



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels,

Ms Anna Maskell  
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### **BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT**

**Subject:** Request for access to documents

**Ref.:** Your request of 9 May 2017 registered on 20 June 2017 under reference GestDem 2017/2790

Dear Ms Maskell,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>. Your request concerns "*1) All legal service correspondence (including e-mail) with, and documents from, representatives from the Energy Charter Secretariat and the Legal Advisory Committee of the Energy Charter Treaty and 2) [a]ll documents created by the legal service concerning the Energy Charter Treaty (for example relating to investor-state dispute settlement cases)*". By mail of 19 June 2017, responding to our request for clarification of 23 May 2017, you confirmed that your request concerns the period from 1st of January 2016 to 22nd of May 2017.

#### **1. IDENTIFICATION OF DOCUMENTS**

After examination of the Legal Service files, I would like to inform you that no document has been identified as responding to the terms of point 1) of your request.

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<sup>1</sup> OJ L145, 31.05.2001, page 43.

Regarding point 2), the following document has been identified as falling within the scope of your request:

Note of the Legal Service of 23 February 2016 for the attention of the Directors General of DG TRADE, DG ENER and DG FISMA: *Options pour faire face à l'incompatibilité des procédures d'arbitrage entre investisseurs d'un Etat membre et un autre Etat membre sur la base de l'article 26 du Traité de la Charte de l'Energie ("TCE") et certaines dispositions des Traités UE* (document reference Ares(2016)926152).

## **2. ASSESSMENT**

The note of the Legal Service registered under Ares (2016)926152 is the response of the Legal Service to a joined consultation by three Directors General on the question of the compatibility with the EU law of the arbitration procedures between investors of a Member State and another Member State under the Energy Charter Treaty.

Having carefully examined the document concerned, I have come to the conclusion that partial access can be granted. Parts of the said document have been expunged, as they must be protected under the exceptions for the protection of legal advice and court proceedings and under the exception for the protection of investigations, as laid down in Regulation (EC) No 1049/2001.

Please also note that personal data have been expunged in accordance with the exception provided for in Article 4 (1)(b) of Regulation (EC) 1049/2001 ("*protection of personal data*"), as will be explained.

Accordingly, please find enclosed an expunged version of the requested document. Please note that you may reuse this document 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 of the document. Please also note that the Commission does not assume liability stemming from the reuse.

### **2.1. Protection of legal advice**

Article 4(2) second indent of Regulation (EC) No 1049/2001 states by way of exception that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice [...] unless there is an overriding public interest in disclosure*".

The above mentioned exception aims at protecting the capacity of the Legal Service to assist the Commission by providing frank, objective and comprehensive legal advice<sup>2</sup>.

As pointed out above, the requested document contains a legal analysis of the question of the compatibility with the EU law of the arbitration procedures between investors of a Member State and another Member State under the ECT. More precisely, it contains a legal assessment, among others, of the question of the options to obtain before the Court of Justice the recognition that Member States do not have the competence to conclude between themselves investment and protection agreements. These questions are still at present the

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<sup>2</sup> Judgment of 1 July 2008 in *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

subject of discussion at various levels, including the above mentioned pending infringement proceedings.

Disclosure of the refused parts of the document concerned would make known to the public internal opinions drafted under the responsibility of the Legal Service on a particularly delicate issue. Public disclosure of the refused parts would render the Commission's Legal Service subject to external pressures and interferences limiting substantially both its capacity to assist the Commission and its services in this sensitive matter as well as the Commission's ability to seek and receive frank, objective and comprehensive legal advice in the framework of its work on ISDS<sup>3</sup>.

#### **2.4. Protection of the purpose of investigations and court proceedings**

By way of exception Article 4(2), third indent of Regulation (EC) No 1049/2001 states that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits [...], unless there is an overriding public interest in disclosure"*.

In this respect, I would like to inform you that the European Commission has in fact initiated several formal infringement proceedings in 2012 and 2013 against various Member States<sup>4</sup>. The investigations, which are currently pending<sup>5</sup>, refer to the issue of the compatibility of Bilateral Investment treaties and the arbitration proceedings provided thereby with the EU law. Although Ares (2016)926152 does not form part of the infringement proceedings administrative files, its expunged parts refer to these proceedings and the suggested strategy to be adopted by the Commission.

As the Court of Justice has acknowledged in its *LPN* judgment, a general presumption of non-disclosure of documents in relation to ongoing infringement proceedings exists: *"[I]t can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001"*.<sup>6</sup>

In these circumstances, the spirit of cooperation and mutual trust between the Member States and the Commission requires that the exchanges and documents concerning infringement procedures remain, at this stage, confidential. A public disclosure of the documents related to open infringement procedures would put at risk the dialogue between the Commission and the concerned Member States in the course of the ongoing procedures under Article 258 TFUE.

Moreover, Article 4(2) second indent of Regulation (EC) No 1049/2001 states that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure"*.

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<sup>3</sup> Judgment in case *Sweden & Turco v Council*, C-39/05 P and C-52/05 P, *ibid*, paragraph 69.

<sup>4</sup> The infringements are the following: 2012/2066 and 2013/2208 against the Slovak Republic, 2012/2078 against the Netherlands, 2013/2205 against Austria, 2013/2207 against Sweden and 2013/2206 against Romania.

<sup>5</sup> The status of infringement proceedings can be seen at [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang\\_code=en](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en).

<sup>6</sup> Judgment of 14 November 2013 in joined cases C-514/11P and C-605/11P, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, EU:C:2013:738, paragraph 65.



In this respect it must be noted that case T-217/17<sup>7</sup> is currently pending before the General Court. This case seeks the annulment of a Commission decision in the field of State aids, concerning the promotion of electricity production from renewable energy sources in the Czech Republic. However, this action concerns also the question of the compatibility with the EU law of arbitration proceedings on the basis of bilateral investment treaties and the Energy Charter Treaty.

The purpose of the exception for the protection of court proceedings is to maintain the independence of the European Union institutions in their dealings with the court, to protect the integrity of court proceedings and to ensure the proper course of justice.

Indeed, although document Ares (2016)926152, was not drafted in view of a specific proceeding, it reveals the Commission's position on the question at stake, which is also the subject of discussion in the referred pending proceedings. In this sense, the General Court has confirmed in its recent judgment in case T-796/14<sup>8</sup> that the scope of the exception relating to the protection of court proceedings covers not only the documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also documents whose disclosure is liable, in the context of specific proceedings, to compromise the Commission's defensive position and the principle of equality of arms, which is a corollary of the very concept of a fair trial, provided that they have a relevant link with the pending proceedings<sup>9</sup>.

In light of the above, I consider that disclosure of the refused parts of the said document could compromise the Commission's defensive position and the principle of equality of arms, since other parties could benefit from privileged access to the Commission's legal strategy, whereas no similar obligation would be imposed on them.

For these reasons, disclosure, at this stage, of the legal assessment made by the Legal Service would also undermine the protection of court proceedings and investigations provided for under the second and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

## **2.5. Protection of personal data**

In accordance with Article 4 (l)(b) of Regulation (EC) 1049/2001 *[t]he 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"*.

Indeed, when access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>10</sup>. According to Article 8(b) of Regulation 45/2001<sup>11</sup>, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

Accordingly, the names and contact details of Commission's officials not having the function of senior management staff and the handwritten signatures have been expunged.

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<sup>7</sup> *FVE Holýšov I and Others v Commission*, T-217/17, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-217/17&td=ALL>.

<sup>8</sup> Judgment of 15 September 2016 in *Philip Morris Ltd v European Commission*, T-796/14, EU:T:2016:483 paragraph 76.

<sup>9</sup> Paragraph 88.

<sup>10</sup> Judgment of 29 June 2010 in C-28/08 P - *Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378.

<sup>11</sup> OJ L 8, 12.1.2001, page 1.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

If you wish to receive the expunged personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

### **3. OVERRIDING PUBLIC INTEREST**

Pursuant to article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest permitting the full disclosure of the requested documents. In order for such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under article 4(2), second indent and third indents. In the present case I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused parts of the documents that would outweigh the public interest in the protection of legal advice, the purpose of investigations and court proceedings.

### **4. MEANS OF REDRESS**

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 following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

The Secretary General will inform you of the result of this 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 how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

Annex: 1