

Brussels, 9 November 2015

European Commission
Secretary-General
Transparency Unit SG-B-4
BERL [REDACTED]
B-1049 Bruxelles
By email: sg-acc-doc@ec.europa.eu

RE: GestDem 2015/5112 Confirmatory application for reconsideration of the European Commission's partial decision to refuse access to documents discussed at the trilogue negotiations regarding the Trade Secrets Directive.

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the partial refusal to disclose the requested documents.

On 28 September 2015 ClientEarth wrote to the Commission requesting access to "the minutes of the trilogue meetings and technical meetings taking place between representatives of the Parliament, the Council and the Commission in connection with the Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [and]...the preparatory documents for the meetings, and any documents which were discussed within the meetings, including position papers sent by industry representatives."

The Commission sent its response on 19 October 2015 together with the following documents:

1. The agenda for the trilogue meeting on 7 September;
2. A four-column document of 7 September 2015;
3. A four-column document of 24 September with the fourth column entirely redacted and colour coding from other columns removed;
4. A four-column document of 28 September with the fourth column entirely redacted and colour coding from other columns removed.

Apart from the first document, the rest of the information disclosed is already publicly available. All of the information in the four-column documents that is not publicly available was redacted or removed. It represents the comments and compromise proposals made in the fourth column of the documents dates 24 September and 28 September (documents 3 and 4), as well as colour coding which indicates which recitals/articles have been agreed and which are still under discussion.

The Commission invokes the exception in Article 4(3) of Regulation 1049/2001 to justify its refusal to disclose the documents in full, and states that ClientEarth failed to substantiate that there is an overriding public interest in disclosing the redacted parts of the documents.

The requested documents are legislative documents for the purpose of Article 12 of Regulation 1049/2001

Regulation 1049/2001 gives a right of access to documents held by the EU institutions. This right exists in particular when documents are generated during a legislative procedure. Article 12 of the Regulation first requires the institutions to make documents directly accessible and second creates a specific regime for legislative documents:

- "1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institutions concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."

The processes leading to the adoption of the Trade Secrets Directive is a legislative process.

In joined cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation's preamble to conclude that *"openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights...It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible."* This has been confirmed in case C-280/11P.

The requested documents contain the detail of the discussions between the three institutions within a legislative process. This information must be provided while the process is ongoing to allow for transparency and public participation. Disclosing the information once the law is adopted does not comply with Regulation 1049/2001 as interpreted by the EU courts. And, considering the Parliament's limited role in rubber stamping the trilogue compromise, nor does disclosure following the conclusion of the trilogue negotiations.

The trilogue procedure is not provided for by the EU Treaties. Nevertheless, it has become a standard step in the legislative process. Its objective is to reach a compromise first reading position which is then rubber stamped by the European Parliament's vote in plenary and the Council. This makes it even more important that the content of trilogue discussions is disclosed – this is precisely the information that the public needs to have access to at a point in time when they can still participate in the process. Decisions reached following discussion within an exclusive and closed group cannot be considered as having been adopted following a democratic process. Confidence and trust among institutions do not ensure transparency and democracy.

Misapplication of Article 4(3), first paragraph, of Regulation 1049/2001

Regulation 1049/2001 provides for some exceptions to the right of access to documents, including Article 4(3). However, according to settled case-law, these exceptions must be interpreted strictly. It is settled case-law that if an institution refuses access it must explain how disclosure of the document could specifically and actually undermine the interest protected by the exception. Moreover, the risk of that interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

In case C-280/11, the Court also recalled that within a legislative process "public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly".

As justification for invoking the exception in Article 4(3), the Commission refers to the fact that the redacted documents are *"preparatory, and evolving, working documents that reflect certain provisional progress in the discussions at technical level carried out on 21 and 28 September respectively. They also identify areas that need discussion at political level."* The Commission continues: *"parts of the documents reflect the provisional position of individual representatives or delegations, or enable the latter to be inferred from the wording or indications (colour coding) used. In the framework of preliminary discussions and negotiations within the trilogue meetings, it is essential that representatives and delegations of the three institutions are able to express their views freely so that compromise solutions can be found and progress can be achieved on delicate questions. Disclosure at this stage of those parts of the documents, which allow identification of the delegations that have adopted provisional positions on the subject still under discussion, would jeopardize this process....In other terms, it would be more difficult to find technical legal drafting solutions on issues under discussion if the representatives of the institutions were subject to external interference or pressure during those discussions. Additionally, such disclosure would likely prevent the representatives from agreeing to continue using this working method: i.e. were the working documents reflecting provisional positions to be disclosed after each meeting, the representatives would most likely refuse to agree to the production of the documents in question in the first place, or to include any provisional idea, wording or colour indication in those documents until the very end of the discussions – when positions would no longer be provisional. This would result in fundamental changes to the working methods (no working documents with provisional positions would be shared between the institutions), to a lower level of efficiency in the working methods (it would most likely take more time) and to a diminution of the level of trust in the room."*

First, contrary to the Commission's argument, transparency in the process could in fact enhance the institutions' ability to find a better compromise, one that is nourished by input from civil society. The Commission does not demonstrate how the process would be undermined and how the chances of reaching an agreement would be jeopardised. It relies on mere assertions which are unsubstantiated by any solid arguments and evidence.

Second, the "external interference or pressure" referred to by the Commission is not relevant. What the Commission defines as external interference or pressure is in fact public input, comments from civil society, constituting democratic debate. It is the intent of the Treaties and Regulation 1049/2001 to create this debate and public participation within legislative processes. Article 4(3) of the regulation does not provide that documents must be kept confidential in order to avoid any pressure. Nor does it provide that the decision-making process must be clear of any interference.

The Court has clarified that: *"As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out*

that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it."

The same reasoning must apply here. The institutions must remain impartial and put a stop to undue external pressure while accepting that diverging opinions and criticism can be expressed.

Third, the Commission states that identification of the positions put forward by individual representatives and delegations present at the meetings would jeopardise the decision-making process. However, individual representatives and delegations act on behalf of the institutions they work for and the governments they represent, not in their personal capacity. The individual representatives from the Commission defend the Commission's position and act within the mandate and the boundaries that have been decided by the Commission as a whole. Their positions should therefore not be protected. According to the Commission's reasoning, no position of any institutions would ever be disclosed as institutions and governments are always represented by individuals. ClientEarth respects the right of the Commission to withhold personal information on its staff, but this cannot justify a refusal to disclose the Commission's negotiating position in the trilogue meetings. Likewise, in Case C-280/11, the Court of Justice held that the identity of delegations within the Council cannot be kept confidential. The identities of MEPs should also a fortiori be disclosed as they are representing their electorate.

Fourth, the Court has also rejected the argument according to which disclosure would narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion and the risk that disclosure could cause one or the other institution to backtrack from compromises reached. In joined cases C-39/05 and C-52/05, the document at stake was a legal opinion from the Council's legal service, but the ruling is still relevant for other types of documents adopted within legislative processes. The Court stressed that *"as regards the Commission's arguments that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001"*.

The same must hold true about disclosure of the requested documents. Disclosure of positions of the institutions within these meetings does not prevent them from changing them eventually; providing appropriate explanations are provided.

Finally, the Commission's argument that disclosure would lead to a change in working methods is irrelevant to the exception provided in Article 4(3). Nevertheless, It should be noted that the institutions would continue to be in breach of Regulation 1049/2001 if any new working methods involved a failure to record their activities in a non-arbitrary and predictable manner, as required by Case T-264/04 *WWF European Policy Programme v the Council of the European Union* (see below).

Misapplication of the overriding public interest test of Article 4(3) first paragraph of Regulation 1049/2001 and failure to state reasons

Even if the decision-making process would be undermined, there is a clear overriding public interest in disclosure of the documents, despite the Commission's submission that no overriding public interest has been substantiated.

The adoption of the Trade Secrets Directive will harmonise trade secret protection across the EU for the first time. As such, it will have a profound impact on the lives of EU citizens. The trilogue negotiations will effectively decide the extent and nature of these impacts. The public has the right to know the considerations that influence the positions taken by the institutions and be able to comment, participate, oppose or support the decisions before they are finalised. This right should be upheld by the institutions involved in this process.

Keeping the outcome of trilogue meetings confidential prevents the organization of democratic debate on the direction that the draft is taking. It also prevents Member State governments and MEPs from being accountable to their electorate with regard to the positions they defend at EU level. We see very clearly that citizens all over the EU require greater transparency and more democratic behaviour from their representatives, in order to maintain confidence in the EU institutions and their activities. The secrecy which the Council maintains with regard to the content of trilogue meetings will only increase "Eurosceptic" opinion, to the detriment of the Council, the Member States and the EU as a whole.

The Commission argues that much of the legislative process is already transparent and so there is no need for trilogues to be transparent too. However, this argument fails to take account of the important role of the trilogues in the legislative process, as demonstrated above. The Council's Common Approach and the JURI Committee's report represent their positions at a given point in time and give no indication of the direction that the negotiations are taking. The Treaties and case law referred to above provide that the legislative process should be transparent, not that it should be transparent only up to a certain point.

Failure of the Commission to draw up and retain an adequate record of its activities

The Commission states "there are no minutes, agreed between the three institutions, of those meetings." If minutes of the meetings were drawn up by the Commission representatives, their existence must be disclosed and a decision taken as to whether they are covered by an exception or not. The Commission's failure to do so would be in breach of Article 2 of Regulation 1049/2001. The question of whether the minutes have been "agreed between the institutions" is irrelevant to this obligation.

In the event that the Commission representatives did not take any minutes of the meetings, this is also in breach of Regulation 1049/2001.

In Case T-264/04 WWF European Policy Programme v the Council of the European Union, the Court of First Instance held that "it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities."

If the Commission failed to take minutes of the discussions, this is entirely arbitrary and unpredictable in this context. It also goes against basic principles of good administration.

In the WWF case, the Court of First Instance held that it could not be concluded that the Council, in claiming that minutes of the first agenda item of its Article 133 Committee meeting did not exist, acted in an arbitrary or unpredictable manner. The Court came to this conclusion owing to the "purely

informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure". However, the same conclusion cannot be applied to the Commission's failure to draw up and retain documentation relating to what has become a commonplace and important step in the legislative procedure, namely trilogue negotiations.

For all of these reasons, ClientEarth hereby requests that the Council grants full access to the requested documents.

Yours sincerely,

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