discussions taking place. As such, this information must be provided while the process is ongoing to allow for transparency and public participation. Disclosing the information once the law is adopted does not comply with Regulation 1049/2001/EC 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.

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), which is intended to protect the institutions' decision-making process.

According to settled case-law, the exceptions in Regulation 1049/2001/EC must be interpreted strictly. 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*". This holds true for the requested documents.

As justification for invoking the exception in Article 4(3), the Commission refers to the following considerations:

- "Trilogue meetings take place in a sphere of confidence and trust, with the aim of finding a ground for compromise between the respective institutions. As long as the inter-institutional decision-making process has not been finalized, disclosure, to the public, of the provisional positions expressed in trilogue discussions by the representatives from the Commission, the Council and the Parliament, in the legitimate expectation that these positions would not be made public, would entail a reasonably foreseeable and specific risk of putting the inter-institutional decision making process under external pressure, thereby jeopardizing the capacity of those representatives to reach compromises."
- Parts of the redacted documents "*reflect the provisional position of individual representatives or delegations, or enable the latter to be inferred from the wording used...disclosure at this stage of those parts of the documents, which allow identification of the delegations that have adopted provisional positions on the subject still under discussion, would jeopardize this process. Indeed, such disclosure would seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during the discussions...this would result in a lower level of efficiency in the working methods (it would most likely take more time) and to a diminution of the level of trust in the room.*"
- "*documents 3 and 4 reflect interpretations by the Commission staff of positions expressed by the other institutions' delegations, in the framework of meetings that were not open to the public...If the Commission were to disclose these documents unilaterally, this would have the effect of seriously prejudicing the climate of mutual confidence necessary for the effectiveness of the Commission's actions and leverage in its inter-institutional negotiations with the Council and the Parliament.*"
- "*part of document 2 contains opinions of the Commission staff on the line to take in the trilogue meetings...This document contains unfiltered, unpolished views of Commission staff regarding the other institutions' negotiating stance...There is a real and non-hypothetical risk that*

disclosure of part of the document would seriously undermine the trust of the other institutions in the Commission and, ultimately, the Commission's position and leverage in ongoing negotiations."

First, contrary to the Commission'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 Commission 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.

Second, the "external pressure" referred to by the Commission is not relevant. What the Commission defines as external pressure is in fact public input, comments from civil society, constituting democratic debate. It is the intent of the Treaties and Regulation 1049/2001 to create this debate and public participation within legislative processes. Article 4(3) of the regulation does not provide that documents must be kept confidential in order to avoid any pressure. Nor does it provide that the decision-making process must be clear of any interference.

The Court has clarified in the Turco case that: *"As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it."*

The same reasoning must apply here. The institutions must remain impartial and put a stop to undue external pressure while accepting that diverging opinions and criticism can be expressed.

Third, the Commission states that identification of the positions put forward by individual representatives and delegations present at the meetings would jeopardise the decision-making process. However, in Case C-280/11, the Court of Justice held that the identity of delegations within the Council cannot be kept confidential on the grounds of this exception. The Court in that case also rejected the argument according to which disclosure would narrow delegations' room for manoeuvre to review their positions. In joined cases C-39/05 and C-52/05, the document at stake was a legal opinion from the Council's legal service, but the ruling is still relevant for other types of documents adopted within legislative processes. The Court stressed that *"as regards the Commission's arguments that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001"*.

The same must hold true about disclosure of the requested documents. Disclosure of positions of the institutions within these meetings does not prevent them from changing them eventually; providing appropriate explanations are provided.

Finally, the Commission fails to show how transparency in the process would lead to a diminution of the level of trust among the institutions, particularly as all three institutions should be aware of the duty to act transparently and take decisions as close to the citizens as possible. Greater transparency may even

enhance the level of trust among the institutions, as they could be certain that each institution is acting in the best interests of the citizens they serve.

Misapplication of the exception in the second subparagraph of Article 4(3) of Regulation 1049/2001/EC

The arguments put forward by the Commission to justify invoking this exception are purely hypothetical. The Commission fails to show how disclosure of the documents would specifically and actually undermine the decision-making process of the Commission. Nor do they show that the risk is reasonably foreseeable. There is no reason why Commission officials should exercise self-restraint in providing opinions on the issues under discussion at the trilogues, given that such issues have been subject to considerable examination by the Commission officials involved in the process leading up to the adoption of the Commission's proposal. According to Article 194, the Commission is required to take initiatives with a view to reconciling the positions of the Parliament and the Council at the stage of conciliation (Article 194(10)). Until that point, the Commission is obliged to defend the position adopted in its proposal. The Commission must fulfil its institutional function in this regard with full transparency.

Misapplication of Article 4(2), second indent of Regulation 1049/2001/EC

As justification for invoking this exception, the Commission states that *"Part 2 of document 2 contains legal opinions of Commission staff on issues subject to discussion in trilogue meetings: i.e. legal interpretation of certain provisions proposed by Council or Parliament, as regards compatibility with the legal basis of the proposal, with international agreements, or legal inconsistencies in the proposals made by the other institutions...Disclosure of those preliminary opinions would prejudice the position that the Commission might need to take in the future: i.e. in the event that the proposal is adopted as Parliament and Council Directive and the Council needs to take part in the future proceedings before the Court of Justice in relation to the interpretation of such Directive."*

First, ClientEarth rejects the Commission's position that document 2 represents "legal advice" within the meaning of Article 4(2), second indent, of Regulation 1049/2001/EC. Therefore, this exception cannot be invoked to justify non-disclosure of the redacted information in document 2. According to joined cases C-39/05P and C-52/05P *Sweden and Turco v Council*, the purpose of the exception is to "protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice". Document 2 does not represent legal advice that has been sought with the purpose of receiving objective and comprehensive advice. If this were the case, the Commission's Inter-Institutional Affairs Group would have sought legal advice from the Commission's legal service, which is charged with this responsibility. Document 2 simply represents the opinion of the Commission staff present at the second trilogue meeting, which may or may not be objective.

In the alternative that document 2 does contain legal advice within the meaning of Article 4(2), second indent of Regulation 1049/2001/EC, the exception has been misapplied in this instance. In the *Turco* case, the Court of Justice considerably limited the scope of this exception and made it almost inapplicable in legislative contexts. Indeed, the Court specifically rejected arguments similar to those raised by the Commission above on the basis that they were purely hypothetical (see the passages already quoted from the *Turco* judgment above).

Misapplication of the overriding public interest test and failure to state reasons

There is a clear overriding public interest in disclosure of the documents, despite the Commission's submission that no overriding public interest has been substantiated.

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. They also have a right to know the Commission's opinion on the legal grounds for the adoption of the Directive, and whether it complies with international commitments, before the legislation is adopted.

Protection of a decision-making process that is undemocratic and non-transparent in nature does not serve the public interest. Keeping the discussions and 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. It also prevents EU citizens from knowing whether the Commission is fulfilling its institutional role of defending its proposal, as foreseen in Article 294 TFEU. 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 Commission maintains with regard to the content of trilogue meetings will only increase "Eurosceptic" opinion, to the detriment of the EU as a whole.

The Commission argues that much of the legislative process is already transparent and so there is no need for trilogues to be transparent too. However, this argument fails to take account of the important role of the trilogues in the legislative process, as demonstrated above. The Council's Common Approach and the JURI Committee's report represent their positions at a given point in time and give no indication of the direction that the negotiations are taking. The Treaties and case law referred to above provide that the legislative process should be transparent, not that it should be transparent only up to a certain point.

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

Yours sincerely,

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