



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Mrs Vicky Cann
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels

Advance copy by email:
ask+request-5241-da29c1f8@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2018/1545

Dear Mrs Cann,

I refer to your application dated 14 March 2018 in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

Please accept our apologies for the delay in answering to your request, which is mainly due to a high number of requests for access to documents being processed at the same time by DG TRADE.

1. SCOPE OF YOUR REQUEST

In your application, you request access to the minutes of the Brexit related meetings listed in DG TRADE's response to your earlier request 2018/0583.

Having assessed the content of each meeting, we have identified eight documents as relevant for your request. We enclose for ease of reference, in Annex 1, a list of these documents. 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.

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.

Please note that the assessment of the reports revealed that three meetings, although initially identified in our response to your request 2018/0583 as potentially pertinent for your Brexit interest, did not eventually touch upon any Brexit-related matters. Instead, they addressed broader trade policy issues, such as DG TRADE's current and future FTA negotiating agenda.

As a result, the following documents fall outside of the scope of your request and are therefore not included in the reply: (1) the report of a meeting with Business Europe on 18 September 2017; (2) the report of a meeting with AmCham EU on 20 September 2017; and (3) the report of a meeting with Spirits Europe on 27 September 2017.

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 grant partial access to all the documents. A copy of the accessible documents is enclosed.

For all the documents, some personal data contained in these documents have been withheld pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001")⁶.

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.

In document 2 and its annex, in addition to personal data, other information was redacted in accordance with Article 4(2) first indent (protection of commercial interests) of Regulation 1049/2001.

In document 2 (and its annex) and in document 7, further information was redacted pursuant to Article 4(3) first paragraph of Regulation 1049/2001 (protection of an ongoing decision-making process).

Please note that parts of some of the reports have been marked as falling outside the scope of your request as they concern topics different from those mentioned in your request.

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 privacy and integrity of the individual (documents 1 to 8)

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”.⁷

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’”⁸ and that “surnames and forenames may be regarded as personal data”,⁹ including names of the staff of the institutions.¹⁰

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

⁷ 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.

⁸ 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.

⁹ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁰ 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"¹¹.

Documents 1 to 8 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 Commission staff in senior management positions (at Director level and above) are disclosed. For the external organisations, the names of the main representatives or of staff in senior management positions are also disclosed.

2.2 Protection of commercial interest (document 2 and its annex)

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 parts in document 2 and its annex have been withheld because they reveal specific views, concerns and interests of Honda Motor Europe regarding the withdrawal of the United Kingdom from the EU. They contain commercial priorities, strategies and concerns this stakeholder has. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of Honda, 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.

2.3 Protection of the institution's decision-making process (document 2, annex to document 2 and document 7)

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."*

The jurisprudence of the EU Courts has recognized that *"the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for*

¹¹ 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.

*restricting access to documents relating to the decision-making process"*¹² and that the capacity of its staff to express their opinions freely must be preserved¹³ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court noted, the result of such self-censorship *"would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]"*¹⁴

Certain parts of document 2 and its annex have been withheld as they contain information that was shared with the Commission in order to provide useful input and support for the EU's objectives in its future trade negotiations with the United Kingdom. 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. Placing 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.

Document 7 relates to a matter, the Art.50 withdrawal negotiations with the United Kingdom, for which the decision-making process is currently still ongoing. As a result, parts of document 7, are withheld as their disclosure would seriously undermine such decision-making process. As the discussions unfold, the EU will be making decisions as to whether or not to pursue certain interests and positions, and may revise its positions. This process needs to be preserved from external pressure in order to preserve the "thinking space" of the Commission, its room for manoeuvre and independence, and the atmosphere of trust in which internal discussions within the Commission and between institutions take place.

In particular, exposing internal views and considerations expressed in the context of preliminary discussions would be premature at this stage and would subject the Commission to external pressure, potential manipulation and unfounded conclusions both from external stakeholders and negotiating partners. It would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches and proposals. This would consequently undermine the decision-making process of the EU institutions by revealing specific elements taken into account for the ongoing discussions.

¹² Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹³ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

¹⁴ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Articles 4(2) first indent and 4(3) of Regulation 1049/2001 apply 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 withheld parts of document 2, its annex and document 7 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 ongoing negotiations with third countries without undermining the commercial position of the entities involved or the ongoing decision-making process.

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

Encl.:

- Annex I - List of documents;
- (Partially) released documents