



Brussels, **28 NOV. 2016**
trade.a.3.dir(2016)6193769

By registered letter with acknowledgment of receipt

Mr Hans Wetzels
Van Spilbergenstraat 84-3
1057RL, Amsterdam
The Netherlands

Advance copy by email:
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Subject: Your application for access to documents – Ref GestDem No 2016/4483

Dear Mr Wetzels,

I refer to your request of 9 August 2016 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on 10 August 2016 under the above mentioned reference number.

Please accept our apologies for the delay in providing you with this reply, which is mainly due to the fact that the units responsible for the TTIP negotiations in DG Trade are currently processing several requests for access to documents at the same time as carrying out a number of other tasks in the context of the ongoing negotiations. Moreover, three units in DG Trade had to be consulted on your request.

1. SCOPE OF YOUR REQUEST

You request access to the following documents:

"on the topic of TTIP: all correspondence (including emails), the list of meetings with detailed minutes and any other reports of such meetings between DG TRADE's officials (including the Commissioner and his Cabinet members) and representatives and/or officials of DG AGRI between January 2013 and December 2015".

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.

In a follow up e-mail of 9 August to DG Trade you specified that your interest covers “*all communication between DG TRADE and DG AGRI for the mentioned period concerning agriculture, food production and farmers in TTIP*”.

We have identified 27 documents that fall under the scope of your request. A list of the documents is enclosed in Annex 1. For each of the documents the list provides a description and indicates whether documents or parts thereof are withheld and if so, under which ground pursuant to Regulation 1049/2001.

Please note that we did not include documents which were merely copied for information between DG TRADE and DG AGRI and documents which were sent by DG AGRI to DG TRADE for transmission to other EU institutions as these documents do not result in policy exchanges between the two services.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² 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*”.³

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁴ “*the exceptions to that right [...] must be interpreted and applied strictly*”.⁵

Having examined the requested documents under the applicable legal framework, I am pleased to release documents 1, 2, 3, 17, 18, 19, 26 (see Annex 1). Copies of the accessible documents are enclosed.

As regards documents 1, 2, 3, 18, 19, only names and other personal data have been removed, pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with

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.

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.

Regulation (EC) No 45/2001 ("Regulation 45/2001").⁶ Hence, the main content of these documents is accessible. Moreover, the names of senior management of the Commission above the Director level, are disclosed.

As regards documents 17 and 26, in addition to personal data covered by the exception of Article 4.1(b), some passages have been redacted as they are covered by the exceptions to the right of access to documents set out in Articles 4.1(a) third indent (protection of the public interest as regards international relations) and Article 4.3 first subparagraph (protection of the decision making process) of Regulation 1049/2001.

Please note that large parts of documents 17 to 27 relate to subject matters other than TTIP.⁷

Concerning documents 4, 5, 6, 7 and 8, we refer to the assessment of these documents made by DG AGRI in the reply to your request with GestDem reference no. 2016/4520, which you received on 23 September 2016 (Ares(2016)5536038). Therefore, these documents will not be part of the assessment contained in this letter.

I regret to inform you that unfortunately documents 9 to 16, 20 to 25 and 27, cannot be disclosed as they are entirely covered by the exceptions to the right of access to documents set out in Articles 4.1(a) third indent and Article 4.3 first subparagraph. Documents 20 to 25 and 27 contain also personal data protected under Article 4.1(b) of Regulation 1049/2001.

The reasons justifying the application of the 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.

2.1 Protection of international relations

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."

According to 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"*.⁸ In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the*

⁶ Regulation (EC) No 45/2001 of the European Parliament and the 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, OJ L 8, 12.1.2001, p. 1.

⁷ For those documents that have been partially disclosed, these parts have been marked as "outside the scope of your request".

⁸ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

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

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".¹⁰* Moreover, 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".¹¹*

Documents 11 to 16 contain the market access proposals on agriculture that DG TRADE shared with DG AGRI and vice versa in preparation for the TTIP negotiations. Documents 9 and 10 contain lines to take on specific issues related to the TTIP negotiations, follow-up comments of DG AGRI and preparatory documents for internal discussions with the Member States. Documents 17 and 20 to 27 contain internal reports of meetings between DG TRADE, DG AGRI and DG MARKT (currently DG GROW) on issues related to geographical indications ("GI"). Among other negotiations and non-agricultural related items, the discussions at these meeting covered also the TTIP negotiations on GIs.

All these documents contain internal assessments, analyses, views and opinions, of DG TRADE or DG AGRI regarding actions, initiatives and objectives that the EU planned to pursue *vis-à-vis* the US in the agricultural negotiations in relation to market access and other agricultural-related issues. They also contain details of the tactical and strategic approaches of EU, and concerns in relation to market access issues and other aspects of the agricultural negotiations.

As the TTIP negotiations are not yet finalised, the positions of the EU are constantly subject to change depending on the concessions and compromises granted to and obtained from the US. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options, concessions and proposals in function of how the discussions evolve. Public disclosure of the documents in question would weaken the negotiating capacity of the EU and reduce its bargaining power by revealing internal considerations, reflections, intentions, internal debates, strategic approaches and shifts of positions with regard to specific aspects of the ongoing negotiations. This would undermine the strategic interests of the EU and consequently, the

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

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

¹¹ *Id.*, paragraph 125.

public interest pursued in the negotiations. Indeed, the success of the negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. When closing her own initiative inquiry on transparency in TTIP, the European Ombudsman herself recognised that *"the Commission needs to create a context in which it can negotiate effectively with the US on TTIP, so as to deliver the best possible deal for the Union and its citizens. This may mean that the Commission can legitimately keep confidential certain information and documents, at least during certain stages of the negotiations."*¹²

Full public disclosure of the documents in question would also weaken the commercial relations of the EU vis-à-vis other trading partners, as it would provide them with information that they could exploit to the disadvantage of the EU and its strategic interests to extract specific concessions in other ongoing or future negotiations covering agricultural matters. This may ultimately undermine not only the goals and objectives that the EU may want to achieve in the TTIP but also in other negotiations and consequently, the public interest as regards international relations.

Finally, some parts of documents 17, and 20 to 27 contain internal views, opinions and assessments regarding the position of the US in the negotiations, or describe details of the US position. Putting this information in the public domain would undermine in a foreseeable manner the mutual trust between the EU and the US. In this respect, the General Court has acknowledged that *"in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations"*.¹³

Preserving a certain level of discretion and special care in handling documents that reflect the positions of our negotiating partners is essential in order not to jeopardise the progress of the ongoing discussions. Negotiating partners need to be able to confide in each other's discretion and to trust that they can engage in open and frank exchanges of views without having to fear that that these views and positions may in the future be exposed. As the Court recognised in Case T-301/10 *in't Veld v Commission*, *"[...] establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise."*¹⁴ If the redacted information were to be disclosed, the US as well as other negotiating partners of the EU may fear that in the future their positions would be revealed and they may as a result refrain from engaging with the EU.

As you will notice, while certain reports of meetings between DG TRADE, DG AGRI and DG MARKT on GI-related issues are disclosed (i.e. documents 17, 18, 19 and 26), other

¹² <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>.

¹³ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraph 126.

¹⁴ *Id.*

reports of these meetings (i.e. documents 20 to 25 and 27) are entirely withheld. This is because documents 20 to 25 and 27 contain a more detailed political and strategic assessment of the position of the US and record in more detail the position and actions of the US in the context of the TTIP negotiations on GI-related issues. As mentioned 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 in view of their specific contents, circumstances, context and risks associated with their release.

2.2 Protection of privacy and integrity of the individual

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 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”.¹⁵

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’”¹⁶ and that “surnames and forenames may be regarded as personal data”,¹⁷ including names of the staff of the institutions.¹⁸

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”.¹⁹

Documents 1 to 3, 9, 10, 17 to 27, all contain personal information, such as names, that allows the identification of natural persons. Signatures have also been removed to avoid any risk of forgery.

¹⁵ 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.

¹⁶ 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.

¹⁷ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁸ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁹ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested without including these personal data.

If you wish to receive these personal data, we invite you to provide us with arguments showing the need for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

2.3 Protection of the institution's decision-making process

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.”

Documents 9 to 16, 20 to 25 and 27, all relate to the conduct of negotiations to conclude an international agreement. As such they fall within the domain of the executive functions of the EU, which – as acknowledged by the EU Courts – 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*”.²⁰

The jurisprudence of the EU Courts has also 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*”²¹ and that the capacity of its staff to express their opinions freely must be preserved²² 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 [...]*”²³

The documents in question concerned relate to a matter, agriculture in TTIP, where a final position has not yet been adopted by the EU and an agreement has not yet been reached with the US. As the TTIP negotiations unfold, the EU will be making decisions as to whether or not to pursue certain interests and positions, and may revise offers and concessions already tabled in the negotiations. This decision-making process needs to be preserved from external

²⁰ 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.

²¹ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

²² Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

²³ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

pressure in order to preserve the “thinking space” of the Commission, its room for manoeuvre and independence, and the atmosphere of trust in which internal discussions within the Commission and between institutions, take place.

Some of the documents in question contain internal opinions of Commission staff members and impressions and perceptions on the US positions based on participation in the negotiations. Certain parts also contain information about strategic approaches for the negotiations. Exposing internal views and considerations expressed in this context would be premature at this stage and would subject the Commission to external pressure, potential manipulation and unfounded conclusions both from external stakeholders and from our negotiating partners. It would also restrict the free exchange of views within the Commission staff and between the Commission and its institutional partners. Finally, it would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches and proposals. This would consequently undermine the decision-making process of the EU institutions by revealing specific elements taken into account for the negotiations.

The risk of external pressure is not hypothetical, but rather tangible and concrete. In the course of the TTIP negotiations, the Commission has been exposed to pressure from US stakeholders and politicians, as well as European stakeholders. Given these specific circumstances, protecting the confidentiality of documents that provide detail of the ongoing decision making process allows for the actors 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 internal criticism, given free of all external constraints and pressures"* which is *"designed to facilitate the taking of decisions"*.²⁴ 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"*²⁵ as transparency and openness of the legislative process

²⁴ See *supra*, case-law cited in footnote 23.

²⁵ 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.

strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.²⁶

As recalled above, the negotiations of international agreements “*fall within the domain of the executive*”; this 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*”.²⁷

Documents 9 to 16, 20 to 25 and 27 all pertain to the domain of the executive functions of the EU as they relate to the negotiation of an international agreement.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making process in the context of the ongoing negotiations prevails over transparency in this specific case. In particular, disclosure at this stage of the TTIP negotiations of certain parts of the documents concerned 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 protection of the EU's ongoing decision-making process in the context of the ongoing TTIP negotiations.

4. PARTIAL ACCESS

Pursuant to Article 4.6 of Regulation (EC) No 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*”. We have analysed in detail the content of documents 9 to 16, 20 to 25 and 27 with a view to determining whether parts of these documents could be released. We have however concluded that these documents are to be withheld in their entirety as their content is covered by the exceptions set out in Article 4 of Regulation 1049/2001, and it would be impossible to disclose any part without undermining the protection of the interests covered by these exceptions.

Even if partial access was possible, which is not the case, it appears that the content that could be released would be meaningless. According to settled case law, the institutions are 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*”.²⁸

²⁶ *Id.*, paragraph 67.

²⁷ 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.

²⁸ Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.

In case you would disagree with my assessment, 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.

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

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

Yours sincerely,

A handwritten signature in dark ink, consisting of a stylized 'J' and 'L' followed by a long horizontal stroke.

Jean-Luc DEMARTY

Encl.:

- list of documents;
- released documents.