



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary-General

Brussels,
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By registered mail:

Ms Maria Swietlik
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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2014/4883**

Dear Ms Swietlik,

I refer to your letter of 14 January 2015, registered on 15 January 2015, 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 documents² ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 11 October 2014, addressed to the Directorate-General for Trade (DG TRADE), you requested access to documents related to: *the correspondence (including emails) between the European Commission and the Polish Government regarding the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP), specifically Poland[']s Notes to [the] Trade Policy Committee [regarding]:*

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

a) [...] TTIP [...] documents [of] 1/10/2013, 27/11/2013 and 30/01/2014; [and]

b) [...] CETA [...] documents [of] 1/09/2009, 17/02/2010, 2/12/2010, 18/01/2012, 16/05/2012, 13/09/2012, 8/11/2012 and 5/06/2013.

The Commission has identified the following 11 documents as falling under the scope of your request:

- (1) Document 1 entitled *Poland's offensive interests in agriculture products related to TTIP*, of 01/10/2013; etc.
- (2) Document 2 entitled *Polish Comments on TTIP: non paper on raw materials* of 27/11/2013
- (3) Document 3 entitled *EU initial tariff offer – Polish comments* of 30/01/2014
- (4) Document 4 entitled *Economic Integration Agreement with Canada - PL comments* of 17/04/2009
- (5) Document 5 entitled *EU-Canada CETA negotiations process - Polish position* of 17/02/2010
- (6) Document 6 entitled *Poland's comments on selected draft provisions of the CETA* of 02/12/2010
- (7) Document 7 entitled *Revised list of PL offensive interests in response to Canada's Second Tariff Offer* of 18/01/2012
- (8) Document 8 entitled *Poland's position on the protocol on rules of origin for the CETA agreement* of 16/05/2012
- (9) Document 9 entitled *Poland's comments on the selected provisions of the draft CETA Agreement* of 13/09/2012
- (10) Document 10 entitled *Poland's comments on protocol on rules of origin to a future CETA agreement* of 08/11/2012
- (11) Document 11 entitled *Poland's comments on the state of play of the CETA negotiations - car package* of 20/06/2013.

It is noteworthy that your initial application was a follow up of your previous application for access to documents registered under Gestdem No. 2014/1209, in response to which DG TRADE had already issued a negative reply in respect to the public disclosure of *inter alia* the above-mentioned 11 documents.

In its initial reply of 15 December 2014, DG TRADE has refused, once again, access to these documents based on the exception laid down in Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations).

Through your confirmatory application you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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 the 11 above-mentioned documents, on the basis of the exceptions provided in Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations) (*infra* 2.1), and Article 4(3), first subparagraph (protection of ongoing decision process) (*infra* 2.2) for the reasons set out below, as the factual and legal circumstances with regard to the documents requested have not changed since that decision.

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.*

As it derogates from the principle of the widest possible public access to documents, this exception must, as you have correctly observed, be interpreted and applied strictly in accordance with settled case-law³.

However, it is noteworthy that the European Court of Justice has further clarified in that regard, that *such a principle of strict construction does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, preclude the [institution] from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision*⁴.

More recently, as noted by DG TRADE, the European Court of Justice has reiterated that whilst the principle of transparency cannot be ruled out in international negotiations, the institutions *must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the field[-] covered by [this exception] could undermine the public interest.*⁵ The ECJ further stressed that a refusal for access to the content of a proposed international agreement and the strategic objectives pursued by the EU in the negotiations could be justified under Article 4(1)(a).

More specifically, directly in relation to the TTIP negotiations, the European Ombudsman has also acknowledged in a recent decision of 6 January 2015, that *the Commission needs to create a context in which it can negotiate effectively with the US on TTIP, so as to deliver the best possible deal for the Union and its citizens [...] [and] this may mean that the Commission can legitimately keep confidential certain information and documents, at least during the stages of the negotiations.* The European

³ *Access Info Europe*, C-280/11, §30.

⁴ Case C-266/05P, *Sison*, §64.

⁵ Case C-350/12P, *Council of the European Union v. Sophie in't Veld*, paragraphs 63, 76 and 109.

Ombudsman further stressed that [...] *in order to uphold the legitimacy of the negotiating process, any policy of non-disclosure must be duly justified.*⁶ These statements certainly apply by analogy to the CETA negotiations.

The Commission is highly committed to the principle of transparency, as evidenced by the unprecedented large number of background, explanatory and negotiating documents proactively published on its dedicated website on trade policy on the TTIP and CETA⁷ negotiations, and also by its communication of 25 November 2014⁸. A certain level of discretion and special care in handling some specific negotiating documents and negotiation positions is, nevertheless, essential in the framework of the ongoing discussions. It is only by safeguarding this discretion, that the Commission will be able to preserve the room for manoeuvre required to lead the negotiations to a successful conclusion with the signatures of the corresponding bilateral agreements.

Furthermore, such discretion is also required to safeguard and foster the mutual trust between the negotiating parties, which is an essential precondition for the success of the negotiations that depend to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved.

The requested 11 documents contain the positions taken and the statements made by Poland in the preparatory meetings, as well as some specific information shared between the Commission and the Member States in view of the TTIP and CETA negotiations. They describe the particular interests of Poland in light of the different strategic options of the Commission, and propose the approaches to be adopted in those negotiations. To this extent, they contain sensitive analytical elements and observations concerning the EU's stance, policy direction and concrete initiatives in key aspects of the TTIP and CETA negotiations. They thus reveal tactical elements of the EU's negotiating positions and one of its Member States in relation to TTIP and CETA, which by their very nature, should not be disclosed, as their release would undermine the Commission's negotiation stance with regards to the US and Canada. This would consequently cause prejudice to the EU's international relations.

In this context, the Commission is not in a position to disclose Poland's comments and positions or the specific information shared between the Commission and the Member States without specifically and actually undermining the interests of the whole international negotiation process regarding TTIP and CETA in a foreseeable and not purely hypothetical way, within the meaning of the above-mentioned case law.

In your confirmatory application you refer to the fact that the initial refusal opposed by DG TRADE *does not cover information whether the [corresponding] decision process [...] was concluded [...] [t]herefore the argument that the dissemination of the requested information can harm the international relation[s] can be irrelevant.*

⁶ EO Decision in case OI/10/2014/RA, available on the European Ombudsman website.

⁷ In respect to the latter, the consolidated text of CETA was published on 26 September 2014 at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

⁸ C(2014)9052 final.

It should however be borne in mind, that the conclusion of the decision making process is not a decisive factor for the application of the exception set forth in Article 4(1)(a), third indent. On the contrary, it is well established that the release of negotiating documents can also be protected under the exception of Article 4(1)(a), third indent, even after the conclusion of the negotiations, where it would provide indications to other negotiating partners of the EU as to the negotiation approach and tactics followed by the EU and would hence weaken the EU's position in its other ongoing or future international negotiations.

In this respect, I draw nevertheless your attention to the fact that the concerned negotiations have not yet reached the stage of signature of the discussed agreements and must be thus considered as uncompleted until then.

In conclusion, notwithstanding your allegations, I consider that the premature release of the requested documents prior to the formal signature of the concerned agreements, would seriously interfere with the negotiating process and strain relations with the Commission's negotiating partners. The mandatory exception relating to the protection of international relations provided for in the third indent of Article 4(1)(a) of Regulation 1049/2001 applies thus in this instance. I must therefore confirm the refusal of DG TRADE to grant public access to the 11 documents requested in your application on this basis.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph 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.*

In the Muñiz case⁹, the Court stated that access to documents can be refused on the basis of the above mentioned provision, where disclosure of the documents requested would have a substantial negative impact on the decision-making process in question, in particular where disclosure of the documents would lead to real and reasonably foreseeable risk of external pressure¹⁰ and/or objectively justified risk of self-censorship¹¹.

In this instance, as explained above, the documents to which you request access were received in the framework of the ongoing negotiations with the US and Canadian authorities. They reflect internal and preliminary opinions expressed freely as part of deliberations and preliminary consultations relating to ongoing trade negotiations. They include detailed information about sensitivities, identified barriers, strategic objectives and possible market access expectations of given EU or Member States' industries, which

⁹ T-144/05.

¹⁰ *Ibid*, §86.

¹¹ *Ibid*, §§89 and 90.

are relevant for the Commission in assessing the progress of and final outcome of the negotiations. The communications in those documents were shared within a climate of mutual trust for the internal use of the Commission and were not meant to be disclosed to the public. Without this degree of confidentiality, the parties would inevitably express themselves less candidly and frankly.

Moreover the disclosure of these documents would expose the Commission's deliberative process to external pressure, in this way severely restricting its room of manoeuvre in the conducting of the on-going and other future negotiations. The public disclosure of these documents would indeed provide to the world an in-depth view of the various internal strategic trade options proposed by some of the Member States and envisaged by the Commission. It would cause serious foreseeable and non-hypothetical prejudice to the EU internal decision-making process, as it could illustrate differences as to the strategic options pursued and weaken as a consequence the collective image of the position adopted by the Union, aimed at reaching the best outcome for European Citizens.

Publicly releasing these negotiating documents would, therefore, seen in connection with the expected harm to the international relations referred to above, seriously undermine the protection of the decision-making process of the Commission during these ongoing and other future trade negotiations.

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

3. LACK OF OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Article 4(1)(a) does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest. As stated by the ECJ, *it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests*¹².

As DG TRADE grounded its refusal of full and partial disclosure of the requested documents solely on this provision, its initial decision did not therefore provide any assessment as to the lack of an overriding public interest. Your interpretation by analogy of the case law of the Court of Justice requiring a thorough analysis of the existence of such prevailing public interest in disclosure is thus irrelevant.

However, as within the framework of the present confirmatory decision, the refusal for access is also grounded upon Article 4(3), first subparagraph; I have assessed your

¹² *Sison*, Case C-266/05P, §46.

arguments as to the existence of an overriding public interest in disclosure under this provision. As quoted above, Article 4(3), first subparagraph provides indeed that the exception for the protection of the on-going decision process must be waived if there is an overriding public interest in disclosing the documents requested. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by the release of the documents, i.e. it must outweigh the interests protected by the above exception.

According to your confirmatory application, *a visible and significant public interest* [is evidenced by] *the large debate on the process concerning TTIP and CETA*. I consider however that in this situation, the public interest lies with the effective conduct of the concerned international negotiations and reaching the best outcome for the European Citizens. Critical to this process is the ability of the Commission to carry out consultations with the Member States without publicly disclosing the strategic choices proposed for the negotiations. Furthermore, in the *TGI* case¹³, the Court of Justice has confirmed that in matters that are in the domain of the executive, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters.

Consequently, I conclude that in this case, there is no overriding public interest that would outweigh the protection provided for in Article 4(3), first subparagraph. The fact that comprehensive information on the TTIP and CETA negotiations has been actively provided by the Commission in a unprecedented way, provides further support to this conclusion.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001, *[i]f only parts of the requested documents are covered by any of the exceptions, the remaining parts of the document shall be released.*

I have thus considered the possibility of granting partial access to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

In your confirmatory application, you argue that the grounds for refusal of the initial decision to grant partial access were *not sufficiently explained and were not reflecting the factual state of the case.*

According to settled case-law, the purpose of the obligation on the institution to state the reasons for its decision to refuse access to a document is, first, to provide the applicant with sufficient information to enable it to determine whether the decision is well founded

¹³ Case C-139/07P, §60.

or whether it is vitiated by an error which may permit its validity to be contested and, secondly, to enable the Community judicature to review the lawfulness of the decision¹⁴.

In the present case, DG TRADE set out thoroughly, in the contested initial decision, the reasons for its refusal not only by releasing the detailed titles of the concerned documents and providing limited information on their subject matter, but also by explaining why their disclosure could undermine the protection of the public interest as regards international relations. It thus clearly stated both the legal and concrete basis for its refusal to grant access to the requested documents.

In this respect, I would like to further draw your attention to the case law of the ECJ¹⁵, pursuant to which it was acknowledged that, in the field of access to documents, *it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.*

In this instance, my thorough examination of the concerned documents has revealed that each of them consists of specific comments and/or position(s) of Poland concerning the Commission's strategic lines of negotiations in relation to TTIP and CETA. It would be impossible, in practical terms, to further describe concretely how their disclosure would undermine the protection of the public interest as regards international relations, or the ongoing decision-making process without revealing part of the contents of the proposed tactical options and thereby depriving the mandatory exceptions of their respective purposes.

I consider therefore that this decision justifies in the most thorough possible manner why the documents cannot be disclosed without revealing the sensitive contents of the documents which it aims to protect.

In your confirmatory application, you also argue that partial access should include at least the *names and positions of the representatives of the Polish government including their signatures*, as well as *other parts of documents [the] dissemination [of which] would not harm the interest described by art. 4(1)(a), third indent of the Regulation*. I would like to stress in that respect, that contrary to your assumption, the documents in question do not contain the names and positions of the representatives of the Polish government nor their signatures. Moreover, the documents in question are quite concise and for the reasons explained above, no meaningful partial access, going beyond the already provided list of documents, is possible without undermining the interests described above.

Consequently, I must conclude that the refusal of partial access is well-founded. The requested documents are indeed covered in their entirety by the invoked exceptions to the right of public access.

¹⁴ Case T-264/04, *WWF*, §36.

¹⁵ See *inter alia*, *Sison*, *op.cit.* §§60; Case T-105/95, *WWF UK*, §65.

5. 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, prominent "D" at the end.

Catherine Day