



**EUROPEAN COMMISSION  
SECRETARIAT-GENERAL**

The Secretary-General

Brussels,  
SG.B.4/MF/ mbp - sg.dsg2.b.4(2014)2378490

Mr Paul de Clerck  
Friends of the Earth Europe

By email only: [paul@milieudefensie.nl](mailto:paul@milieudefensie.nl)

**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO  
ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2014/884**

Dear Mr De Clerck,

I refer to your email of 27 May 2014, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (*Regulation 1049/2001*).

**1. SCOPE OF YOUR REQUEST**

Through your initial application of 17 February 2014, addressed to the Directorate-General for Trade (DG TRADE), you requested, on behalf of the European Federation of Journalists, the European Environmental Bureau, ClientEarth and Corporate Europe Observatory, access to the following documents related to the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the European Union (hereinafter: "the EU") and the United States of America (hereinafter: "the US"):

- a) *The text of the EU's negotiation mandate;*
- b) *The text of the EU's positions on regulatory cooperation, ISDS, the chemical sector, food safety, sustainable development and energy as disclosed to the Government of the US;*
- c) *Any other reports or papers provided to the US by the EU on the topics identified above in b);*

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

d) *Any reports or papers provided to EU Member States and the European Parliament on the topics identified in b) above.*

The Commission has identified 16 documents as falling under the scope of your request<sup>3</sup>

- ad a): Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the EU and the US ("document 1");
- Ad b) and d): 13 negotiating papers, systematically shared with the US authorities , all Member States and the European Parliament/INTA<sup>4</sup> Committee
  - o "EU initial position paper on SPS matters for the TTIP negotiations" (marked as "limited"), 20 June 2013 ("document 2");
  - o EU Initial Position Paper on Trade and Sustainable Development" (marked as "EU limited"), 20 June 2013 ("document 3");
  - o "Initial position paper: Regulatory issues in financial services" (marked as "limited"), 28 June 2013 ("document 4");
  - o "Initial position paper on Trade and Investment in Raw Materials and Energy for the TTIP Negotiations between the EU and the US" (marked as "limited"), 2 July 2013 ("document 5");
  - o "TTIP negotiations: Modified EU draft proposals on trade in services, investment and electronic commerce" (marked as "limited"), 2 July 2013 ("document 6")<sup>5</sup>
  - o "Initial position paper: "TTIP - Cross-cutting disciplines and institutional provisions" (marked as "limited"), 3 July 2013 ("document 7");
  - o "TTIP; regulatory cluster; non-papers on sectoral issues for discussion at the first round / Annex II - Non-paper on Chemicals" (marked as "Limited"), 5 July 2013 ("document 8")
  - o "Raw materials and energy" ("non-paper" marked as "EU restricted"), 20 September 2013 ("document 9"); "TTIP: Cross-cutting disciplines and institutional provisions: Building blocks for the "Horizontal Chapter" (non-paper" marked as "EU Restricted"), 2 October 2013 ("document 10");
  - o "Regulatory Co-operation on Financial Regulation" (non-paper" marked as "EU Limited), 2 October 2013 ("document 11");
  - o "The Relation between the EU Legislative Process and Regulatory Cooperation in Financial Services" (non-paper" marked as "EU Limited), 2 October 2013 ("document 12"); "TTIP: Cross-cutting disciplines and institutional provisions: Position paper - Chapter on Regulatory Coherence" (classified "EU Restricted), 29 November 2013 ("document 13");
- Ad c and d): 3 round reports (classified "EU Restricted"), relating to the negotiating rounds of, respectively:
  - o **8-12 July 2013 ("document 14");**
  - o **13-15 November 2013 ("document 15");**
  - o **16-20 December 2013 ("document 16");**

<sup>3</sup> From the beginning of the negotiations until 17 February 2014, date at which your request was introduced.

<sup>4</sup> International Trade.

<sup>5</sup> The EU indicative text on Services & Investment shared with the Member States and the INTA Committee ahead of the first round is illustrative and not a negotiating document.

Documents 14, 15 and 16, relating respectively to the first, second and third negotiating rounds, have been systematically shared with all Member States and the European Parliament/INTA Committee.

Through its initial reply, DG TRADE:

- provided you with the *weblink* enabling you to access documents 2, 3, 5 and 7<sup>6</sup> the initial TTIP position papers, which were already public at that time, and listed the policy areas covered by those papers<sup>7</sup>.
- refused access to the remainder of the documents requested, based on the exception of Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations);
- drew your attention to the public consultation on a possible approach to investment protection and ISDS in the TTIP that the Commission launched on 27 March 2014<sup>9</sup>. In your confirmatory application, you state that the latter document is *not relevant to your request*;
- referred you to background information on the TTIP negotiations, available on the internet<sup>10</sup>.

Through your confirmatory application you request a review of DG TRADE's position. You ask for:

- a list of all documents covered by your request. I consider that the latter part of your request has been satisfied by the list provided above;
- full access to the documents requested. You state that discussions have inevitably moved on since the Commission made publicly available its position papers on environmental and non-environmental issues. You support your request with detailed arguments, which I will address in the corresponding sections hereafter.

As access was already granted at the initial stage to documents 2, 3, 5 and 7, I consider your request to cover only the remaining documents.

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<sup>6</sup> These documents are the technical documents presented to our American counterparts during the first negotiating round that took place from 8 to 12 July 2013. While in a different format, the initial paper published are, in its essence, the same that were provided to all Member States and the European Parliament/International Trade (INTA) Committee.

<sup>7</sup> Cross-cutting and institutional provisions on regulatory issues, technical barriers to trade, sanitary and phytosanitary measures, public procurement, raw materials and energy, trade and sustainable development.

<sup>8</sup> The EU position paper on chemicals as well as a document summarising the EU proposal for cooperation on financial services regulation are now public and available at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1076> and [http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc\\_152101.pdf](http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf), respectively.

<sup>9</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052>.

<sup>10</sup> "The core of TTIP: Tackling regulatory issues", and "Fact sheet on Investment protection and Investor-to-State Dispute Settlement in EU agreements", available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/resources/>.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG TRADE to refuse access to documents 1, 4, 6 and 8-16, based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001, for the reasons set out below.

## **3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

### **3.1. 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.*

The documents to which you request access are all negotiating documents: position papers, non-papers, draft texts and round reports, with security classifications as "EU Restricted" or "EU Limited".<sup>11</sup> Within the Commission, they are accessible only to a very limited number of staff<sup>12</sup>, on a strict need-to-know basis and under restrictive and secure conditions. Whilst documents 2-13 have been shared with the US authorities in the framework of the negotiations, and documents 1-16 have been shared with the Member States and the European Parliament/INTA Committee, this has occurred under very restrictive and secure conditions.

The Commission is of the view that public access to these negotiating documents would undermine the position of the Commission in the negotiations and, more generally, its relations with the US and other negotiating partners.

Indeed, the success of the negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. While the Commission is highly committed to the principle of transparency, as it is witnessed by the large number of background, explanatory and negotiating documents published on the internet, a certain level of discretion and special care in handling its negotiating documents is essential. Only by safeguarding this discretion can the Commission preserve the room for manoeuvre required to lead the negotiations to a successful conclusion.

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<sup>11</sup> These classifications are only an accessory (and not a main) factor in assessing the possibility to release the documents.

<sup>12</sup> I.e. those dealing with access-to-documents requests covering the documents requested.

Indeed, as the General Court recognised in case T-301/10<sup>13</sup>, *the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion. [...] [A]ny form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust.*

The General Court acknowledged furthermore that *[i]n the context of international negotiations, the positions taken by the European 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. [...] [T]he formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.*<sup>14</sup>

Furthermore, such discretion is also required to safeguard the mutual trust between the negotiating parties, which is an essential precondition for the success of the negotiations. Indeed, some of the documents requested include direct and indirect references to the negotiation position of the US. Release of the latter position would undermine the trust of the US in the confidentiality of the negotiations, and therefore also the chances of reaching successful negotiation results. The fact that both negotiating partners have pledged to respect the confidentiality of the negotiations only reinforces this conclusion.

In the above-mentioned judgment<sup>15</sup>, the General Court confirmed that *in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. As the Commission emphasises, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise.*

The Commission also notes that the US negotiation documents have not been released. Under these conditions, the unilateral and asymmetrical release, by the Commission, of its negotiation position as reflected in the documents would be an additional factor weakening the EU's position in the negotiations.

Finally, release of the documents would also provide indications to other negotiating partners of the EU as regards the negotiation approach and tactics followed by the EU in its negotiations with the US, and would hence weaken the EU's position in its other, ongoing and future, bilateral negotiations.

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<sup>13</sup> Judgment of the General Court of 19 March 2013 in case T-301/10, *Sophie in 't Veld v European Commission*, paragraph 119.

<sup>14</sup> *Ibid*, paragraph 125.

<sup>15</sup> Paragraph 126.

For these reasons, access to the documents requested has to be refused based on the exception defined in Article 4(1)(a), third indent of Regulation 1049/2001, as their release would result in a real and non-hypothetical risk to the international relations protected by that provision. This risk, which applies to all 13 negotiating documents identified above, is particularly acute for documents 14, 15 and 16, which – by definition – should not be shared with the US authorities as they are reports to the Member States and the INTA Committee about the negotiations.

Concerning document 1, consisting of the negotiation mandate approved by the Council, the Commission has, pursuant to Article 4(4) of Regulation 1049/2001, consulted the Council at confirmatory stage so as to be in a better position to assess, in light of the provisions of that Regulation, whether access can be granted to this document, of which it holds a copy.

Following this consultation, the Council indicated that, in its view, the document cannot be released pursuant to the exceptions of Article 4(1)(a) (protection of international relations) and Article 4(3), first subparagraph (protection of the decision-making process).

This confirms the Commission's own assessment, reflected in the reasoning set out above, that document 1 (and the other negotiating documents) cannot be released, as the release thereof would undermine the international relations protected by Article 4(1)(a) of Regulation 1049/2001.

### **3.2. Protection of the decision-making process**

*Article 4(3), first paragraph of Regulation 1049/2001 provides that [a]ccess to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

The documents to which you request access were drawn up for internal use, in preparation of the ongoing negotiations with the US authorities. Public access to these documents would seriously hamper a free exchange of views within the Commission services and with the US authorities in the ongoing and in future similar negotiations. Publicly releasing these negotiating documents would, therefore, seen in connection with the protection of international relations referred to above, seriously undermine the protection of the decision-making process of the Commission.

Having regard to the above, I consider that the documents requested also fall under the exception of Article 4(3), first paragraph of Regulation 1049/2001, and that access to the document must be refused on that basis.

#### 4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3), first paragraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you allege that there is a clear public interest in disclosing the documents requested in the sense of Aarhus Regulation 1367/2006 and the Aarhus Convention.

However, for the reasons described above I consider that, to the extent that the documents or parts thereof would be considered to include "environmental information" (which has not been substantiated), the public interest in protecting the EU's international relations and its decision-making process outweigh the interest of the public in obtaining the negotiating documents at this stage. Indeed, the Commission is of the view that the EU is in the best position to defend the different (including environmental) interests at stake if its positions and tactical considerations are not prematurely released to the public and its negotiating partners.

I note that you do not allege, in your confirmatory application, that the documents to which you request to obtain access include information on emissions into the environment, in which case an overriding public interest would have been deemed to exist. Indeed, I confirm that the documents to which you request access do not include information on "emissions into the environment" but are of a more general nature.

Nor have I been able to identify any public interest capable of overriding the interest in protecting the EU's international relations and the Commission's decision-making process in this case.

The fact that the documents requested do not relate to a legislative procedure, but to the initiation and conduct of negotiations to conclude an international agreement only reinforced this conclusion. Indeed, in the above-mentioned judgment T-301/1016, the General Court confirmed that *[...] the Court held that initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations (Case T-529/09 in 't Veld v Council [2012] ECR II-0000, paragraph 88; see also paragraph 57 and the end of paragraph 59 of the judgment)*. Therefore, the *Turco* judgment, to which you refer in your confirmatory application, is not applicable in this case, as that judgment specifically concerned documents drafted by the Council in the framework of a legislative procedure.

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<sup>16</sup> Paragraphs 120 and 181.

I would also like to point out that, as the General Court acknowledged in the above-mentioned ruling T-301/10<sup>17</sup>, the exception laid down in Article 4(1)(a), third indent of Regulation 1049/2001 is of an absolute nature and does not envisage any balancing against a possible overriding public interest under that provision.

Consequently, I consider that in this case and at this stage, there is no overriding public interest that would outweigh the protection provided for in Article 4(1)(a), third indent and Article 4(3), first paragraph of Regulation 1049/2001. The fact that comprehensive information on the TTIP negotiations, including the initial position papers, has been actively provided by DG TRADE through its website, provides further support to this conclusion.

This conclusion does not in any way prejudice the public debate that may develop once the international agreement is signed, in the context of the ratification procedure.

## **5. NO PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the document requested. However, for the reasons explained above, no meaningful partial access (going beyond the provision of the list of documents above) is possible without undermining the interests described above. Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exception to the right of public access.

## **6. RESTRICTIVE INTERPRETATION IN THE MEANING OF THE AARHUS REGULATION**

I note that in your initial application you allege that the documents in question relate to environmental information in the sense of "Aarhus" Regulation 1367/2006<sup>18</sup>, as they concern measures that will have implications on the development and application of environmental legislation. You allege that the exceptions to the right of access should consequently be interpreted in a restrictive way, as confirmed by the judgment of the Court of Justice in case T-545/11 (*Stichting Greenpeace Nederland and Pesticides Action Network (PAN) Europe*).

Article 6(1) of Regulation 1367/2006 imposes a strict interpretation of the exceptions defined in Article 4(1) and 4(3) of Regulation 1049/2001. Without prejudice to the question whether Regulation 1367/2006 is applicable to the documents requested (which has not been substantiated), I can confirm that the analysis reflected below is based on a restrictive interpretation of the exceptions invoked, in accordance with the relevant case-law of the European Court of Justice and the General Court.

As regards your allegation that the invoked exceptions of Article 1(a), third indent and 4(3) of Regulation 1049/2001 are not relevant in light of Article 3(7) of the Aarhus Convention,

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<sup>17</sup> Paragraphs 177-179.

<sup>18</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Official Journal L 264, 25/09/2006, p. 13-19. This Regulation transposes the Aarhus Convention, to which you also refer in your confirmatory application, into EU law.

as interpreted by the Almaty Guidelines, this argument has to be rejected. Indeed, the provisions of the Aarhus Convention do not contradict the interpretation of Article 4(1)(a) and 4(3) of Regulation 1049/2001 reflected in the reasoning set out in this decision. Furthermore, the interpretative value of the *Almaty Guidelines* has not been substantiated. Indeed, Regulation 1367/2006, which transposes the Aarhus Convention into directly applicable provisions of EU law, remains the main point of reference for the purpose of interpreting the exceptions of Article 4 of Regulation 1049/2001 in case of documents (or parts thereof) constituting “environmental information” (which, as indicated above, has not been substantiated).

#### **7. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Catherine Day". The signature is written in a cursive style with a large, stylized 'D' at the end.

Catherine Day