



EUROPEAN COMMISSION
Directorate-General for Trade

The Director-General

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

Ms Pia Eberhardt
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels

Advance copy by email:
[ask+request-5971-
184ee399@asktheeu.org](mailto:ask+request-5971-184ee399@asktheeu.org)

Subject: Reply to your access to documents request GestDem No. 2018/5134

Dear Ms Eberhardt,

I refer to your request for access to documents under Regulation (EC) No. 1049/2001 ("Regulation 1049/2001")¹ dated 2 October 2018 and registered on the same date under the above-mentioned reference number.

Please accept our apologies for the delay in answering your request, which is mainly due to the high number of requests for access to documents being processed at the same time by the Directorate-General for Trade (hereinafter 'DG TRADE').

1. SCOPE OF YOUR REQUEST

In your application you seek access to the following documents:

- *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 March 2017). The list should*

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.

include the names of the individuals and organisations attending; the date; and any agendas / minutes / notes produced;

- *minutes and other reports of these meetings;*
- *all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of companies, business associations and law firms, in which the EU's foreign investment policy was discussed (since March 2017).*

You clarified that by “EU foreign investment policy” you mean:

- EU negotiations of investment protection provisions, for example, with Canada, Japan, Singapore, China, the ASEAN countries and Mexico;
- the Multilateral Investment Court project;
- the EU's role in the Energy Charter Treaty (ECT);
- the ECJ's Achmea ruling from April 2018 and its implications.

My services have identified 15 documents falling within the scope of your request, some of which include annexes. We enclose for ease of reference a list of the relevant documents in Annex I. For each of them, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law, 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 1049/2001.²

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 would undermine the protection of the interest covered by the exception. Third, the risk of that interest being undermined must be "*reasonably foreseeable and not purely hypothetical*".³ If the institution 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*".⁴

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 *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.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁵, *"the exceptions to that right [...] must be interpreted and applied strictly"*⁶.

Having carefully examined your request in light of the applicable framework, I am pleased to inform you that annexes 1 and 2 to document 2, the annex to document 3 and the annex to document 15 are **publicly available**⁷ and that **full access** can be granted to document 11 as well as to the annex to document 6 and to annex 2 to document 12.

Except with respect to the annex 3 to document 2, **partial access** is granted to the remaining documents. In particular, personal data have been redacted from all those documents, pursuant to Article 4(1)(b) of Regulation 1049/2001 concerning the protection of the privacy and protection of the individual and in accordance with Regulation (EC) No 45/2001 (hereinafter, 'Regulation 45/2001').⁸

In documents 1, 2, 3 and 8, information in addition to personal data has been redacted pursuant to Article 4(2) first indent of Regulation 1049/2001 concerning the protection of the commercial interests of a natural or legal person, including intellectual property. In document 6, information in addition to personal data has been protected under Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations.

Please note that information not related to the scope of your request has been marked as falling outside the scope.

I regret to inform you that **access is not granted** to the annex 3 to document 2 pursuant to Article 4(2) first indent of Regulation 1049/2001 concerning the protection of the commercial interests of a natural or legal person, including intellectual property.

The reasons justifying the application of the aforesaid 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: (a) the public interest as regards: [...] international relations".

⁵ Regulation (EC) No 1049/2001, recital (4).

⁶ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁷ You can find the link to these documents in Annex 1 to this letter (the list of documents).

⁸ 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.

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"*.⁹ In this context, the Court of Justice of the EU 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"*.¹⁰

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"*.¹¹ Moreover, *"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"*.¹²

Document 6 is the report of a meeting with an external stakeholder. Some sentences have been redacted since they reveal the EU's strategic position as regards the ongoing discussion on reforming the Investor-State Dispute Settlement (ISDS) in the framework of the UNCITRAL in light of the potential launch of multilateral negotiations, as well as third countries' diverging views with respect to the ongoing discussion aforementioned. Releasing that information would pose a significant risk to the good relations between the EU and the concerned third countries. That information has therefore to remain protected.

2.2. Protection of the privacy and the 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"*.

⁹ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

¹⁰ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

¹¹ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

¹² *Id.*, paragraph 125.

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*".¹³

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'*"¹⁴ and that "*surnames and forenames may be regarded as personal data*",¹⁵ including names of the staff of the institutions.¹⁶

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*".¹⁷

All the documents partially released contain names or other personal information (e-mail addresses, telephone numbers, job titles) that allows the identification of natural persons, as well as biometric data.

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 protected in order to ensure the protection of the privacy and integrity of the individuals concerned.

However, please note that in line with the Commission's commitment to ensure transparency and accountability, the names of Commissioners, of Members of their Cabinets and of the senior management of the Commission (i.e. Director level and above) are disclosed. For external stakeholders, the name of their main representatives are also disclosed.

2.3. Protection of commercial interests

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: [...]"

¹³ 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.

¹⁴ 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.

¹⁵ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁶ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁷ 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.

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,¹⁸ 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.¹⁹ 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*".²⁰

Documents 1, 2, 3 and 8 are reports of meetings with different stakeholders, in which sensitive information of a commercial nature was expressed in support of the views and arguments of these stakeholders. Certain parts of these documents have been redacted, as they contain commercial priorities, strategies and concerns these stakeholders may have.

In particular, some words have been removed from document 1. They reveal part of the ERT's (European Roundtable of Industrialists) commercial strategy towards China.

One sentence and two paragraphs have been removed from document 2. They contain the specific details of SEA (Shipyards & Equipment Association) members' market access difficulties in China and provide concrete examples of Chinese regulatory measures aimed at strengthening entry barriers in the framework of the Chinese shipbuilding market.

A paragraph has been removed from document 3. It reveals Düsseldorf Chamber of Commerce's members strategical approach towards China and the challenges they are facing as regards market access.

Disclosing the information redacted in document 8 could harm the competitive position of the stakeholders concerned.

Annex 3 to document 2 is DAMEN's presentation in the context of the China-EU Shipbuilding Dialogue and contains commercially sensitive information, sales figures and market shares, strategic investment considerations as well as market access action plans. It is therefore justified not to disclose it.

These companies and industry associations shared this information with the Commission in confidence in order to support the EU's objectives in the investment negotiations or on the MIC initiative. 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

¹⁸ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁹ See Article 339 of the Treaty on the Functioning of the European Union.

²⁰ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

impacting on their relations with third countries. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission, are key elements for the success of the internal and external policies of the EU and its international negotiations. Bringing in the public domain specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

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.

Accordingly, we have also considered whether the risks attached to the release of the withheld parts of documents 1, 2, 3 and 8 and of the entire annex 3 to document 2 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 concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions for its policy-making without undermining the commercial position of the entities involved.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 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"*. Accordingly, we have also considered whether partial access can be granted to the annex 3 to document 2. However, this document is entirely covered under the exception set out in Article 4(2) first indent of Regulation 1049/2001 as it is impossible to disclose any parts without undermining the protection of the commercial interests of DAMEN.

* * *

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, Document Management & Access to Documents (SG.C1)
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

Enclosures:

- Annex I: list of documents
- Documents (partially) disclosed