



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels, 8 April 2020
TRADE/B2/CP/CG (2020) 422513

***By registered letter with
acknowledgment of receipt***

Ms Pia Eberhardt
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**Subject: Your applications for access to documents – Ref. GestDem 2020/0294
and 2020/0302**

Dear Ms Eberhardt,

I refer to your requests for access to documents under Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001") dated 15 January 2020 and registered on the same date under the above-mentioned reference numbers.

Please accept our apologies for the delay in providing you with this reply, which is mainly due to a high number of simultaneous and complex requests for access to documents being dealt with by the Directorate General for Trade of the European Commission (DG Trade).

1. SCOPE OF YOUR REQUEST

In your application addressed to DG Trade and registered under GestDem 2020/0294 you seek access to the following documents:

*1) a 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-China investment agreement** was discussed (since 1 January 2019);*

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.

2) minutes and other reports of these meetings;

3) all correspondence (including emails, letters, phone calls) 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-China investment agreement was discussed (since 1 January 2019);

In your application addressed to EEAS and registered under GestDem 2020/0302 you seek access to the following documents:

4) a list of meetings of staff of the EU delegation to China and representatives of individual companies (including law firms) and/or industry federations such as the European Union Chamber of Commerce in China, in which the **EU-China investment agreement** was discussed (since 1 January 2019);

5) minutes and other reports of these meetings;

6) all correspondence (including emails, letters, phone calls) between staff of the EU delegation to China and representatives of companies, business associations and law firms, in which the EU-China investment agreement was discussed (since 1 January 2019).

As the subject matter of the documents you are requesting falls within the competence of DG Trade, DG Trade is answering both requests. We have inquired whether EEAS Headquarters and the Beijing Delegation hold any documents falling within the scope of your request.

With regard to parts 1 and 4 of your request, we inform you as follows. Information on meetings of the Commissioner (including his Cabinet) are published on his website² while information on meetings with the Director-General can be found on a different webpage³. Meetings held by other DG Trade officials and EEAS officials are not systematically listed in a way indicated in your request. As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that Regulation applies only to existing documents in the possession of the institution. Given that no such document corresponding to the description given in your application is held, we are only in a position to refer you to the websites indicated above.

The following documents have been identified (see also Annex I: List of documents):

- (1) The report of a meeting with an EU company, dated 2 April 2019 (Ares(2019)2361780) ("**Document 1**");
- (2) The report of a DVC with the European Chamber of Commerce in China, dated 19 November 2019 (Ares(2020)960790) ("**Document 2**");
- (3) The report of a DVC with the European Chamber of Commerce in China, dated 9 December 2019 (Ares(2020)960790) ("**Document 3**");
- (4) The report of a meeting with an EU company, dated 5 March 2019 (Ares(2019)1698952) ("**Document 4**");

² See: <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=65110a9d-dfdf-418d-a5ee-c5c8bcc8707e>

³ See: <https://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=5f4689e0-014c-4bec-8125-f9e6d3592c86>

- (5) Request of a PhD candidate dated 10 January 2019, to have an interview or phone call (Ares(2019)168789) ("**Document 5**");
- (6) Meeting between Commissioner Hogan and BusinessEurope dated 13 December 2019 (Ares(2019)7728955) ("**Document 6**");
- (7) Meeting between Director-General Sabine Weyand and BusinessEurope, 21 June 2019 (Ares (2020)1499255) ("**Document 7**");
- (8) Meeting between DG Sabine Weyand and BDI dated 9 October 2019 (Ares(2019)6291336) ("**Document 8**");
- (9) Side meetings with EUCCC members in the margins of the CAI 21th negotiating round (Ares(2020)1385952) ("**Document 9**");
- (10) Written inputs from major EU energy companies (Ares(2020)1385952) ("**Document 10**").

Moreover, a Civil Society Dialogue on the state of play of the EU-China Investment negotiations took place on 25 October 2019. The report of the event is available on DG Trade website⁴.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law⁵, 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 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*"⁶.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁷, "*the exceptions to that right [...] must be interpreted and applied strictly*"⁸.

Having carefully examined the documents that you requested in light of the applicable legal framework, partial release can be granted to **documents 1-8**. Copies of these documents are enclosed.

⁴ See: https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158414.pdf

⁵ 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.

⁶ *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.

⁷ Regulation (EC) No 1049/2001, recital (4).

⁸ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

In particular, names and other personal data have been removed pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No. 2018/1725. In addition to personal data, other information was redacted pursuant to Article 4.1(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations). Further information was redacted pursuant to Article 4.2 first indent of Regulation 1049/2001 (protection of commercial interests). Finally, some parts in **documents 7 and 8** have been redacted as out of scope.

Documents 9 and 10 cannot be released since they are entirely covered by the Article 4.1(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations).

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 2.1 to 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

2.1. Protection of the public interest as regards international relations (documents 1-4; 9-10)

Article 4.1(a) third indent of Regulation 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."

The Court of Justice has 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*".⁹ More specifically, the General Court has stated 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*".

Documents 1-4 contain the description and assessment of market access and sectoral issues encountered by EU economic actors in China, which are currently under negotiation in the framework of a Comprehensive Agreement on Investment (CAI) with the People's Republic of China.

In particular, parts of **documents 1-4** reveal the views, positions and priorities of EU companies on the Chinese market, along with the Commission's assessment of EU offensives and defensive interests currently under negotiation within the CAI framework.

The Commission is seeking the views and experiences of EU economic actors active in China in order to effectively tackle the difficulties they face – notably with regard to the technology sector (**document 1**), State-owned Enterprises (**document 2**) and standard-setting (**document 3**) – by integrating substantial provisions in the CAI. Indeed, the successful outcome of the ongoing negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved, and on the possibility for the EU to retain the necessary space to shape and adjust its tactics, options, concessions and proposals in function of how the negotiations evolve.

Document 4 contains the Commission's legal assessment of the China's draft foreign investment law currently under review.

⁹ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

Disclosure of the withheld parts of the documents would reveal the strategic reflection and the legal considerations underpinning the Commission's negotiating proposals in ongoing negotiations on a CAI with the People's Republic of China. This would weaken the Commission's negotiating position by giving to the Commission's negotiating partner an insider look into the Union's strategy and negotiating margin of manoeuvre. Thus, the full disclosure of **documents 1-4** in the current stage of the negotiations would undermine the protection of the public interest as regards international relations in the ways described above.

Both **documents 9 and 10** cannot be released since they are entirely covered by the Article 4.1(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations). In particular, **document 9** is a classified document that supports the ongoing CAI negotiations by reporting the current constraints faced by EUCCC members in the Chinese market, and **document 10** reveals the discriminatory treatments currently suffered by the major EU energy companies in China. The disclosure of these documents would reveal the strategic reflection and the legal considerations underpinning the Commission's negotiating proposals in ongoing negotiations on a CAI with the People's Republic of China, thus undermining the protection of the public interest as regards international relations.

2.2. Protection of the privacy and the integrity of the individual (documents 1-8)

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

The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹⁰ (‘Regulation 2018/1725’).

Documents 1-8 contain names and other personal information that allow the identification of natural persons.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data “means any information relating to an identified or identifiable natural person [...]”. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.¹¹ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.¹²

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

¹² Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹⁴

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests". Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individual concerned would not be prejudiced by disclosure of the personal data concerned.

2.3. Protection of commercial interests (documents 1-4)

Article 4.2 first indent of Regulation 1049/2001 provides that "[t]he 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".

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4.2 first indent,¹⁵ it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.¹⁶ Accordingly, it must be

¹³ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹⁴ Whereas this judgment specifically related to 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

¹⁵ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁶ See Article 339 of the Treaty on the Functioning of the European Union.

information that is "*known only to a limited number of persons*", "*whose disclosure is liable to cause serious harm to the person who has provided it or to third parties*" and for which "*the interests liable to be harmed by disclosure must, objectively, be worthy of protection*".¹⁷

Document 1 contains commercially sensitive information of an EU chipmaker company and its strategic considerations vis-à-vis the Chinese market. Revealing that information would undermine the company's economic relations with China and would create a serious risk of retaliation.

Documents 2 and 3 contain the European Chamber of Commerce's assessment of the economic situation and market access problems in China. The documents describe in detail a wide range of sectoral obstacles and concrete examples of discriminatory treatment of foreign companies in China, thus putting EU companies under a serious risk of retaliation.

Finally, **document 4** reveals the name of an EU company active on the Chinese market.

These companies and industry association shared this information with the Commission in confidence in order to support the EU's objectives in the investment negotiations. There is a reasonably foreseeable and not purely hypothetical risk that revealing their commercial strategies and priorities as well as their commercially sensitive business information could undermine their commercial interests, including by impacting on their relations with third countries.

Therefore, access to the relevant parts in **documents 1-4** has to be refused on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4.2 of Regulation 1049/2001 applies unless there is an overriding public interest in disclosing the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by the disclosure.

The negotiations of international agreements as such "*fall within the domain of the executive*", which entails 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*".¹⁸

Documents 1-4 pertain to the executive functions of the EU, as they concern consultations with the European economic actors active in the Chinese market aimed at collecting useful input for the ongoing negotiations of a Comprehensive Agreement on Investment (CAI) with the People's Republic of China.

Accordingly, we have also considered whether the risks attached to the release of the withheld parts of **documents 1-4** are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies and organisations concerned.

¹⁷ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

¹⁸ 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.

You may reuse **documents 1-8** disclosed free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message. The Commission does not assume liability stemming from the reuse.

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.C.1
BERL 7/205
1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,



Sabine WEYAND

Enclosures: - Annex I: list of meetings
 - Documents partially released