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By registered letter with acknowledgment of receipt

Mr Marco Jonville
International Association for technicians,
experts and researchers (Aitec)
21ter rue Voltaire,
75011 Paris

Advance copy by email:
ask+request-6925-719e7aa3@asktheeu.org;

Subject: Your application for access to documents – Ref. GestDem N° 2019/3004

Dear Mr Jonville,

I refer to your e-mail dated 22/05/2019 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on 22/05/2019 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 access to documents requests being processed at the same time.

1. SCOPE OF YOUR REQUEST

In your application, you request access to:

- 1) *a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies, industry associations, law firms, academics, public consultancies, associations and think tanks in which the EU-Tunisia DCFTA negotiations were discussed (between January 2011 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*

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.

representatives of individual companies, industry associations, law firms, academics, public consultancies, associations and think tanks regarding EU-Tunisia DCFTA negotiations (between August and December 2018);

- 4) *all correspondence (including emails, letters, faxes) and documents (including briefings, memo's, non-papers) shared between Commission officials and between Commission officials and the Council in which EU-Tunisia DCFTA negotiations were discussed (between August and December 2018).*

With regard to part 1 of your request, we inform you as follows. Information on meetings of the Commissioner (including her Cabinet) are published on her website² while information on meetings with the Director-General can be found on a different webpage³. Meetings held by other DG TRADE officials are not systematically listed in a way indicated in your request. As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. Given that no such document corresponding to the description given in your application is held by DG TRADE, we are only in a position to refer you to the websites indicated above.

With regard to parts 2-4 of your request, we have identified **22 documents**. All of them are minutes and reports of meetings with representatives of civil society, and local authorities. Documents **20**, **21** and **22** as well as **annexes** to document **2**, **8** and **13** are already publicly available online.

A list of all identified documents is enclosed in the Annex to this reply and where publicly available, a link has also been provided for ease of reference. Please note that all EU proposals for negotiating texts and reports of rounds of negotiations have been published on the Europa websiteⁱ.⁴

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law⁵, 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 pose 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

² See: <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=fd6c08d-54d1-4524-aa70-1287c34ceb4d>

³ See: <https://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=5f4689e0-014c-4bec-8125-f9e6d3592c86> and <https://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=5f4689e0-014c-4bec-8125-f9e6d3592c86&startDate=01-11-2014>

⁴ <https://ec.europa.eu/trade/policy/countries-and-regions/countries/tunisia>

⁵ Judgement in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

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*".⁶

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁷ "*the exceptions to that right [...] must be interpreted and applied strictly*".⁸

Having carefully examined the documents identified above in light of the applicable legal framework, I am pleased to inform you that five of these documents have been fully disclosed (three are already in the public domain: **documents 20-22**, and an additional one has been added: **document 6**). In addition, in all documents disclosed personal data has been withheld, in accordance with Article 4(1)(b) of Regulation 1049/2001, and in nine documents information has been withheld in accordance with Article 4(1)(a) of Regulation 1049/2001: **documents 1, 2, 4, 5, 8, 11, 14, 18 and 19**. Finally, in one document only (**document 19**) information has been withheld according to Article 4(3) of Regulation 1049/2001.

2.1. 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/EC9 ('Regulation 2018/1725').

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 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.¹⁰ 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.¹¹

⁶ *Id.*, paragraphs 37-43. See also judgement in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁷ See Regulation (EC) No 1049/2001, recital (4).

⁸ Judgement in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁹ Official Journal L 205 of 21.11.2018, p. 39.

¹⁰ Judgement 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.

¹¹ Judgement 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.

In its judgement in Case C-28/08 P (*Bavarian Lager*)¹², the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.¹³

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, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

¹² Judgement of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹³ Whereas this judgement 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.

Documents 1-5 and 7-19 contain names and other personal information that allows the identification of natural persons. Additionally, in several documents the signatures have been removed to avoid the risk of fraudulent use of such signatures.

2.2 Protection of the public interest as regards to international relations (parts of documents 1, 2, 4, 5, 8, 11, 14, 18, 19)

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: (a) 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*".¹⁴ In this context, the Court of Justice of the EU 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*".¹⁵

Parts of **documents 1, 2, 4, 5, 8, 11, 14, 18, 19** contain information that could risk undermining the dialogue, trust and relations with certain third countries if those parts were disclosed. In fact the disclosure of EU or TU negotiating priorities, strategies and positions, as well as information on the organizational aspects of the negotiations, or positions expressed by non-State actors in the EU or Tunisia, could damage the protection of the public interest as regards international relations, impact negatively on the negotiations, as well as reveal, indirectly, those positions of other parties to the negotiations. In addition disclosure of documents containing assessment of political situation and elections could undermine the protection of international relations. It is also to be considered that the positions taken by the Union or by TU 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. Therefore, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, or of positions and views expressed in confidence by these other actors could, in practice, have a negative effect on the negotiating capacity of the Union.

I conclude that pursuant to Article 4(1)(a) of Regulation 1049/2001, access cannot be granted to the parts of the documents falling within the scope of your request related to the EU's position with regard to or assessment of third countries in so far as it would undermine the protection of international relations.

2.3 Protection of the institution's decision-making process (part of document 19)

¹⁴ Judgement in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

¹⁵ Judgement in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

Article 4(3), second subparagraph of Regulation 1049/2001 provides that “[a]ccess 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 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 restricting access to documents relating to the decision-making process”¹⁶ and that the capacity of the individuals involved to express their opinions freely must be preserved¹⁷ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, the result of such self-censorship would be that the institutions “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 [...]”.

Document 19 contains inter alia sensitive information related to preliminary views and exchanges of the Commission. The disclosure of part of the document in question would restrict the decision-makers’ “space to think” and their room for maneuver, and undermine the necessary atmosphere of trust during discussion and negotiation processes in future similar situations.

It follows from the above that disclosure of some of the information contained in the requested document would hamper a free exchange of views and the possibility for the Commission to analyse and draw conclusions in documents intended for internal purposes in this and also future similar cases, thereby impairing the decision-making process. In consequence, the exception laid down in Article 4(3) of Regulation 1049/2001 applies.

2.4 Overriding public interest

The exceptions laid down in Article 4(2) first indent and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. 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 parts of the documents that are withheld for these reasons are outweighed by the public interest in accessing these parts. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned and the need not to undermine the Commission’s decision-making process.

Finally, I take this opportunity to remind you that the documents provided in the attachment to this letter may not be copied or reproduced for commercial purposes without prior consultation with the European Commission.

¹⁶ Judgement in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹⁷ Judgement in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

3. MEANS OF REDRESS

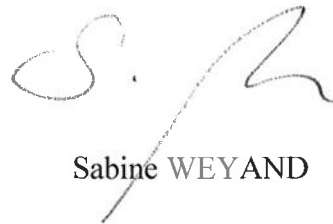
In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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, Document Management & Access to Documents unit SG-C-1
BERL 7/076
BE - 1049 Bruxelles

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

Yours sincerely,



Sabine WEYAND

Annexes: - List of the identified documents related to Gestdem 2019/3004
 - Disclosed documents