EUROPEAN COMMISSION

Brussels, 10.4.2024
C(2024) 2504 final

Mr Alexander Fanta

DEcision of the eUropean commissiOn pUrSUANT to artiCle 4 of the impleMen ting ruLes to rEGUlation (EC) no 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/5812

Dear Mr Fanta,

I refer to your email of 29 November 2023, registered on the same day, by which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 4 October 2023, registered on the same day and addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to the following documents:

‘[A]ll documents related to exchanges with ASML since January 1, 2020. This is meant to include minutes of meetings, position papers, e-mails and any other document.’

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified the following documents as falling under the scope of your request:

– email from ASML dated 15/07/2021, reference Ares(2023)7814724 (hereinafter ‘document 1’);


Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
In its initial reply of 28 November 2023, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs granted wide partial access to document 1, subject only to redactions on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of the privacy and the integrity of the individual). Access to document 2 was refused on the basis of the first indent of Article 4(2) of Regulation (EC) No 1049/2001 (protection of the commercial interests).

In your confirmatory application, you request a review of this position as concerns document 2 and the use of the exception to access to documents laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001. You argue, I quote, ‘that DG Grow made an error in law by an overly broad application of this provision.’

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

During the processing of your confirmatory application, the Secretariat-General determined that your request falls under the remit of more than one Commission service. In order to allow for the correct handling of your request and the use of all means of redress, the Secretariat-General decided to open ex officio a split of case 2023/5812 at initial level. This new initial case was registered on 28 February 2024 under case number EASE 2024/1143 and attributed to the Directorate-General for Communications Networks, Content and Technology.

You will receive a reply in case 2024/1143 in due course. Please note that the handling of your present confirmatory application under reference 2023/5812 is independent from this newly created initial case and that this decision only concerns the review by the Secretariat-General of the initial reply provided by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs on 28 November 2023. As your confirmatory application addresses the Directorate-General’s refusal of access to document 2, the scope of the present confirmatory review is circumscribed to document 2.

Following this review, I am pleased to inform you that partial access can be granted to document 2, with redactions based on the exceptions under Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of the commercial interests) of Regulation (EC) No 1049/2001, for the reasons below.
2.1. Protection of the commercial interests

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides 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 first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (hereafter ‘TFEU’), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings and their business relations. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering ineffective Article 339 TFEU, over which it does not have precedence.

As the Court of Justice explained, ‘[i]n order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person. That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations […]’.

In addition, the sphere of information covered by obligation of professional secrecy benefits from the provisions of Article 339 TFEU. The Court of Justice of the European Union recognised that, ‘[i]n order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible’.

Document 2 contains the minutes of a meeting held between ASLM and the Director-General of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission. The redacted parts of the meeting minutes relate to the business strategies of ASML as well as ASML’s analyses of the international market development. This information is, as the Court has held in MasterCard and Others v Commission, commercially sensitive information. This information has not been made public and has been shared with the Commission in confidence. Therefore, the information

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contained in the minutes is clearly covered by the obligation of professional secrecy as held by the Court of Justice.

Granting access to this sensitive business information contained in the redacted parts *erga omnes* to the public would seriously undermine the commercial interests of the legal entity concerned as it would provide the company’s competitors with knowledge about its internal strategies. Especially sharing the company’s analyses of international market developments risks seriously harming their position vis-à-vis competitors from third countries. In the Secretariat-General’s view, access to such information may enable its competitors to adapt and orient their own commercial strategies based on the information received which may seriously undermine the commercial interests of the company concerned, in the competitive context.

Furthermore, ASML operates in a sector of strategic importance. Public disclosure of the redacted information would undermine the protection of the expertise and knowledge of the company in an intensely regulated and internationally competitive sector, thus prejudicing their legitimate commercial interests. In this respect, the information provided therein could be sensationalised or instrumentalised by third parties, competitors and clients in ways that could have real adverse impacts on the interests of the company concerned. Such a disclosure would put the company in a delicate position as regards its competitors and clients.

It should be noted that third parties should feel free to engage in a discussion with the European Commission and feel confident to share their views, positions, as well as confidential and commercially sensitive information, in trust that this will not be further disseminated putting at risk their interests. Therefore, disclosure of sensitive information, shared in confidence with European Commission services, could also discourage companies from speaking freely with European Commission representatives without the fear of adverse impacts to their interests.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the third parties at stake.

Consequently, the Secretariat-General confirms that the redacted parts of the document need to be protected based on the exception provided for in the first indent of Article 4(2) (protection of the commercial interests, including intellectual property) of Regulation (EC) No 1049/2001.

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6 Judgment of the General Court in *PTC Therapeutics International v European Medicines Agency (EMA)*, cited above, paragraph 85.
2.2. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

The Court of Justice has ruled that when a request is made for access to documents which contain personal data, 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 data7 (hereinafter ‘Regulation (EC) No 45/2001’) becomes fully applicable8.


However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

According to the Court of Justice, Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [the Data Protection] Regulation’10.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person’. As confirmed by the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life’11.

Document 2 contains the names of natural persons not acting in the capacity of a public figure as well as the names and functions of Commission staff not forming part of senior management.

10 European Commission v The Bavarian Lager judgment, paragraph 59.
11 Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
The names\textsuperscript{12} of the persons concerned, as well as other data from which their identity can be deduced\textsuperscript{13}, undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

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 “[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 (EU) 2018/1725, can the transmission of personal data occur.

The Court of Justice has ruled that the institution does not have to examine by itself the existence of a need for transferring personal data\textsuperscript{14}. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the institution must examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes 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 institution must 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, according to the above-mentioned provision, the Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the 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.

\textsuperscript{12} European Commission v The Bavarian Lager judgment, paragraph 68.
Consequently, the Secretariat-General has concluded that, pursuant to Article 4(1)(b) of Regulation (EC) No 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 the disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.\(^{15}\)

In your confirmatory application, you argue that ‘the Commission is increasingly relying on the commercial interest exception to keep the content of lobby meetings from the public. I believe this to be in contravention to the right of transparency and the principle of good administration. What stakeholders say vis-à-vis the Commission as part of public procurement decisions, in regard to subsidies or in ongoing lawmaking procedures should be held to the highest standards of transparency. I see a clear overriding public interest in disclosure.’

In its *ClientEarth v Commission* judgment, the Court held that a general reference to the principle of transparency is not sufficient to substantiate an overriding public interest in disclosure.\(^{16}\) In its judgment in the *Strack* case,\(^ {17}\) the Court of Justice ruled that, in order to establish the existence of an overriding public interest in transparency, an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.\(^ {18}\) This judgment was recently confirmed by the General Court.\(^ {19}\)

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The arguments put forward in your confirmatory application do not demonstrate a pressing need for the disclosure of the relevant parts in the document.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the interests protected by the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

Please note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

Enclosure: (1)

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