ACCESS INFO AND CORPORATE EUROPE OBSERVATORY

COMMENTS AND RECOMMENDATIONS ON DG TRADE VADEMECUM

I. Comments and Recommendations on the DG Trade Vademecum

1. **Front Page**: It's good to have the citation from the Treaty, this should of course be updated now to Article 15, and it's good to mention the two main principles established by Article 15

   1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. …

   3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium ...

2. **Intro Section**: The section on "10 things to remember" is good. We suggest that Point 1 makes clearer that all documents, including all e-mails created by DG Trade, are subject to the access to documents rules as well as those received from third parties (because of the latter doubts cast on e-mails, which we will suggest removing). The 10th point should be deleted as the warning tone risks going against the spirit of the EU's transparency initiative and the general principle of good administration which is to keep a good and true record of all stages in the decision-making process.

3. It might be useful to cross reference to the **staff guidance produced by the Secretariat General** so that public officials can review that as well.

4. **Section on "What Documents"** This section is generally clear, with the exception of the references to e-mails as noted in the next point.

5. **Page 5, e-mails:** We suggest deleting the highlighted clause. E-mails should be considered documents. The only exception to this is where the e-mail constitutes purely private correspondence. Similarly, private correspondence delivered by post would be exempted. For example, an official receives a registered letter at his or her office because he/she cannot be at home during working hours. In a number of EU countries it is accepted that officials can do this. The same with purely private e-mails using a work address: a husband or wife writes a quick e-mail to their partner at the work e-mail address saying that someone needs to pick up their child early from school. That is clearly nothing to do with work matters. HOWEVER, where the line is blurred – such as an industry representative who is also friends with the official, then the e-mail could well be included because there is a mix of the professional and personal relationship.

   We understand the desire in this Vademecum to encourage officials to keep the line clear when in reality it is often blurred. We all have work colleagues who have become friends

and often mix professional and personal messages in our e-mails. Given that such mixed e-mails are quite likely to be the subject of information requests, perhaps the best advice is remind the officials that the content of e-mails, including the friendly messages and other personal information, could well become public.

6. **"Documents" vs. "Information"**: For public officials coming from access to information rather than access to documents countries (most European laws are rather broader access to information laws) this distinction may not be clear. It could be useful to have a section of this Vademecum explaining how DG Trade handles a request that does not specifically mention documents or the Regulation 1049/2001.

   It would also be positive to encourage good faith interpretation of the request. For example, when a member of the public asks for any type of "document" such as minutes, reports, notes, etc., this is clearly an access to documents request, even if the Regulation 1049/2001 or the word "document" are not specifically mentioned.

   Stronger advice to DG Trade officials on clarifying requests when they are unclear would be helpful here. In addition, more guidance on the Code of Good Administrative Behaviour is recommended here. It should be made clear that if a requester asks for information such as a summary of facts which might be contained in a number of documents, then the Code requires that such information be produced.

7. **Section on "Exceptions" (Article 4)**. It might be useful to make clear in this section what is a direct quotation from the Regulation and what is a comment by DG Trade. The majority of the section is clear enough in its guidance.

8. **Public Interest Test**: the explanation of the public interest test is not quite correct. All exceptions must always be applied on a case-by-case basis (as noted elsewhere in the Vademecum). The public interest test implies that the overriding public interest in knowing the information even if it were to cause some harm to a protected interest should be considered. The public interest test should also be applied on a case-by-case basis.

   For more on the public interest test, reference can be made to the jurisprudence of the European Court of Justice and the Court of First Instance. The following paragraphs are from the case of Borax Europe v. Commission, Case T-121/05, decision of 11 March 2009:

   > *43. It is settled case-law that the examination required for the purpose of processing an application for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception (Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, paragraph 69; see also, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 Sison v Council [2005] ECR II-1429, paragraph 75). Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Sweden and Turco v Council, paragraph 43).*
   >
   > *63. According to the settled case-law referred to in paragraph 43 above, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that*

exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document would specifically and effectively undermine the protected interest. On the other hand, the risk of a protected interest being undermined must, to be relied upon, be reasonably foreseeable and not purely hypothetical. In the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, the institution must also assess whether there is an overriding public interest in the disclosure of the document concerned (Sweden and Turco v Council, paragraphs 44 and 45).

In the case of Sweden and Turco v. Council, Joined Cases C-39/05 P and C-52/05 P, ruling of 1 July 2008 the Court of Justice explained in more detail the public interest test (applying it in the context of a particular case):

67. In any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. As was pointed out in paragraphs 45 to 47 of this judgment, such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.

68. It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process.

So, an example of the public interest being applied in practice is whether it is necessary to disclose the information for the European public to scrutinise and participate in the workings of the European Union. There is no need for the Vademecum to enter into these details, but it should make clear that the balancing to be carried out is between protecting an interest enumerated in Article 4 and the wider public interest in transparency.

9. **Partial Release of Documents Section:** The main rule in Regulation 1049/2001 is that partial access shall be granted to a document if those parts are covered by any of the exceptions and the remaining parts of the document shall be released (Article 4.6). This should be emphasised and it is recommended to make clear that the Court has insisted that there should be evidence of examination of the specific document and specific parts of it when applying exceptions. Even when partial application of exceptions is applied, detailed reasons have to be given explaining the legal basis for withholding the particular information.

   There is nothing in Regulation 1049/2001 which requires partial access that parts of the document "that are **not relevant** to the request will not be disclosed." Whilst it may be courteous to provide an applicant with a direct answer by providing him/her with only the relevant information held in a particular document, this could also cause problems if the applicant actually wanted the entire document.

   There is no justification under Regulation 1049/2001 for deleting the "non-relevant" parts of the document and it's hard to see how such deletions would be explained.

In particular, we note that the paragraph in which the Vademecum asks "***does the request cover contacts with DG Trade officials, contacts with the Cabinet and/or with the Commissioner?"*** seems particularly problematic: it seems to be encouraging a very pedantic interpretation of the request rather than just given out the documents which contain the relevant information.

10. The Box at end of the section on partial access is rather unusual in its content.

    It says:

    > *Practical experience shows that one of the more difficult elements is how to handle personal comments or reflections in notes, meeting reports or flash e-mails, which may often fall under the exceptions foreseen in the Regulation.*
    >
    > *In order to limit the deletions in released texts, you may wish to distinguish between elements that represent a lasting record for the DG from any personal assessment of the meeting for your own purposes or possible lists of follow up points to guide your work (see p. 16 of this Vademecum).*

    We understand that DG Trade has had serious doubts about whether to release comments which are more "personal" contained in documents and e-mails. This is indeed something which during the transition to a full access to information can cause problems, if people are not used to having what they write scrutinised by the public. The only solution to this is for public officials to get used to the fact that the public has a right of access to their notes, e-mails, memos and reports. This right may also apply to hand-written notes in some cases. There is nothing in Regulation 1049/2001 which permits these being excluded from the right of access and it's inappropriate for the Vademecum to suggest that there might be (which is what this Box, coming at the end of the partial access section, appears to encourage). In fact, we still believe that this box encourages the creation of double reports and the removal of crucial information from documents considered for release in case of an access to documents request – and assessments and follow up points are crucial elements in a policy process and therefore crucial information.

    What advice can the Vademecum give? The Vademecum can remind public officials that all documents are potentially public and that all notes and comments should be set down in an appropriately professional manner so that no embarrassment will be caused by disclosure. This does not mean that no evaluations or assessments should be carried out. Rather, it means that as public servants, accountable to the European citizens, it should be accepted that these evaluations and other comments and exchanges are in the public domain and if they were created while staff were working on salaries paid by European taxpayers then they must be ready to share these comments and exchanges with them.

11. **Third Party Documents**: the main concern with this section is to say that DG Trade has a general practice of applying the international relations exception (4.1.a) to all information where a non-EU country has objected to disclosure. We note that a mere refusal is not sufficient as each exception has to be evaluated on a case-by-case basis and needs to be justified. It may well be that the third country has different openness standards that those inside the EU, and a general reflex towards secrecy, even when disclosure would not harm international relations.

    DG Trade should never encourage its staff to apply exceptions on a blanket basis as this goes against the letter of Regulation 1049/2001 as well as the jurisprudence of the Court of First Instance and Court of Justice.

12. **The section "Processing of applications and time limits**" could perhaps be given more prominence at the start of the Vademecum so that staff members are clear on the procedures and who to contact before getting into the detail of rules.

    We refer to the comment above about distinguishing between access to documents and information requests.

13. **Section II: Access to DG Trade Documents.** The first few paragraphs of this section tread a fine line between encouraging openness and encouraging non-disclosure, but do so in a reasonable way by insisting on the case-by-case and non-absolute nature of the exceptions. In general, this section starts with the right principle of case-by-case assessment but then in a number of cases highlighted by comments in the text, there is a tendency to encourage blanket exceptions.

    This is particularly the case with respect to references to Article 4.3 where it needs to be emphasises that the exception is very clearly limited by (a) requirement that "disclosure of the document would seriously undermine the institution's decision-making process" (emphasis added) and (b) "unless there is an overriding public interest in disclosure."

    Similarly the reference to the legal advice exception under Article 4.2 is not up to date because there are cases when such information should be disclosed.

    There is also a serious question about the concept of the "news value" of information as the basis for taking a decision on whether or not to release information. We understand that this Vademecum is written from the perspective of those inside DG Trade carrying out negotiations under public scrutiny and where there is an interest in protecting the EU's negotiating strategy. However, it is important to recall the following principles:

    - All documents and the information they contain are in principle public unless a specific exception applies on a case-by-case basis.
    - If information is already in the public domain, it should not subsequently be refused.
    - The only exceptions which may be applied are those under Regulation 1049/2001.

    It therefore seems that the appropriate question which officials should be asking themselves, is whether release of the information will cause any harm to an Article 4 exception, and whether this can be justified in a way that can be sustained if there is an appeal. If not, the presumption of openness should prevail.

    If there is any DG Trade specific case law or rulings by the Ombudsman, it would make sense to include these here. See how this was done by DG Internal Market for example.

14. **Section III on the Practical Implications for DG Trade**: This section seems to us to be in many places written in a warning tone that runs counter to the spirit of transparency. In particular, advice about not setting down personal opinions, which we would think is unnecessary for professional European public servants. The advice should be to encourage good and comprehensive record-keeping of all DG Trade activities and to ensure that the public is fully informed about all its activities.

    In addition, some of the text towards the end of this section could usefully be crossed or combined with higher sections.

II. DG Trade Webform

In line with the recommendations which Access Info Europe made in its report "Question to Brussels" in November 2009, we observe that, in common with many other EU institutions, DG Trade's website has the following shortcomings when it comes to citizens searching for access to documents:

1. The DG Trade website does not specifically inform members of the public of their right of access to documents;
2. There is no information about how to file request by e-mail (as opposed to by web form) and no option for adding attachments;
3. The contact page and web form is only available in 6 of the 21 languages of the European Union;
4. The form has mandatory fields for country, category and subject, even though these fields are not required under Regulation 1049/2001 and it should never be mandatory to provide this information (at least the category field has "do not wish to declare" at the bottom, but in this case why is it a compulsory field?!);
5. Access to documents is not one of the subjects of the form in the "subject" section.

III. General recommendations for the improvement of DG Trade's transparency about consultation processes

CEO and Access Info would herewith like to repeat previous recommendations to DG Trade to proactively improve its transparency about consultation processes. Greater transparency might render many access to documents requests unnecessary and would also bring DG Trade in line with the Commission's General Principles on Minimum Standards for Consultation of Interested Parties, which state that "it must be clear: what issues are being developed, what mechanisms are being used to consult, who is being consulted and why, what has influenced decisions in the formulation of policy". As already stated in our letters to and the meeting with DG Trade, we recommend that it:

- adopts as a rule the practice of writing minutes for all meetings with lobbyists, in order to assure the widest possible transparency;
- regularly publishes lists of meetings with interest representatives which include the meetings' dates, the principal subjects discussed and the names of people and organisations present at the meetings and if possible also the minutes of these meetings. There are a couple of examples the Commission could build upon as a further step towards transparency: Since October 2009, all departments of the UK government publish online information about Ministers' meetings with outside interest groups on a quarterly basis.[1] The practice is also followed by several Members of the European Parliament.[2] The Commission should follow and even improve upon these examples.

Ends

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1 See, for example, the Department of Transport (http://www.dft.gov.uk/press/ministers/ministers-meetings/) or the Department of Health (http://www.dh.gov.uk/en/FreedomOfInformation/DH_113319)

2 See, for example, the list of meetings published by Green MEP Reinhard Bütikofer (http://reinhardbuetikofer.eu/2009/12/16/1133/) or by Conservative MEP Giles Chichester (http://www.gileschichestermep.org.uk/letters/Oct2009.htm).