



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels
TRADE/SW/B.2 (2022) 7524385

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*By email only – with request for
acknowledgment of receipt:*
ask+request-11759-7299e96c@asktheeu.org

Subject: Your application for access to documents – GESTDEM-EASE 2022/4759

Dear Sir,

We refer to your e-mail of 23 August 2022 in which you make a request for access to documents, registered under the above-mentioned reference number.

1. SCOPE OF YOUR REQUEST

You request access to:

- *The flash report on the WTO e-commerce negotiation round in July*
- *All documents on the small group negotiations on privacy*

Accordingly, we consider your request to cover documents held prior to the date of your application, i.e. prior to 23 August 2022.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law¹, 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:

¹ 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.

- 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 Article 4(2) and Article 4(3) of Regulation 1049/2001, the institution is required ‘*to ascertain whether there is any overriding public interest justifying disclosure*’².

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents³, ‘*the exceptions to that right [...] must be interpreted and applied strictly.*’⁴

In reply to your request, we have been able to identify nine documents listed in the annex to this letter.

Having examined the documents requested under the provisions of Regulation 1049/2001 regarding public access to documents, we have come to the conclusion that none of these documents can be disclosed. Disclosure of these documents is prevented by the exception to the right of access laid down in Article 4(1)(a) and Article 4(1)(b) of this Regulation.

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 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*’⁵. 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*’⁶.

² *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52-64.

³ See Regulation 1049/2001, recital (4).

⁴ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁵ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35.

⁶ Judgment in *Council v Sophie in 't Veld*, C-350/12P, EU:C:2014:2039, paragraph 63.

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’*⁷. 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’*⁸.

Disclosure of the documents requested by you would undermine the protection of the public interest as regards international relations, because the documents include the position of several WTO members participating in the Joint Statement Initiative on e-commerce, which they have not made public. In addition to this, documents (1) and (2), listed in the annex, also include information relating to the EU strategic objectives and negotiating positions. Disclosure of the documents listed in the annex would therefore undermine the mutual trust between participants and would affect the EU position and interests in the context of the e-commerce negotiations.

2.2 Protection of the privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation 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’).

The requested documents contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information.

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,

⁷ Judgment in *Sophie in ’t Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁸ Id., paragraph 125.

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

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

In its judgment 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

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ 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.

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.

3. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 '*[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*'. Accordingly, I have also considered whether partial access can be granted to the individual documents identified.

However, we consider that the requested documents are either fully protected by a coherent application of Articles 4(1)(a) third indent of Regulation 1049/2001 and 4(1)(b) or that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use, and that therefore access to the requested documents has to be refused.

4. POSSIBILITY OF A CONFIRMATORY APPLICATION

In case you would disagree with this position, you are entitled, in accordance with Article 7(2) of Regulation (EC) No 1049/2001, to submit 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
Unit C.1, 'Transparency, Document Management and Access to Documents'
BERL 7/076
1049 Brussels
Belgium

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

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'S. Weyand', with a stylized flourish at the end.

Sabine WEYAND

Annex: List of documents (Gestdem 2022/4759)

Document No.	Ares number	Title	Date	Release: Yes/No/Partial	Reason under Regulation 1049/2001
1	Ares(2022)6679242	Flash report WTO e-commerce plenary of 19 July 2022	19/07	No	Article 4(1)(a) and Article 4(1)(b)
2	Ares(2022)6683922	eJSI - Small Group discussion reports/texts – Plenary 14 July 2022 (email incl. 13 attachements)	21/07	No	Article 4(1)(a) and Article 4(1)(b)
3	Ares(2022)6979737	JP contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	08/07	No	Article 4(1)(a) and Article 4(1)(b)
4	Ares(2022)6979737	UK contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	07/07	No	Article 4(1)(a) and Article 4(1)(b)
5	Ares(2022)6979737	HK contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	07/07	No	Article 4(1)(a) and Article 4(1)(b)
6	Ares(2022)6979737	CHN contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	08/07	No	Article 4(1)(a) and Article 4(1)(b)
7	Ares(2022)6979737	US contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	08/07	No	Article 4(1)(a) and Article 4(1)(b)
8	Ares(2022)6979737	AUS contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	08/07	No	Article 4(1)(a) and Article 4(1)(b)

9	Ares(2022)6979737	SGP contribution for the homework questions of the July meeting - eJSI - Small Group Privacy	08/07	No	Article 4(1)(a) and Article 4(1)(b)
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