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Ildikó GÁLL-PELCZ
Vice-President

REGISTERED LETTER
WITH ACKNOWLEDGEMENT OF RECEIPT

D 321726 15.12.2015

[redacted]
Lawyer
Client Earth,
36 Avenue de Tervueren (Box 17),
1040 Brussels

Dear [redacted]

Re: Your confirmatory application for access to European Parliament documents
Our reference: A(2015)11910C (to be quoted in any future correspondence)

On 29 September 2015, the European Parliament received your application, under Regulation (EC) No 1049/2001, seeking public access to documents related to the trilogue meetings and technical meetings conducted in the context of the procedure leading to the adoption of the "Trade secrets directive", in particular minutes, preparatory documents and documents discussed, including any position papers sent by industry representatives.

Parliament identified 4 documents falling within the scope of your initial request.

On grounds of protecting the efficiency of the ongoing legislative procedure concerned[1], Parliament granted partial access to the documents at stake, pursuant to the first paragraph of Article 4(3) of Regulation (EC) No 1049/2001. In the case of documents identified as 3 and 4 in the reply, consisting of four-column documents, access was denied to the contents of the fourth column, as well as to the colour indications contained in the other columns.

On 10 November 2015, Parliament received your confirmatory application under Article 7(2) of Regulation (EC) No 1049/2001, by which you asked the institution to reconsider its initial position.

You allege, *inter alia*, that the documents at stake are legislative documents in the meaning of Article 12 of Regulation (EC) No 1049/2001. You consider that Parliament has not demonstrated how the exception provided for in the first paragraph of Article 4(3) of the Regulation applies to the concerned documents and that in any case an overriding public interest in disclosure would prevail. Finally you consider that Parliament fails to draw up and retain adequate record of its activities.

Pursuant to Rule 116 (4) and (6) of the Rules of Procedure of the European Parliament and to Article 15 of the Decision of the Bureau of the European Parliament, dated 28

[1] 2013/0402(COD)

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November 2001, on public access to European Parliament documents, I, as Vice-President responsible for matters relating to access to documents, am responding to your confirmatory application, on behalf and under the authority of the Bureau.

Individual reassessment of the documents concerned

According to settled case law[2], in order to defend a full or partial refusal to public access to documents established in the context of a legislative procedure, pursuant to Article 4(3) of Regulation (EC) No 1049/2001, the institution has to demonstrate that public disclosure of such documents would specifically and effectively undermine its decision-making process.

As explained in the reply to your initial request, documents 3 and 4, for which partial access was granted, consist of four-column documents indicating the positions of the respective negotiating institutions and possible compromise texts. The fourth column contains text elements that have not yet been agreed upon by the three institutions and which are still subject to upcoming negotiation. The document relate thus to a matter where the final decision has been taken neither by Parliament nor the co-legislators.

In this regard, the fact that the requested documents are legislative documents for the purpose of Article 12 of Regulation (EC) No 1049/2001 does not automatically give rise to an obligation to make them directly accessible since Article 12(2) only imposes such obligation *"subject to Articles 4 and 9"*, as underlined by settled case law[3]. In the present case, Parliament holds the view that the relevant documents fall under the exception foreseen in the first paragraph of Article 4(3) of the same Regulation.

It should be noted that discussions on this specific legislative file touch upon very sensitive issues, as the proposal concerns national regulation of certain aspects of Members States´ civil law (extra-contractual liability), civil procedure law and possibly also criminal law, all of which are core elements of the national legal systems. In addition, the proposed Directive will implement in EU law existing obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), by which both the Union and all Member States are bound. Cooperation without external interference is vital at this stage, in order to carefully balance the different interests at stake and reach a final compromise of the various positions.

Moreover, as regards the specific legislative procedure concerned, on certain points further internal discussions between rapporteur, shadow rapporteurs and political groups are still not finished at this moment. The discussions concern in particular the coherence of the Directive with the international legal framework, in particular the TRIPS Agreement; the choice between maximum or minimum harmonisation and the appropriateness of touching upon Member States criminal law. Disclosure would most likely lead to public pressure being exerted on Members involved in the negotiations, making finding a common line within Parliament either impossible or at least much more difficult. Such external pressure will most likely focus on partial issues while trilogues are supposed only to arrive at a globally balanced approach. As a consequence, the internal decision-making process and, subsequently the inter-institutional negotiations would risk to become blocked, thus seriously undermining the decision-making process within Parliament and in the inter-institutional negotiations.

Besides, disclosure of the relevant column or of the colour codes at this stage would make the Presidency more wary about sharing information and cooperating with the parliament negotiating team, and in particular with the rapporteur, who is the central contact point

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[2] Council vs Access Info Europe, T-233/09 (and C-280/11 P) and Sweden and Turco vs Council, C-39/05 P and C-52/05 P

[3] ClientEarth vs Commission, T-424/14 and T-425/14, paragraph 105.

and who has the task of building the common negotiating position on the Parliament side. Being no longer able to cooperate with the Presidency, however, would have a negative impact on the standing of the rapporteur vis-à-vis his fellow colleagues. This would again complicate the internal decision-making for finding a common line. Furthermore, the relationship of trust established with the Presidency would be called into question in a serious manner. Parliament considers that both these elements, again, would seriously undermine the decision-making process.

In addition, Parliament's negotiating team would, due to increased public pressure namely by national authorities and interest groups, based on the documents being made available, be faced prematurely with strategic choices to be made between where to give in to the Council and where to demand more from the Presidency. Disclosure at this moment in time would put the negotiating team in the highly uncomfortable position to decide on this question before it had the intention to do. This would hinder the finding of an agreement on a common line within Parliament, therefore seriously undermining the internal decision-making process.

Finally, the importance of the principle "*nothing is agreed until everything is agreed*" for the well-functioning of the legislative procedure has to be stressed. This principle plays a key role when negotiations are prepared by the negotiating team, also when defining their common line, i.e. for the internal decision-making process, and when negotiations take place. Public disclosure of one element, even if in itself not sensitive, can have negative consequences on all other parts of a dossier, thereby obstructing the possibility of reaching an agreement between the institutions and seriously undermining the decision-making process as regards the inter-institutional negotiations.

Consequently, cooperation between the institutions is functioning well in the relevant legislative file and there is a foreseeable risk that disclosing the compromises before the end of the negotiations would harm the overall good cooperation and negatively affect the negotiation process. A loss of mutual trust and time would be the consequence. Working methods agreed so far between the parties would need to be revised. All these effects will negatively impact Parliament's internal decision-making and hinder attempts to find a common political line. Furthermore, on neither of the documents in question have negotiations been concluded. The risk of negatively affecting the decision-making process can only be excluded once agreement on all parts of the documents has been reached and both sides have approved the agreement.

In the light of all the foregoing, Parliament comes to the conclusion that access shall be refused to the entire fourth column of both documents as long as the agreed text has not yet been approved by both sides. The same applies for the colour indications in the other columns. Disclosure at this stage of the procedure would specifically, actually and seriously undermine the ongoing decision-making process within Parliament and with regard to the inter-institutional negotiations.

Absence of an overriding public interest in disclosure

For the above outlined reasons Parliament considers that full disclosure of documents 3 and 4 would adversely affect the on-going negotiations and reduce the possibility to reach an overall agreement, thereby jeopardising the effectiveness of the legislative procedure. Full public disclosure would thus seriously undermine the decision-making process, within the meaning of the first paragraph of Article 4(3) of Regulation (EC) No 1049/2001 within the institution.

As regards the existence of an overriding public interest in full disclosure of documents 3 and 4, you allege that *"the public has the right to know the considerations that influence the positions taken by the institutions and be able to comment, to participate, oppose or support the decisions before they are finalised"* and that *"keeping the outcome of trilogue*

meetings confidential prevents the organization of democratic debate on the direction that the draft is taking".

However, the principle of transparency and the higher requirements of democracy do not constitute in themselves an overriding public interest. As it has been held by the Court of Justice of the European Union, the overriding public interest capable of justifying the disclosure of a document must in principle be distinct from the principles underlying Regulation (EC) No 1049/2001.

Moreover, Parliament holds the view that the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001 would be deprived of all practical effects, if a general rule were accepted according to which in the context of a legislative procedure, transparency, as general interest, would always outweigh the specific interests protected under Article 4 of the Regulation.

Although it follows from the applicable case law that a *maximum* of transparency has to be ensured by the institutions in the legislative field, such obligation may not amount to a situation in which the well-functioning of the legislative procedure and the very existence of procedural "tools" such as the trilogues were called into question. This, however, would be the case if the requested documents were fully disclosed.

Undeniably, Article 294 TFEU and the Joint Declaration of the European Parliament, the Council and the Commission on practical arrangements for the codecision procedure, setting out the general rules and guidelines on the ordinary legislative procedure, leave the institutions with some room for manoeuvre and a certain degree of flexibility to determine, for each legislative proposal, the most suitable approach and working arrangements that may help them reconciling their positions with a view to clearing the way for the adoption of the legislative act concerned at the earliest possible stage of the procedure.

Indeed, the existence of the trilogue procedure requiring a minimum of confidentiality of preliminary positions in the course of the negotiations, as outlined above, is inherent to the special features of the legislative process in the EU, which consists in finding compromise solutions between the two co-legislators by granting flexibility to Parliament and to the Council as to their negotiating strategy, with a view to successfully reaching an agreement. An obligation to fully disclose four column-documents at each and every stage of the procedure would undermine the well-functioning of the trilogue procedure as such and, thus, the well-functioning of the legislative procedure, as designed under the applicable rules and protected, *inter alia*, by Articles 293 to 299 TFEU. Article 15 TFEU and Regulation (EC) No 1049/2001 therefore have to be interpreted in a way that these rules are not deprived of their practical effect.

Against this background, Parliament comes to the conclusion that in the case under consideration, the protection of a minimum of confidentiality of the negotiating positions as reflected in the four-column documents with a view to ensuring the well-functioning of the decision-making process of the institution exceptionally outweighs transparency interests of the general public even in the legislative context.

Alleged failure to draw up and retain record of activities

Referring to case law in ruling T-264/04, you claim that the failure of Parliament's negotiating team to take minutes of the discussions is entirely arbitrary and unpredictable, and that it goes against basic principles of good administration.

It is to be noted, in this respect, that the scope of Regulation (EC) No 1049/2001, as defined in its Article 2(3), extends only to "*documents held by an institution, that is to say, documents drawn up or received by it and in its possession*". It follows that in the absence

of any documents, there is no obligation for the institutions to produce documents for the purpose of an application[4].

Furthermore, the institution is not obliged to give reasons for the non-existence of documents. The Court has stipulated that an institution is: "*...entitled to limit itself to indicating that such documents did not exist, without being under any obligation to specify why such decisions had not been taken*"[5].

Conclusion

On the basis of the foregoing, I confirm that only partial access can be granted to documents 3 and 4, as their full disclosure at the current stage of the legislative procedure would "seriously undermine the institution's decision-making process" within the meaning of the first paragraph of Article 4(3) of Regulation (EC) No 1049/2001.

Finally, I would draw your attention to the means of redress available against this decision according to Article 8 of the Regulation (EC) No 1049/2001. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in the Treaty on the Functioning of the European Union. I equally draw your attention to the fact that filing complaint with the European Ombudsman does not have suspensory effect.

Yours sincerely,

[redacted]

Ildikó GÁLL-PELCZ

[4] Case T-106/99 Meyer vs Commission (Order), paragraphs 35-36.
[5] Case T-123/99 JT's Corporation vs Commission, paragraph 67.