



Brussels, 13 May 2019

By registered letter with acknowledgment of receipt

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Subject: Your application for access to documents – Ref GestDem 2019/286

Dear Mr Verbeek,

I refer to your request of 15 January 2019 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001") and hereinafter registered as GestDem 2019/286. This request follows your previous request for access to the documents, which were identified under the scope of your request GestDem 2018/4306.

Please accept our apologies for the delay in answering your request, which is mainly due to the high number of requests for access to documents being processed at the same time by the Directorate-General for Trade (hereinafter 'DG TRADE').

1. SCOPE OF YOUR REQUEST

Under the present request, you are referring to your initial request for documents as registered under Gest Dem 2018/4306, which concerns the following:

1) a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms,

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.

academics, public consultancies and think tanks in which the EU-Indonesia Free Trade Agreement was discussed (between January 2016 and today);

2) minutes and other reports of these meetings;

3) all correspondence (including emails, letters, faxes) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, academics, public consultancies as well as think tanks regarding the EU-Indonesia Free Trade Agreement (between January 2016 and today);

4) all correspondence (including emails, letters, faxes) and documents (including briefings, memo's, non-papers) shared between DG Trade officials and/or the Commissioner and the Cabinet in which the EU-Indonesia Free Trade Agreement was discussed (between January 2016 and today).

On 21 September 2018 we had sent you the list of the identified 223 documents, including their title, the type of document and its date.

The Commission replied to your request for selected identified documents with a letter dated 21 December 2018.

On 15 January 2019 you expressed your interest to obtain access also to documents 111 to 136 in a list of identified documents which the Commission had submitted to you. Please note that documents 111 to 114 have already been assessed in our previous reply of 21 December 2018. We have therefore replaced them by documents 137 to 140 of the list sent to you on 21 September 2018.

A list of the documents covered in this reply is enclosed in Annex 1. For each of the documents 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 the institution takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2)

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.

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 requested documents under the applicable legal framework, I am pleased to grant you full access to annex a of document 132 and partial access to the remaining documents except to documents 120, 127, 128, 134, annex a of document 134 and 136.

In documents 119, 122, 125, 126, 129, 130, 131, 132, 135, 138, 139, 140, annexes a and c of document 118 and annex a of document 131 only names and other personal data have been redacted pursuant to Article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 2018/1725. Hence, the main content of these documents is accessible.

In documents 115, 116, 117, 118, annex b of document 118, 121, 123, 124, 133 and 137, in addition to personal data, additional information was redacted as it is covered either by the exception set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) or by the exception set out in Article 4(2) first indent of Regulation 1049/2001 (protection of the commercial interest of a natural or legal person) or in accordance with Article 4(3).

Please note that parts of documents that do not relate to your request have been redacted as falling out of scope.

Access is not granted to documents 120, 127, 128, 134, annex a of document 134 and 136, as their disclosure is prevented by the exception set out in Article 4(3) of Regulation 1049/2001 (protection of the commercial interest of a natural or legal person) and in accordance with Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations). Some information in these documents is also protected pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual).

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 and section 4 considered whether partial access could be granted to the documents withheld.

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.

2.1 Protection of the public interest as regards 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"*.⁶ 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"*.⁷

The General Court found that *"it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations" and "have a negative effect on the negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations"*.⁸ Moreover, *"the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union"*.⁹

The EU and Indonesia are currently negotiating a free trade agreement.

Documents 118, 121, 123, 133 and 137 contain internal views either from the EU or from Indonesia and other countries. These views cannot be disclosed without undermining the mutual trust and hence the negotiations between the EU and Indonesia as these views could reveal strategic considerations of either side.

Access to documents 120, 127, 128, 134, annex a of document 134 and 136 is not granted as their disclosure would reveal strategic interests, priorities and business concerns of the EU. As such, this information could indirectly reveal negotiating priorities, strategic objectives and tactics, which the EU could consider pursuing in its trade negotiations.

More generally, it remains important for the EU when negotiating with its counterpart to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Exposing internal views and considerations would

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

⁷ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁸ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ *Id.*, paragraph 125.

weaken the negotiating capacity of the EU and consequently, the protection of the public interest as regards international relations.

There is a reasonably foreseeable risk that the public disclosure of the protected information would undermine and weaken the position of the EU in its ongoing trade negotiations with Indonesia. Indeed, the information contained in these documents would allow the EU's trading partner to draw conclusions with respect to certain detailed positions, concerns, views and strategies of the Commission and of its Member States. This in turn may allow the counterpart to extract specific concessions from the EU in the context the ongoing negotiations, thus to the disadvantage of the EU's international relations, and the interests of its citizens, consumers and economic operators.

Furthermore, some of the withheld passages reveal the position of Indonesia. Such disclosure is likely to upset the mutual trust between the EU and Indonesia and thus undermine their relations. It may also jeopardise the mutual trust between the EU and other trading partners as they may fear that in the future their positions would be exposed and they may as a result refrain from engaging with the EU. Negotiating partners need to be able to confide in each other's discretion and to trust that they can engage in open and frank exchanges of views without having to fear that these views and positions may in the future be publicly revealed. As the Court recognised in Case T-301/10 *in't Veld v Commission*, "[...] *establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise*"¹⁰.

The abovementioned passages must, therefore, remain protected.

2.2 Protection of privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹¹ ('Regulation 2018/1725').

All the documents partially released contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information like signatures.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data "*means any information relating to an identified or identifiable natural person [...]*". The Court of Justice

¹⁰ Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

¹¹ Official Journal L 205 of 21.11.2018, p. 39.

has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.¹² Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.¹³

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹⁵

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "*[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests*". Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, we do not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

¹² Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

¹³ Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

¹⁴ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹⁵ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

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”.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent¹⁶, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy¹⁷. Accordingly, it must be information that is “known only to a limited number of persons”, “whose disclosure is liable to cause serious harm to the person who has provided it or to third parties” and for which “the interests liable to be harmed by disclosure must, objectively, be worthy of protection”¹⁸.

Some passages in documents 115, 116, 117, 118, annex b of document 118, 121, 124 and 137 have been withheld because they contain business sensitive information pertaining to an organisation, a company or group of companies, including details about commercial priorities, objectives, strategies, concerns and interests that they pursue in their respective domains.

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. 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. Sharing publicly specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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 withheld parts of documents 115, 116, 117, 118, annex b of document 118, 121 and 124 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

¹⁶ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁷ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁸ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

continues to receive useful contributions for its ongoing negotiations with third countries without undermining the commercial position of the entities involved.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 "*if 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 could be granted to documents 120, 127, 128, 134, annex a of document 134 and 136. However, and after a careful review, we have concluded that this is not possible.

The content of those documents is entirely covered by the exceptions described above and it is thus impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply.

In case you disagree with the assessment contained in this reply you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, 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, Document Management & Access to Documents (SG.C1)
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

- Annex 1: List of documents
- Documents plus annexes including fully and partially released documents