



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels,

Mrs Lena Blanken
foodwatch e.V.
Brunnenstr. 181
10119 Berlin
Germany

lena.blanken@foodwatch.de

BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your application of 4 August 2016 registered under the reference GestDem
2016/4372

Dear Mrs Blanken,

I refer to your request mentioned above by which you ask, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹, for *"the release of the texts of the legal review of the EU-Canada Free Trade Agreement (CETA) as well as all legal advice and analysis which underpins the Commission conclusion that this Agreement falls into the EU's competences only and not into those of the EU Member States (see the Commission's press release of 5 July 2016)."*²

As regards the first point of your request i.e. the legally reviewed text of CETA, please note that the English text of the agreement has been published on 29 February 2016 on the following link:

http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

¹ OJ L145, 31.05.2001, page 43.

² The text of the original request: *"Hiermit beantrage ich die Herausgabe der Texte der Rechtsförmlichkeitsprüfung des europäisch-kanadischen Freihandelsabkommens CETA sowie alle juristischen Gutachten und Analysen, die dem Schluss der EU-Kommission zugrunde liegen, das Abkommen betreffe ausschließlich die Kompetenzen der EU, nicht aber die der EU-Mitgliedstaaten (siehe Pressemitteilung der EU-Kommission vom 5. Juli 2016)."*

Furthermore, the Commission's Proposals for Council Decisions on the signing, on the conclusion and on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States of the other part (thereafter "*Proposals for Council Decisions*"³) contain in annex the legally reviewed text of CETA, available in all EU languages on the following links:

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&n=10&adv=0&cotelId=1&year=2016&number=444&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&n=10&adv=0&cotelId=1&year=2016&number=443&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&n=10&adv=0&cotelId=1&year=2016&number=470&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>

Regarding the second point of your request, after examination of the Legal Service's files, the following two documents have been identified as falling within its scope:

1. Note of 25 April 2016 to the attention of Mr. Demarty, Director General of DG TRADE (reference Ares(2016)1954788).
2. Legal Service's legal opinion of 24 May 2016 to the attention of the Cabinet of the President of the Commission (reference Ares(2016)4469869).

1. ASSESSMENT OF THE DOCUMENTS

Having carefully examined the concerned documents, I have come to the conclusion that partial access can be granted to those parts that are not covered by any of the exceptions foreseen at Article 4 of Regulation 1049/2001. As regards the withheld parts of the documents (thereafter "*the refused documents*"), I regret to inform you that they cannot be disclosed since they are covered by the exceptions provided for in Article 4(2) second indent ("*protection of court proceedings and legal advice*")⁴ and Article 4(3) second subparagraph ("*protection of the decision-making process*")⁵ of Regulation 1049/2001 for the reasons explained below.

³ COM(2016)444 final
COM(2016)443 final
COM(2016)470 final

⁴ "The institutions shall refuse access to a document where disclosure would undermine the protection of: court proceedings and legal advice [...], unless there is an overriding public interest in disclosure".

⁵ "Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

Furthermore, the names of the staff members not having the function of senior management staff at the Commission as well as the handwritten signature have been redacted from document under number 1 in accordance with the exception provided for in Article 4(1)(b) ("*protection of personal data*")⁶ of Regulation 1049/2001.

Accordingly, please find enclosed an expunged version of both documents. Please note that you may reuse these documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of them. Please also note that the Commission does not assume liability stemming from the reuse.

2. FRAMEWORK AND DESCRIPTION OF THE REFUSED DOCUMENTS

On 5 July 2016 the Commission formally proposed to the Council of the EU the signature and the conclusion of CETA in conformity with the procedure foreseen under Article 218 TFUE. This procedure is still pending.

At the outset, I must underline that the refused documents were drawn up for purely internal purposes within the Commission in the context of preliminary consultations and deliberations in view of the adoption of the Commission's Proposals for Council Decisions.

Document under number 1 is the reply of the Legal Service to a consultation of DG TRADE. It contains a legal analysis of the issues of the European Union's competence to sign and conclude CETA and of its provisional application. It also makes an assessment of the referred issues in the light of the pending case A-2/15 before the Court of Justice⁷.

Document under number 2 is a legal opinion, addressed to the Cabinet of the President of the Commission, which contains also a concrete assessment of the issues of the Union's competence to sign and conclude CETA and of the question of its provisional application. More precisely, it makes a detailed analysis of the different options the Commission might consider when deciding on the adoption of the Commission's Proposal for Council Decisions. It also contains references to individual positions or comments of Member States on some sensitive questions relating to the Trade agreement with Canada, including the question of the EU's competence, expressed in the Foreign Affairs Council held on 13 May 2016. Furthermore, this legal opinion reveals the legal arguments developed by the Commission as well as the positions pleaded by the Parliament, the Council and the intervening Member States in case A-2/15, pending before the Court of Justice.

⁶ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

⁷ <http://curia.europa.eu/juris/liste.jsf?num=C-2/15>

2.1. Protection of court proceedings

The sensitive question of the EU's competence to conclude trade and investment agreements is subject of discussion in the framework of the above referred ongoing case A-2/15, request for an opinion from the Court of Justice submitted by the Commission pursuant to Article 218(1) TFEU with regard to the extent and nature of the Union's competence to conclude the Free Trade Agreement with Singapore (EUSFTA).

As set out in the Commission's Proposals for Council Decisions, *"CETA has identical objectives and essentially the same contents as the EUSFTA and, therefore, the Union's competence is the same in both cases"*. Whilst the requested documents were drawn up in the framework of the adoption of the Commission's Proposals for Council Decision in view of the conclusion of the CETA, both legal opinions contain specific references to the Commission's legal arguments developed in case A-2/15. Furthermore, document under number 2 contains, among other issues, the positions of the Parliament, the Council and the intervening Member States in case A-2/15.

Since case A-2/15 is still pending, I consider that full disclosure of the requested documents would, firstly, be negatively affecting the referred ongoing proceedings before the Court of Justice as well as the main purpose of the exception of "court proceedings", which is to protect the integrity of court proceedings and the serenity of the justice.

Consequently, the refused documents cannot be made available to you at this stage.

2.2. Protection of and legal advice and the decision-making process

Secondly, I consider that full disclosure of the refused documents would undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation 1049/2001 which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice⁸. Indeed, their full disclosure would put in the public domain internal opinions on highly sensitive open issues, drafted under the responsibility of the Legal Service and intended exclusively, as part of preliminary consultations within the Commission, for the President and the Members of the Commission and for the Commission's service responsible for the adoption of the referred Commission's Proposals for Council Decisions. As noted above, the legal issues assessed in the refused parts of the legal opinions are at the core of the court proceedings in the ongoing case A-2/15.

Disclosing the legal analysis contained in the withheld parts of the refused documents would have very adverse consequences for both the Legal Service's capacity to assist the Commission and its services in this sensitive matter and for the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice, thus depriving the Commission of an essential element to enable it to perform its tasks.

⁸ C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, [2008] ECR p. I-4723, at para. 42.

In addition, disclosing the withheld parts of the legal opinions would also prejudice the ongoing inter-institutional decision-making process for the signature and conclusion of CETA as well as its ratification by Member States. Indeed, as indicated above, the refused parts of the documents contain references to the positions expressed by the institutions and individual Member States both in the pending case A-2/15 before the Court of Justice regarding the EU's competence to conclude EUSFTA and in the context of preliminary consultations and deliberations within the Commission for the adoption of the Commission's Proposals for Council Decisions in view of the conclusion of CETA. Consequently, even if the Commission adopted on 5 the July 2016 the referred Proposals for Council Decisions, full disclosure of the legal opinions at this point in time would entail a reasonably foreseeable and specific risk for the procedure leading to the Council's final decision to conclude CETA.

Consequently, I consider that the withheld parts refused documents are also covered by the exception provided for in the second subparagraph of Article 4(3) of Regulation 1049/2001 and must remain confidential at this stage.

3. PROTECTION OF PERSONAL DATA

The names of the staff members not having the function of senior management staff at the Commission as well as the handwritten signature have been redacted from document under number 1 since they are covered by the exception provided for in Article 4(1)(b) ("*protection of personal data*")⁹ of Regulation 1049/2001 in accordance with the European Union legislation regarding the protection of personal data. Indeed, when access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable¹⁰.

According to Article 8(b) of Regulation (EC) No 45/2001, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

If you wish to receive the expunged personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

⁹ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

¹⁰ Judgment of the Court of Justice of 29 June 2010 in case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378.

Should you disagree with the assessment that the expunged data is personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled to make a confirmatory application requesting that the Commission review this position in accordance with the provisions and rules set out at the end of this letter.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

4. OVERRIDING PUBLIC INTEREST

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2) and (3). I understand the interest of transparency in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

In the present case, for the reasons explained above, I consider that the interest in transparency does not outweigh the public interest of the Commission and its services to receive frank, objective and comprehensive legal advice and the need to protect the currently ongoing proceedings as well as the institution's decision making process.

Furthermore, I have not been able to identify any public interest capable of overriding the public interests protected by the second indent of Article 4(2) and the second subparagraph of Article 4 (3) of Regulation No 1049/2001.

5. MEANS OF REDRESS

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 unit SG-B-4
BERL 5/327
B-1049 Brussels

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

The Secretary-General will inform you of the result of such review within 15 working days from the date of registration of your request. You will either be given access to the document or your request will be rejected, in which case you will be informed of what further action is open to you.

Yours sincerely,



Luis ROMERO REQUENA

Enclosures: 2



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 13 April 2016

sj.l.dir(2016) 2055955

*Opinion of the Legal Service**

NOTE TO MR JEAN-LUC DEMARTY, DIRECTOR GENERAL, DG TRADE

Subject: CETA - approach to be taken re competence and provisional application

Ref.: Your Note trade.dga2.f.2(2016)1561585 of 29 March 2016

The Legal Service shares DG Trade's view that the material content of the Comprehensive Economic and Trade Agreement with Canada (CETA) is very similar to that of the Free Trade Agreement with Singapore (EUSFTA). In the Opinion 2/15 case, which is still pending before the Court, the Commission has expressed the view that EUSFTA falls in its entirety within the Union's exclusive competence.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

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It may be protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council and may only be disclosed under the procedures provided for in Commission Decision 2001/937/EC, ECSC, Euratom.

[REDACTED]

[REDACTED]

Luis ROMERO REQUENA

c.c.: S. Weyand, M. Petriccione, P. Sandler, R. Schlegelmilch, H. König, S. Gallina,
I. García Bercero, D. Redonnet, S. Ratso, L. Rubinacci, T. Baert, S. Leupold,
C-A. Vasile, J. Lasik, M. Lukas, [REDACTED], [REDACTED], [REDACTED], [REDACTED]
[REDACTED], [REDACTED] (DG TRADE)
U. Woelker, [REDACTED], [REDACTED] (Legal Service)

CETA – EU only or mixed agreement?

1. The Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) seeks to liberalise and facilitate trade and investment between the Parties in a comprehensive manner. To that effect, CETA provides for the establishment of a free trade area for goods and for services, consistent with Article XXIV of the GATT 1994 and Article V of the GATS, respectively. In addition, CETA includes provisions on investment protection, government procurement and trade related aspects of intellectual property, as well as horizontal chapters on competition, trade and sustainable development, transparency and dispute settlement.
2. The objectives and content of CETA are very similar to those of the Free Trade Agreement with Singapore (EUSFTA). In July 2015 the Commission requested from the Court of Justice an opinion under Article 218(11) TFEU on the competence to conclude EUSFTA (case A – 2/15). Specifically, the Commission raised the following question:

Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,

- *which provisions of the agreement fall within the Union's exclusive competence?;*
- *which provisions of the agreement fall within the Union's shared competence?;*
- and*
- *is there any provision of the agreement that falls within the exclusive competence of the Member States?*

3. The question put to the Court has as its main purpose clarifying the extent and nature (exclusive or shared) of the Union's competence in respect of each of the areas covered by EUSFTA. The Commission has pleaded exclusive competence over all areas, meaning that EUSFTA would legally have to be an "EU only" agreement; [REDACTED] it has however filed an alternative plea for shared competence (see point 4 below in more detail). [REDACTED]

4. [REDACTED]

Pages 2 to 4 DELETED