Registered letter with acknowledgement of receipt

Subject: Your application for access to documents – GestDem 2022/0725

Dear Mr Henning,

We refer to email dated 2 February 2022 wherein you make your request for access to documents pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ‘Regulation 1049/2001’), registered on the same date under the abovementioned reference number. We also refer to our email, dated 23 February 2022, our reference Ares(2022)1361840, whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation 1049/2001.

1. SCOPE OF YOUR APPLICATION

Your application reads as follows:

’’[...]Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting the following document:

The eight-point policy document circulated by the United States of America regarding the ongoing negotiations on the Digital Markets Act, as mentioned in this article’’
2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

We have identified the following documents that fall within the scope of your application:

- Email dated 26 January 2022 from the US authorities (‘Document 1’) and its attachment, the DMA paper (‘Document 2’)

3. ASSESSMENT UNDER REGULATION 1049/2001

Following an examination of the identified documents under the provisions of Regulation 1049/2001 and taking into account the opinion of the third party, I regret to inform you that access to the identified documents cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

(i) Protection of international relations

Article 4(1)(a), third indent of Regulation 1049/2001 stipulates that access to a document shall be refused where disclosure would undermine the protection of the public interests 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". 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".

The identified documents are covered by the abovementioned exception of Regulation 1049/2001.

The documents relate to the US position concerning the Digital Markets Act. There is a concrete risk that the public disclosure of these documents would affect the mutual trust between the EU and the US and thus undermine their relations. 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”.

Consequently, access to the identified documents has to be refused as there is a real and non-hypothetical risk that their disclosure would undermine the public interest as regards international relations.

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1 See Judgment in Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 36.
(ii) Protection of privacy and integrity of individuals

Disclosure of Document 1 is prevented by the exception concerning the protection of privacy and integrity of the individual outlined in Article 4(1)(b) Regulation 1049/2001, since it contains the following personal data:

- Names of Commission staff members not pertaining to the senior management
- Names and contact information of other natural persons

Article 9(1)(b) of the Data Protection Regulation\(^4\) does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) Regulation 1049/2001, access cannot be granted to the requested documents, 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.

(iii) Protection of the decision-making process

The first subparagraph of Article 4(3) 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 identified documents contain sensitive information with regard to the ongoing procedures related to the Digital Markets Act. They also contain the considerations, position and views of third parties. This content is subject to ongoing discussions and deliberations. The risk of disclosing sensitive information regarding the Commission services’ and other parties’ preliminary views while the relevant decision-making process is still ongoing would deter them from freely expressing their opinions and having frank discussions. Speculations and misinterpretations of the public on the views, positions, considerations put forward in an early stage of the decision-making process would affect the exploration of different options and unduly restrict the Commission’s internal space to think, exposing the Commission to external pressure and also affecting its relations with other countries. Disclosure of these documents would therefore seriously undermine the ongoing decision-making process. This risk is also reasonably foreseeable and not purely hypothetical.

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Consequently, access to the identified documents should be refused as they are also covered by the abovementioned exception of Article 4(3) first subparagraph of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) first subparagraph of Regulation 1049/2001 applies, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the aforementioned documents but we have not been able to identify such an interest.

5. PARTIAL ACCESS

We have considered whether partial access could be granted to the documents requested. However, partial access is not possible considering that the documents concerned are covered in their entirety by the abovementioned exceptions of Article 4 of Regulation 1049/2001.

6. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation (EC) No 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 Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Roberto Viola