



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels, 10 April 2013

Mr Erik Wesselius

***By email only to:***

ask+request-320-26de7e57@asktheeu.org

**Subject: Your request for access to documents under Regulation (EC) No 1049/2001 – reference GestDem No 2013/0593**

Dear Mr Wesselius,

I refer to your message of 26 February 2013 by which you clarified your request for access to documents presented on 6 February 2013 in accordance with Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>. Your request was split into two parts and reads as follows:

"1) I request access to ALL documents (including notes of minutes, emails and other correspondence) dating from the period 1 January 2012 - 25 February 2013 AND relating to the (revision of) the Tobacco Products Directive AND relating to contacts between Legal Services staff and Mr Michel Petite or other lawyers working with the Brussels, Paris or London offices of Clifford Chance.

2) I also request access to ALL documents, including notes of minutes, emails and other correspondence relating to contacts between Legal Services staff and Mr. Michel Petite over the period 1 January 2008 - 25 February 2013."

### **1. SCOPE OF YOUR REQUEST**

Concerning the **first part** of your request, the Legal Service has not identified any documents exchanged from 1 January 2012 - 25 February 2013 between Legal Service staff and Mr. Michel Petite or other lawyers working with the Brussels, Paris or London offices of Clifford Chance relating to the (revision of) the Tobacco Products Directive.

Concerning the **second part** of your request, the Legal Service has identified the following documents.

1. A set of documents comprising 11 printouts of (chains of) e-mails exchanged between 22 April 2010 and 3 May 2010 between Mr Smulders, Director in the Legal Service, and Mr Petite of Clifford Chance on the modalities for the legal

<sup>1</sup> OJ L 145, 31.05.2001, page 43.

assistance by Clifford Chance to the European Commission on the Greek Loan Facility Agreements. These documents are identified in the annexed table (e-mails that already figure in one of these printouts have not been identified separately).

2. A set of documents comprising 39 printouts of (chains of) messages exchanged between 23 April 2010 and 20 May 2010 between the Legal Service and Mr Petite on the legal issues concerning the Loan Facility Agreements with Greece, which were the subject of the legal assistance by Clifford Chance to the European Commission.
3. Exchange of e-mails between Mr Petite of Clifford Chance and Mr Christoforou, Director in the Legal Service, sent on 30 July 2008 and 2 August 2010.
4. E-mail sent on 22 June 2011 by Mr Petite of Clifford Chance to Mr Van Rijn, Director in the Legal Service.
5. E-mail sent on 27 January 2012 by Mr Petite of Clifford Chance to Mr Hetsch, Deputy Director-General of the Legal Service.

## **2. ASSESSMENT AND CONCLUSIONS**

### **2.1. The first set of documents**

Having assessed the documents concerned, we have come to the conclusion that full or partial access can be granted to the **first set** of documents, copies of which you will find enclosed. For the details, please refer to the enclosed list.

Please note that we interpret your request as not extending to documents exchanged in attachment to e-mails. In this case, the attachments are drafts of the envisaged contract between the Commission and Clifford Chance. Should our interpretation not correspond to your request, please contact the Legal Service. That being said, I wish to inform you that a contract was concluded, on 23 April 2010 between the Commission and Clifford Chance, valid until 2 May 2010, and another contract on 3 May 2010, for a sum of 65.000,00 € and 55.000,00 € respectively. The subject matter of these contracts is "Consultations on the preparation of legal documents governed by English law and needed to enable and manage coordinated financial assistance in the form of pooled bilateral loans granted by Euro Area Members States in favour of another Euro Area Member State", i.e. the Hellenic Republic. Regarding the first contract, the Commission made a payment of 65.000,00 € on 23 November 2010. As to the second contract, the Commission has paid, on 7 December 2010, an invoice amounting to 12.943,37 €.

The non-disclosed parts of the documents concerned are (i) the figures concerning the fees discussed between the Commission and Clifford Chance in view of the future contract, (ii) the other conditions for the legal assistance, including the expertise proposed and (iii) personal data of other members of staff of Clifford Chance, personal data (GSM numbers) of Mr Smulders and Mr Petite and personal data of other members of staff of the Legal Service appearing in e-mails exchanged within the Legal Service and not in direct contact with Mr Petite.

Information considered under categories (i) and (ii) has been blanked out in the disclosed documents since it falls under the exception provided for in Article 4(2), first indent of

Regulation 1049/2001 concerning the protection of commercial interests of a natural or legal person<sup>2</sup>.

Indeed, the negotiating positions of Clifford Chance, including the conditions and proposed fees, must be considered as business and commercial secrets and must be covered by the obligation of professional secrecy provided for under Article 339 TFEU. Their disclosure would certainly have very negative effects for that undertaking since it would enable other undertakings to have an insight of Clifford Chance's commercial and business strategy. Furthermore, it would have adverse effects on free competition between undertakings.

The Court of Justice has confirmed that in the context of contract award procedures, confidential information of undertakings must be protected and that the maintenance of fair competition in that context is an important public interest<sup>3</sup>.

I therefore conclude that the withheld parts of the relevant documents are protected by the exception provided for under Article 4(2), first indent of Regulation 1049/2001.

Information considered under category (iii) has been expunged in the disclosed documents, since it is covered by the exception provided for in Article 4(1)(b) ("*protection of personal data*")<sup>4</sup> of Regulation 1049/2001, as set out below under point 3.

## **2.2. The second set of documents**

As indicated above, the second set of documents deals with the legal issues concerning the Loan Facility Agreements with Greece.

All these documents have been exchanged in the framework of the contract for legal advice by Clifford Chance to the Commission in the context of the management of the Greek debt and in the broader context of the different measures of financial assistance taken in favour of Greece.

Having assessed the documents concerned, we have come to the conclusion that they must be refused for the reasons set out hereafter.

Firstly, access must be refused on the basis of Art. 4(1)(a), 4<sup>th</sup> indent of Regulation 1049/2001, according to which *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of (a) the public interest as regards the financial, monetary or economic policy of the Community or a Member State"*.

Disclosure of the concerned documents would certainly undermine the protection of the financial and economic policy of the Union and of Greece for the following reasons.

The management of the Greek debt and the financial assistance to Greece both form part of an on-going process of confidential negotiations between the concerned Member

---

<sup>2</sup> *"The institutions shall refuse access to a document where disclosure would undermine the protection of: - commercial interests of a natural or legal person, [...], unless there is an overriding public interest in disclosure."*

<sup>3</sup> Judgment of the Court of Justice of 14 February 2008, Case C-450/06, *Varec SA v Belgian State*, European Court reports 2008 page I-581, paragraphs 42-50.

<sup>4</sup> *"The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data"*.

State, the other euro area Member States, the International Monetary Fund, the European Central Bank, private lenders and the Commission. The internal assessment made by the Commission with the assistance of Clifford Chance on the feasibility, advantages and disadvantages of the different legal options that are available in this context is a key element for the establishment of the Commission's positions in this negotiation process. Its public disclosure would thus considerably weaken the possibility for the Commission to fulfil its tasks related to the financial, monetary or economic policy of the Union and its Member States. Moreover, its public disclosure could be highly detrimental to the financial situation of both the Union and Greece. Indeed, it could result in adverse market reactions that would be detrimental to Greece, the euro area and the Union.

Secondly, access to the concerned documents must be refused also on the basis of the exception provided for under Article 4(2), second indent of the Regulation according to which *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of legal advice.*

As stated above, the concerned documents contain legal advice provided by Clifford Chance. This legal advice concerns a highly sensitive matter. Their disclosure would certainly undermine the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice<sup>5</sup>. Indeed, in addition to the harm caused to the financial and economic policy indicated above, public disclosure of these documents would also affect the Commission's negotiation position vis-à-vis the Greek authorities on the matter concerned but also with regard to other Member States in the context of the management of their financial assistance programs. Should the Commission and its services be obliged to disclose the requested documents, it would in the future refrain from seeking written legal advice on such sensitive matters.

### **2.3. Exchange of e-mails between Mr Petite of Clifford Chance and Mr Christoforou, Director in the Legal Service, sent on 30 July 2008 and 2 August 2010**

Having assessed these documents, I am pleased to inform you that full access can be given to them, with the exception of some personal data. In the e-mail of 30 July 2008 the name of the island where Mr Christoforou spends his holidays has been expunged. It is clear that these data concern solely the private life of Mr Christoforou and that disclosure of this information would undermine his legitimate privacy rights. In the e-mail of 2 August 2010 the name of a private person has been expunged. Consequently, this information is covered by the exception provided for in Article 4(1)(b) ("*protection of personal data*") of Regulation 1049/2001, as set out below under 3.

Please note that we interpret your request as not extending to documents exchanged in attachment to e-mails, as in this case the account of the hearing of "APDC" representatives by the "Commission Lagarde". Should our interpretation not correspond to your request, please contact the Legal Service.

---

<sup>5</sup> Judgment of the Court of Justice of 1 July 2008, Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, European Court reports 2008, page I-4723, paragraph 42.

#### **2.4. E-mail sent by Mr Petite on 22 June 2011 to Mr Van Rijn, Director in the Legal Service**

Having assessed this document, I am pleased to inform you that access can be granted to it, with the exception of the personal data of the person that is the subject of this mail. I consider that these data are covered by the exception provided for in Article 4(1)(b) ("*protection of personal data*") of Regulation 1049/2001, as set out below under point 3.

#### **2.5. E-mail sent on 27 January 2012 by Mr Petite of Clifford Chance to Mr Hetsch, Deputy Director-General of the Legal Service**

Having assessed this document, I am pleased to inform you that full access can be granted to it. Please note that we interpret your request as not extending to the documents attached to this e-mail. In this case, these attachments are copies of the complaint lodged with the European Commission by Clifford Chance on behalf of three companies it represents. Should our interpretation not correspond to your request, please contact the Legal Service.

### **3. PROTECTION OF PERSONAL DATA**

Disclosure of the removed personal data contained in the disclosed documents would undermine the legitimate privacy rights of the concerned persons and, therefore, would be contrary to Article 4(1)(b) of Regulation 1049/2001. Indeed, according to Article 8(b) of Regulation 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<sup>6</sup>, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. You have not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred<sup>7</sup>.

In these circumstances, we must conclude that the withheld personal data are covered by the exception under Article 4(1)(b) of Regulation 1049/2001.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position. This remedy is set out below under point 5.

### **4. OVERRIDING PUBLIC INTEREST**

Pursuant to Article 4(2) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. The Legal Service does not see any elements that would show the existence

---

<sup>6</sup> OJ L 8, 12.01.2001, page 1.

<sup>7</sup> Judgment of the Court of Justice of 29 June 2010, Case C-28/08P, *European Commission v The Bavarian Lager Co. Ltd*, European Court reports 2010 page I-6051, paragraphs 77-78.

of a public interest that would outweigh the need to protect the commercial interests of Clifford Chance and legal advice contained in the concerned documents or parts thereof. In this regard, it has to be stressed that the exception protecting the *the public interest as regards the financial, monetary or economic policy of the Community or a Member State* and the exception protecting *legal advice* are closely intertwined. In this situation and for the reasons explained above, the Legal Service considers that the interest in transparency does not outweigh the public interest of the Commission and its services to receive frank, objective and comprehensive legal advice.

## 5. PARTIAL ACCESS

We have also examined the possibility of granting partial access to the set of documents identified under point 2.2. However, given the content of these documents, only some parts of phrases or words could be disclosed. Such partial access would not be meaningful and would require a disproportionate administrative burden<sup>8</sup>. In these circumstances, I consider that it is necessary to safeguard the interests of good administration. Consequently, no partial access is possible.

## 6. REMEDIES

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

The Secretary-General will inform you of the result of such review within 15 working days from the date of registration of your request. You will either be given access, or your request will be rejected, in which case you will be informed of what further action is open to you.

All correspondence should be sent to the following address:

The Secretary-General  
European Commission  
B-1049 BRUSSELS  
e-mail: Sg-Acc-Doc@ec.europa.eu

Yours sincerely,



Luis ROMERO REQUENA

---

<sup>8</sup> Judgment of the Court of 6 December 2001, Case C-353/99 P, *Council of the European Union v Heidi Hautala*, European Court reports 2001, page I-9565, paragraph 30.