



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,
Trade (2018) 4048383

By registered letter with acknowledgment of receipt

Mr Olivier Hoedeman
Corporate Europe Observatory (CEO)
Rue d'Edimbourg 26
1050 Brussels

Advance copy by email:

ask+request-5114-xxxxxxx@xxxxxxx.xxx

Subject: Your application for access to documents – Ref GestDem No 2018/2850

Dear Mr Hoedeman,

I refer to request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered for the Directorate-General for Trade (DG TRADE) on 24 May 2018 under the reference number GestDem 2018/2850.

1. SCOPE OF YOUR REQUEST

In your application, you request access to

- *all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc, as well as organisations and individuals that work to further the interests of the tobacco industry), since January 1st 2017.*
- *all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc. as well as organisations and individuals that work to further the interests of the tobacco industry), since January 1st 2017.*

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence).

We have identified 20 documents (14 main documents and six annexes), falling under the scope of your request. We enclose for ease of reference a list of these documents in Annex I. For each of them, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach. First, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception. Second, it must examine whether disclosure of the parts of the document in question poses a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception. Third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2) and 4(3) of Regulation 1049/2001, the institution is required “*to ascertain whether there is any overriding public interest justifying disclosure*”³.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, “*the exceptions to that right [...] must be interpreted and applied strictly*”⁵.

Having examined the documents in light of the applicable legal framework, I am pleased to inform you that **full access is granted to five documents** (1a, 1b, 3a, 8a and 8b) and **partial access is granted to 14 documents** (1, 2, 3, 4, 5, 6, 7, 8, 9, 10 11, 12, 13 and 14).

In particular, in documents 1, 2, 3, 4, 5, 6, 8, 11, 12, 13 and 14 only personal data have been redacted, pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 (“Regulation 45/2001”) ⁶.

In documents 7, 9 and 10 in addition to personal data protected under article 4(1)(b) of Regulation 1049/2001, additional information was redacted in accordance with article 4(1)(a) third indent (protection of the public interest as regards international relations) and

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in’t Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁶ Regulation (EC) No 45/2001 of the European Parliament and the of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

article 4(2) first indent (protection of the commercial interests of a natural or legal person) of Regulation 1049/2001.

I regret to inform you that **access cannot be granted** to document 12a, in accordance with article 4(1)(a) third indent and article 4(2) first indent of Regulation 1049/2001.

Please note that those parts not falling within the scope of your request have been clearly marked as out of the scope.

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2 and 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

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: the public interest as regards: [...] international relations.”

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*⁷. In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest"*⁸.

Certain passages in documents 7, 9 and 10 have been redacted and the entire document 12a has been withheld, as their disclosure would reveal the external stakeholders' main business concerns, strategic interests, priorities and their internal assessment and input for the negotiations with Mexico and Mercosur. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics which the EU could consider pursuing in its trade negotiations.

The above-mentioned information was in general meant for internal use as a basis to establish EU positions, strategies, objectives and way forward on specific aspects of the negotiations with Mexico and Mercosur.

Indeed, the success of trade negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in function of how the

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

⁸ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

discussions evolve in its trade negotiations. Exposing internal views and considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partner to obtain specific results, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations.

Against this background, if this specific information submitted by these external stakeholders to the European Commission would be released, there would be a clear and non-hypothetical risk that external stakeholders would not provide similar information to the European Commission in the future. This means that the European Commission would be deprived of the possibility to obtain precise and relevant information allowing it to objectively assess its negotiating options. The negotiation power of the European Commission would consequently be affected and its position in the negotiations weakened, which in turn would damage the protection of the public interest as regards international relations.

2.2 Protection of privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”

The Court of Justice has ruled that “where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data” “the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety”.⁹

Article 2(a) of Regulation 45/2001 provides that “‘personal data’ shall mean any information relating to an identified or identifiable natural person [...]”. The Court of Justice has confirmed that “there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of ‘private life’”¹⁰ and that “surnames and forenames may be regarded as personal data”,¹¹ including names of the staff of the institutions.¹²

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish “the necessity of having the data transferred” and additionally “if there is no reason to assume that the legitimate interests of the data subjects might be

⁹ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

¹⁰ Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹¹ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹² Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

prejudiced". The Court of Justice has clarified that "it is for the person applying for access to establish the necessity of transferring that data".¹³

All documents –except 12a, contain names and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

However, please note that the names of representatives of the companies occupying senior management positions are disclosed.

2.3 Protection of commercial interests

Article 4(2) first indent of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure”.

Certain passages in documents 7, 9 and 10 have been redacted and the entire document 12a has been withheld because their disclosure would reveal specific views, concerns and interests of different stakeholders regarding negotiations with Mexico and Mercosur. They contain commercial priorities, strategies and concerns these stakeholder have. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the entities and companies concerned, as it could be exploited by competitors to undermine their competitive positions in third countries and their relationship with the other economic operators in such markets.

All this information was shared with the Commission in order to provide useful input and support for the EU’s objectives in its trade negotiations with Mexico and Mercosur. Economic operators typically share information with the Commission so that the latter can determine how to best position itself in the negotiations in order to protect its strategic interests and those of its industry, workers and citizens. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission, are key elements for the success of the internal and external policies of the EU and its international negotiations. Bringing in the public domain specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

¹³ Judgment in C-127/13 P *Guido Strack v Commission*, EU:C:2014:2250, paragraph 107 and judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have also considered whether the risks attached to the release of the protected passages and documents are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions for its negotiations with its trading partners.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 "*[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*". Accordingly, we have also considered whether partial access can be granted to document 12a.

After a careful review, we have concluded that it is entirely covered by the exceptions described above as it is impossible to disclose any parts of this document without undermining the protection of the interests identified in this reply.

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 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY