To: Alexander Schmalenberger  ask+request-13051-1114e20f@asktheeu.org

Brussels, 11 July 2023

Subject: Your application for access to documents – Ref No 2023-19

Dear Mr. Schmalenberger,

We refer to your e-mail dated 30 May 2023 in which you requested to gain access to all submissions mentioned in the EDPB binding decision 1/2023. We confirmed the registration of your request on 31 May 2023.

We have interpreted the scope of your request as covering all the documents formally considered as submissions in the EDPB binding decision 1/2023, namely:

- Meta submissions to the Preliminary Draft Decision, to the revised Preliminary Draft Decision, and to the Draft Decision
- Noyb's submissions to the Preliminary Draft Decision, to the revised Preliminary Draft Decision
- US government submissions to the Preliminary Draft Decision, to the revised Preliminary Draft Decisions

Assessment

We have identified 73 documents that fall within the scope of your request.

To facilitate our assessment and your consultation of the files, the titles of the files have been numbered using the document numbering assigned during the work on the EDPB binding decision 1/2023 and consequently the numbering isn’t in sequence. We will refer to the numbers of each single file in our assessment below.

We have conducted the following assessment in light of Regulation (EC) No 1049/2001 regarding public access to documents and the relevant case law of the Court of Justice of the European Union (CJEU).

1. Full disclosure

The following document can be fully disclosed:

Documents 2k, 2l, 2m, 2n, 2o, 2p, 2r, 2s, 2t, 2u, 2v, 2w, 3b, 3c, 3d, 3e, 3f, 8e, 8f, 8g, 8h, 8i

2. Full non-disclosure

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001, in accordance with Article 4(4) of Regulation (EC) No 1049/2001, we have come to the conclusion that the 51 documents mentioned below cannot be disclosed, as their disclosure is
Exceptions applicable under Article 4 Regulation (EC) No 1049/2001:

1) Article 4(1)(a), 3rd indent (“international relations”)  
The document to which you requested access contains information provided by a third country in the context of an investigation conducted by the IE SA, whose disclosure would undermine the protection of international relations between the USA and the concerned Member State, as well as between the USA and the EDPB as recipient of the document, given the confidential character of the exchange and information provided. As a result, these documents cannot be disclosed.

This exception applies to the following documents:
Documents 7, 7a, 14, 14a

2) Exception 4(1)(b) (“Privacy and integrity of the individual”):

The following documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. 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 EU legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EU) 2018/17251. When access is requested to documents containing personal data, Regulation (EU) 2018/1725 becomes fully applicable2. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available to date, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

This exception applies to the following document:
Documents 2, 2g, 2h, 2j, 3a, 6b, 8, 8c, 8d, 13a, 14a, 15a, 36, 36a

3) Article 4(2), 1st indent (“commercial interests of a legal person, including intellectual property”): The documents to which you requested access contain commercial information, the

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1 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.  
2 Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055. This case concerns the previous 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.
disclosure of which could result in undermining the protection of the commercial interests of the company mentioned in these documents.

This exception applies to the following documents:

Documents 2, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2q, 3, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 8, 8a, 8b, 8c, 8d, 13, 15, 15a, 36, 36a

4) Article 4(2), 2nd indent (“disclosure would undermine court proceedings”): The documents to which you requested access relate to ongoing proceedings before EU and/or Irish courts in different sets of proceedings, which are currently ongoing. The court proceedings could be jeopardised should these documents be disclosed. Therefore, the following documents cannot be disclosed.

This exception applies to the following documents:

Documents 2, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2q, 3, 3a, 3b, 3c, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 7, 7a, 7b, 7c part A, 7c part B, 7d, 7e, 7f, 7g, 7h, 7i, 7j, 7k, 7l, 8, 8a, 8b, 8c, 8d, 13, 13a, 14, 14a, 15, 15a, 36, 36a

5) Article 4(2), 3rd indent (“purpose of investigations”): The documents to which you requested access contain information obtained during the course of investigations performed by the Irish SA into cross-border processing activities. Please note that while the Article 65 procedure has concluded, the documents may still be relevant in the context of ongoing investigations conducted by the Irish SA. Therefore, if your requested documents were to be disclosed, this investigation process would be undermined.

This exception applies to the following documents:

Documents 2, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2q, 3, 3a, 3b, 3c, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 7, 7a, 7b, 7c part A, 7c part B, 7d, 7e, 7f, 7g, 7h, 7i, 7j, 7k, 7l, 8, 8a, 8b, 8c, 8d, 13, 13a, 14, 14a, 15, 15a, 36, 36a.

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. We have not been able to identify such an interest. We consider that the public interest is better served by preserving the mutual trust, openness and effective cooperation between (and amongst) the Irish SA, the EDPB members and the EDPB Secretariat protecting the internal deliberations and preliminary consultations so as to ensure effective operation of the Article 65 dispute resolution mechanism, which contributes to the consistent application of Regulation (EU) 2016/679 (GDPR). Therefore, the public interest weighs in favor of non-disclosure of the aforementioned internal documents.

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, we have considered whether partial access could be granted to the documents identified under point 2 “Full-non disclosure”. However, they are either entirely covered by one or more of the above-mentioned exceptions.

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under Article 4(2) of Regulation (EC) No 1049/2001, or the expungement of the information falling under the exceptions identified above is so significant that it renders the documents irrelevant, which is why they have not been provided. Please note that the application of the exceptions under Article 4 (1)(a) 3rd indent and 4 (2) are the ones leading to the full non-disclosure of the documents also covered by the exception under Article 4 (1) (b). The application of Article 4 (1) (b) alone would have led to a partial disclosure of those documents (redacting all the personal data).

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**Means of redress**

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the EDPB to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the following email address: edpb@edpb.europa.eu. Please make reference to the case number of your request in the subject.

Yours sincerely

Irene Loizidou Nikolaidou

Vice-Chair of the EDPB