Brussels, 13 June 2022

By e-mail

Ms Ine Lejeune
Mingerslaan 6
8370 Blankenberge
Belgium

ask+request-11132-eba99858@asktheeu.org

Subject: Request for access to documents
Ref.: Your requests of 26 April 2022, registered on 3 May 2022, under reference GestDem 2022/2484

Dear Ms Lejeune,

I refer to your above-referenced emails, under Regulation (EC) No 1049/2001 regarding public access to documents\(^1\), by which you request access to the following written observations submitted in:

- **Case C-333/20, Berlin Chemie A. Menarini by:**
  1. the European Commission;
  2. the Romanian Government;
  3. Berlin Chemie A. Menarini SRL;

- **Case C-547/18, Dong Yang Electronics by:**
  4. the European Commission;
  5. the Polish Government;
  6. the United Kingdom Government;
  7. Dong Yang Electronics;

- **Case C-931/19, Titanium by:**
  8. the European Commission;
  9. the Austrian Government;

- **Case C-319/11, Widex A/S v. Skatteverket by:**
  10. the European Commission;
  11. the Skatteverket;
  12. the Swedish Government.

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In accordance with the *fair solution proposal* agreed upon by email of 29 April 2022, this reply concerns the written observations in Cases **C-333/20**, **C-547/18**, **C-319/11** and **C-931/19** (11 documents).

As regards document 12, please note that although the Swedish Government had submitted its written observations in this case, the Court of Justice did not notify this document to the Commission. Article 2(2) of Regulation No 1049/2001 states that “…[i]t is Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and its possession, in all areas of activity of the European Union”. Since the Commission does not hold the submission made by the Swedish Government, it cannot send you any document.

**1. Written Observations Submitted by the European Commission (Documents 1, 4, 8 and 10)**

After a concrete assessment of the documents concerned, I am pleased to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001, with the exception of some personal/commercial data, as will be explained below.

Accordingly, as requested, please find enclosed copies of the French translation of documents 4 and 8 as well as redacted copies of the French translation of documents 1 and 10. You may reuse the disclosed documents free of charge, provided that the source is acknowledged and that you do not distort their original meaning or message. Please note that the Commission does not assume liability stemming from the reuse.

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2 Ares(2022)3334017.
3 Judgment of the Court of Justice of 7 April 2022, ECLI:EU:C:2022:291.
6 Judgment of the Court of Justice of 3 June 2021, ECLI:EU:C:2021:446.
7 Languages of the proceedings: Romanian, Polish, German and Swedish.
2. **Written observations submitted by third parties (Documents 2, 3, 5, 6, 7, 9 and 11)**

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the Commission has consulted the authors of the written pleadings submitted by the third parties. Following these consultations, I would like to inform you that:

- Berlin Chemie A. Menarini as well as the Austrian, Polish, Romanian, United Kingdom, Governments and the Skatteverket have agreed to the disclosure of their written observations (documents 2, 3, 5, 6, 9 and 11);

- Dong Yang Electronics has not replied to the Commission’s consultation (document 7).

With regard to the document for which the Commission did not receive a reply (document 7), I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001.

In fact, the Court of Justice has recognized in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that, in cases where the proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine those proceedings.

Since Case C-547/18 is now closed, and in the absence of an objection from Dong Yang Electronics, I conclude that access can be granted to this document in accordance with Regulation (EC) No 1049/2001.

Please note however that some personal/commercial data has been deleted in some of the documents disclosed, as will be explained below. Accordingly, please find attached copies of the French translation of documents 2 and 7 as well as redacted copies of the French translation of document 3, 5, 6, 9 and 11.

The disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant to the Court proceedings at stake. Access is granted for information only and cannot be re-used without the agreement of their originators, who hold a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

2.1. **Protection of commercial interests**

As mentioned above, some commercially sensitive information has been redacted concerning the name of Berlin Chemie’s commercial partner. The lawyers representing Berlin Chemie argue that divulging this information may have a serious impact on their client’s business in Romania, affecting the client’s privacy and business relationship. Accordingly, this information has been deleted on pages 3 (paragraphs 4 and 5), 5 (paragraph 14) and 11 (paragraphs 46 and 47) of the third party’s document (document 3). The same information has been deleted on page 4 (paragraph 7) of the Commission’s document (document 1).

Article 4(2), first indent of Regulation (EC) No 1049/2001 states by way of exception 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”.

The purpose of this exception is to protect the commercial and business interests of natural or legal persons, especially with respect to confidential information related to their economic activities.

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8 *ibid.*
In the light of the above, the withheld information must be covered by the said exception and cannot be disclosed. In fact, considering that the Court of Justice abstained from revealing this piece of information in its judgment, I consider that it constitutes sensitive information, known to a limited number of persons, the disclosure of which may have prejudicial effect to the commercial interests of the applicant. This risk is reasonably predictable and not purely hypothetical.

2.2. **Protection of personal data**

The initials of the Commission’s officials, not having the function of senior management staff (first page of document 10), as well as the initials of the Court’s officials (first page of documents 5, 6, 9 and 11) have been redacted in the documents disclosed. This information must be protected under the exception provided for in Article 4(l)(b) of Regulation (EC) No 1049/2001, in accordance with the European Union legislation regarding the protection of personal data.

According to Article 4(l)(b) of Regulation (EC) No 1049/2001 "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”.

In its judgment in Case C-28/08P (Bavarian Lager)\(^9\), 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\(^10\).

The applicable legislation in this field is Regulation (EU) 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/EC\(^11\) (‘Regulation (EU) 2018/1725’).

Article 3(1) of Regulation (EU) 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\(^12\).

As regards the personal data of the officials of the institutions, the General Court has confirmed, in its judgment in Case T-39/17 that the information such as names, signatures, functions, telephone numbers and other information pertaining to staff members of an institution fall within the notion of "private life", regardless of whether this data is registered in the context of a professional activity or not. Accordingly, the initials of the Institutions’ officials have been deleted, since this information constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725\(^13\).

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\(^10\) *Bavarian Lager* judgment, paragraph 63. 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 (EU) 2018/1725.


\(^12\) Judgment of the Court of Justice of 20 December 2017, Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, “personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if the 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 met and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation (EU) 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 request, 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 (EC) No 1049/2001, access cannot be granted to 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.

3. OVER RIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001 the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4(2), first indent. In the present case, there are no elements capable of showing the existence of an overriding public interest in disclosure of this information, which would outweigh the public interest invoked for the protection of commercial interests of the persons/companies concerned.

Please note that the exception of Article 4(1)(b), concerning the protection of personal data, has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.
4. **MEANS OF REDRESS**

Should you wish these positions to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the address below:

European Commission  
Secretariat-General  
Unit C.1. ‘Transparency, Document Management and Access to Documents’  
BERL 7/076  
B-1049 Brussels

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

Yours sincerely,

[signed electronically]
Daniel CALLEJA CRESPO

Attachments: 11