



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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

Ms Pia Eberhardt
c/o Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels
Belgium

Advance copy by email:
ask+request-4370-49b2fc04@asktheeu.org

Subject: Your applications for access to documents – Ref. GestDem 2017/3510

Dear Ms Eberhardt,

I refer to your request for access to documents under Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001") dated 7 June 2017 and registered on the same date under the above-mentioned reference number.

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 you seek access to the following documents:

"1) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and her 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's foreign investment policy was discussed (since October 2015);

2) minutes and other reports of these meetings;

3) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of

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.

companies, business associations and law firms, in which the EU's foreign investment policy was discussed (since October 2015)" (emphasis added).

Following two exchanges of emails pursuant to Article 6(2) of Regulation 1049/2001 aiming to better define the scope of your request, you explained that the term "EU foreign investment policy" means:

" **EU negotiations** of investment protection provisions with the **US, Canada, Japan, China, ASEAN countries, Mexico, Mercosur, and India***

** the EU proposal for a **Multilateral Investment Court** (excluding documents, which the Commission will publish anyways in the context of the results of the consultation on the issue)*

** the EU's role in the **Energy Charter Treaty (ECT)**" (emphasis added).*

We would like to share with you 21 documents that fall within the scope of your request and which concern meetings and exchanges of correspondence with the above-mentioned companies:

- (1) an email from BusinessEurope to the Director General of DG Trade dated 8 October 2015 (Ares(2017)3772135) ("**Document 1**");
- (2) the report of a meeting with Telenor held on 13 October 2015 (Ares(2017)3710773) ("**Document 2**");
- (3) an email from BusinessEurope to the Director General of DG Trade dated 23 October 2015 enclosing the confederation's position paper on the European Commission's proposal on an Investment Court System (Ares(2015)5415143 ("**Document 3**");²
- (4) a reply letter by DG Trade to the European Union Chamber of Commerce in China (EUCCC) dated 4 November 2015 (Ares(2015)4897117) ("**Document 4**");³
- (5) the report of a meeting with Heineken held on 29 January 2016 (Ares(2017)3711260) ("**Document 5**");
- (6) an email exchange between DG Trade officials and the European Automobile Manufacturers' Association (ACEA) dated 2-3 February 2016 (Ares(2017)3711549) ("**Document 6**");
- (7) the report of a meeting with BusinessEurope held on 2 March 2016 (Ares(2016)1099040) ("**Document 7**");
- (8) the report of a meeting with the European Centre of Employers (CEEP) held on 3 June 2016 (Ares(2016)2609548) ("**Document 8**");

² The position paper is available at https://www.busseurope.eu/sites/buseur/files/media/position_papers/rex/2015-10-23_assessment_of_commission_proposal_on_a_new_investment_court_system.pdf

³ The original letter by EUCCC dated September 2016 – thus outside the scope of your current request – was fully disclosed to you on 4 March 2016 in reply to your application for access to documents request Ref. GestDem No. 2015/5130.

- (9) the report of a meeting with the European Association of Automotive Suppliers (CLEPA) held on 9 June 2016 (Ares(2017)3712001) ("**Document 9**");
- (10) the report of a meeting with European Services Forum (ESF) held on 14 July 2016 (Ares(2016)5299715) ("**Document 10**");⁴
- (11) an email exchange between DG Trade officials and the European Ships and Maritime Equipment Association (SEA Europe) dated 26-27 July 2016 (Ares(2017)3712792) ("**Document 11**");
- (12) the report of a seminar organised by BusinessEurope, the EU-China Chamber of Commerce and the EU-China Business Association on 19 September 2016 (Ares(2017)3713080) ("**Document 12**");
- (13) the report of a meeting with SEA Europe held on 20 September 2016 (Ares(2016)5729207) ("**Document 13**");⁵
- (14) an email exchange between DG Trade officials and the European Lighting Industry Association (LightingEurope) dated 26-30 September 2016 (Ares(2017)3713302) ("**Document 14**");⁶
- (15) the report of a meeting with the European Rail Industry Association (UNIFE) held on 13 October 2016 (Ares(2017)3714685) ("**Document 15**");
- (16) the report of a meeting with the German-Chinese Lawyers Association held on 28 October 2016 (Ares(2017)3715482) ("**Document 16**");
- (17) the report of a meeting with BusinessEurope held on 14 November 2016 (Ares(2016)6435856) ("**Document 17**");
- (18) the report of a meeting with BusinessEurope held on 5 December 2016 (Ares(2016)808460) ("**Document 18**");
- (19) the report of a meeting with the EU Chamber of Commerce in China (EUCCC)'s investment working group held on 8 February 2017 (Ares(2017)808460) ("**Document 19**");
- (20) a letter by EUROCHAMBERS to the EU Commissioner for Trade Cecilia Malmström dated 21 March 2017 (Ares(2017)1517815) ("**Document 20**");
- (21) the reply to the abovementioned letter by the Trade Commissioner dated 10 April 2017 (Ares(2017)1894609) ("**Document 21**").

⁴ In accordance with the Code of Good Administrative Behavior (*see below footnote 7*) , please note that the letter mentioned in the report is out of scope as it does not refer to the EU's investment protection negotiations but to the local content requirements challenges faced by the European industry association when operating in emerging markets.

⁵ In accordance with the Code of Good Administrative Behavior, please be informed that the *Facts & Figures sheet* mentioned in the report was not enclosed to the report.

⁶ In accordance with the Code of Good Administrative Behavior, please note that the meeting mentioned in the abovementioned email exchange did not relate to "*the EU's negotiations of investment protection provisions*".

A list of these documents is enclosed in Annex I. Furthermore, a list of meetings has been created for the purpose of your request and provided in Annex II to this letter. Please note, however, that Regulation 1049/2001 applies only to documents *held* by European Institutions and does not require the latter to create new documents for the purpose of an access to documents request. We therefore prepared the abovementioned list of meetings as an act of courtesy because its creation did not require disproportionate resources and in accordance with the Code of Good Administrative Behaviour.⁷

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law⁸, 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*"⁹.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents¹⁰, "*the exceptions to that right [...] must be interpreted and applied strictly*"¹¹.

Having carefully examined the documents that you requested in light of the applicable legal framework, we are pleased to inform you that a partial release can be granted to **Documents 1 – 21**. Copies of these documents are enclosed.

In particular, as regards **Documents 1, 3, 4, 7, 9 – 16 and 18 – 21** only 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. 45/2001¹² ("Regulation 45/2001"). Hence, the main content of these documents is accessible.

In documents **8** and **17**, 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).

⁷ https://ec.europa.eu/info/sites/info/files/code-of-good-administrative-behaviour_en.pdf

⁸ 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.

⁹ *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.

¹⁰ Regulation (EC) No 1049/2001, recital (4).

¹¹ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

¹² 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.

In documents **2**, **5** and **6**, further information was redacted pursuant to Article 4.2 first indent of Regulation 1049/2001 (commercial interests).

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 international relations (Documents 8 and 17)

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*".¹³ 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*".

A sentence has been removed from **Document 8** as it contains an internal assessment of specific aspects of negotiations with the United States of America. While these negotiations have now come to a pause, the public disclosure of this information would jeopardise the results achieved so far and negatively influence further discussions on the same matter. This would undermine the position of the EU in international negotiations, thus ultimately affecting their final outcome.

Three sentences have been removed from **Document 17**. These sentences contain the views, positions, concerns and priorities of stakeholders regarding the subject of the Multilateral Investment Court, and the reaction of the Commission to the specific issues discussed during the meeting.

While the objective to establish a Multilateral Investment Court is embedded in the Commission's *Trade for All* Communication and mentioned in the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement, the discussion with trading partners on the setting up of such court are currently in a preliminary exploratory phase and no formal negotiations have started yet. The Commission is also currently seeking input from a wide range of stakeholders, including in the context of a public consultation,¹⁴ and engaging in talks and exchange of views with trading partners on this project both in bilateral and multilateral settings. The position of the EU in this context has not yet been entirely established and is still the subject of internal discussion with other institutional actors. Its definition will depend on a wide range of factors, including the position of Member States and of other institutional partners, as well as the input of external stakeholders, and it may evolve in function of how the discussions with other trading partners progress.

In such specific circumstances, fully releasing internal documents which set out the preliminary thinking of the Commission and external stakeholders on a matter on which

¹³ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

¹⁴ See at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610>.

formal negotiations have not yet started, would weaken the position of the EU, its strategic interests and its negotiating capacity in the future. In particular, if disclosed this information would reduce the margin of manoeuvre of the EU and be exploited by our trading partners to support certain positions or extract specific concessions in this and other ongoing and future negotiations, thereby undermining the EU strategic interests and the interest of its citizens. Indeed, the success of the future 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 discussions evolve.

On this basis, parts of the abovementioned **Document 17** are withheld as their disclosure at the current stage of the multilateral discussions concerning the Multilateral Investment Court would weaken the future position of the EU, and thus undermine in a reasonably foreseeable manner the protection of the public interest as regards international relations.

2.2. Protection of the privacy and the integrity of the individual (Documents 1 – 21)

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 – 21 contain names and other personal information that allows the identification of natural persons.

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 Judgment in C-127/13 P *Guido Strack v Commission*, EU:C:2014:2250, paragraph 107 and judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned. On the other hand, we do disclose the names of senior management of the Commission starting from the Director level (included), members of Cabinet, senior representatives of external stakeholders, and public figures.

2.3. Protection of commercial interests (Documents 2, 5 and 6)

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,²⁰ 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.²¹ Accordingly, it must be 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”.²²

Three sentences have been removed from **Document 2**. They contain the specific details of Telenor's license in Myanmar, its commercial strategy and detail market shares in the country. A few words have been removed from **Document 5**. They consist of a clarification of Heineken's concerns in the Philippines and its prospective strategy in another country. A sentence has been removed from **Document 6**. It contains the ACEA's assessment of the economic situation and market access problems in China.

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.

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

²⁰ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

²¹ See Article 339 of the Treaty on the Functioning of the European Union.

²² Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

*view of the legitimate interest in not revealing strategic elements of the negotiations".*²³
Documents 2, 5 and 6 pertain to the executive functions of the EU, as they concern consultations with external stakeholders aimed at collecting useful input for the trade and investment negotiations.

Accordingly, we have also considered whether the risks attached to the release of the withheld parts of **Documents 2, 5 and 6** 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.

You may reuse **Documents 2, 4, 5, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19 and 21** 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.

Documents 1, 3, 6, 11, 14 and 20 were received from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originator. They do not reflect the position of the Commission and cannot be quoted as such.

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-B-4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,

Jean-Luc DEMARTY



For the Director General absent
Joost KORTE
Deputy Director general

²³ 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.

Enclosures:

- Annex I: list of documents
- Annex II: list of meetings
- Annexes III to XXIII: documents disclosed