Subject: Request for access to documents
Ref.: Your request of 4 March 2024, registered under reference EASE 2024/0965.

Dear Mr Kiezebrink,

I refer to your application under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, by which you request access to:

1. “Any correspondence between representatives of Klesch Group Holdings Limited, Klesch Refining Denmark A/S, Raffinerie Heide GmbH, and companies affiliated to these entities on the one hand, and the European Commission on the other hand with respect to the Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices

2. Any correspondence between representatives of the aforementioned companies and the European Commission with respect to ICSID Case No. ARB(AF)/23/1, including the notice of arbitration

3. Any other correspondence between representatives of energy companies and the European Commission with respect to (possible) arbitration proceedings, involving either the EU or any EU member state, in relation to Council Regulation (EU) 2022/1854”.

Kindly note that your application has been split into two parts: the part regarding points 2 and 3 is handled by the Legal Service (2024/0965) and the part regarding point 1 is handled by DG ENER (2024/1607). The present reply addresses the parts under the responsibility of and the documents held by the Legal Service.

1. IDENTIFICATION OF THE DOCUMENTS

The Legal Service has identified, as matching the terms of your request, the correspondence between the companies referred to above and the European Commission in the following three cases:

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¹ OJ L 145, 31.05.2001, page 43.
In response to your request, I regret to inform you that access to the documents identified cannot be granted, since the proceedings in the above-mentioned cases are not definitely finalised.

Consequently, the documents must be protected under the exception provided for under Article 4(2) second indent of Regulation (EC) No 1049/2001 ("protection of court proceedings").

2. PROTECTION OF COURT PROCEEDINGS

Article 4(2) second 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 [...] court proceedings [...] unless there is an overriding public interest in disclosure".

The purpose of this exception concerning the protection of court proceedings is to maintain the independence of the European Union’s institutions in their dealings with the courts, to protect the integrity of the court proceedings and to ensure the proper course of justice.

In this regard, the Court of Justice has stated in its judgment in joined cases C-514/07P, C-528/07P and C-532/07P (API judgment) that the pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently part of the judicial activities of the Court and these activities are as such excluded from the scope of the right of access to documents without any distinction being drawn between the various procedural stages, in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity5.

In addition, the Court has recognised the existence of a general presumption under which "disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending6".

Furthermore, the General Court has also recognized that the scope of the exception relating to the protection of court proceedings can also be applied to all court proceedings including those outside the EU/Member States7, as in the present case proceedings before the World Bank’s International Centre for Settlement of Investment Disputes (ICSID).

Therefore, public disclosure of the documents regarding those three pending cases, at this stage, would undermine the proceedings concerned and the atmosphere of total serenity.

In light of the above, I consider that the requested documents are clearly covered by the exception provided for in Article 4(2) second indent of Regulation (EC) No 1049/2001 and cannot be disclosed for as long as the arbitral cases remain pending.

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2 Case Details | ICSID (worldbank.org)
3 Case Details | ICSID (worldbank.org)
4 Case Details | ICSID (worldbank.org)
6 Ibid, paragraph 94.
Please note that in accordance with the case law of the Court of Justice, the Commission is entitled to refuse access to documents covered by a general presumption, without having to carry out a specific and individual examination of these documents.

3. OVERRIDING 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 documents. 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) second indent. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused documents that would outweigh the public interest in the protection of the ongoing proceedings.

4. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application 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 Brussels
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[signed electronically]
Daniel CALLEJA

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