



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels,
trade.a.5(2017)6939957

***By registered letter with acknowledgment
of receipt:***

Mr Ekaitz Cancela
Errekatxu Kalea nº13
48902 Bilbao,
Spain

Advance copy by email:
ask+request-4406-59bd775b@asktheeu.org

**Subject: Your application for access to documents – Ref. GestDem No
2017/3682 - Batch II**

Dear Mr Cancela,

We refer to your e-mail of 20 June 2017 in which you made a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on 21 June 2017 under the reference number GestDem 2017/3682.

By letter of 24 October 2017 (Ares(2017)5190429) we provided you with a first batch of 64 documents identified under the scope of your request. The present reply concerns a second and last batch of 12 documents.

We would like to apologise for the time it has taken to finalise our reply. The delay is due to large number of complex access to documents requests pending simultaneously with DG TRADE, as well as the wide scope of your request, which required that we identify and assess quite a number of documents.

1. SCOPE OF YOUR REQUEST

You requested access to:

¹ OJ L 145, 31.5.2001, p. 43.

(1) *"minutes and other reports of the meetings of the European Commissioner for Trade, Cecilia Malmström and other officials and representatives of his DG about all the issue related to digital trade (including those of Data Flows, data localisation and data transfer) with private providers of digital services (including tech companies and tech industry groups such as ESF, Digital Europe or Business Europe, but also lobby consultancies, law firms and others working for tech industry clients or otherwise representing the tech industry) in the EU between January 1st 2012 and today;*

(2) *all information related with the DG Trade launching - on the day of the adoption of the "privacy shield" adequacy decision - of an Inter-Services Consultation on data flows in preparation of presenting a proposal at the TTIP and TiSA rounds, where more than 10 DGs contributed."*²

As mentioned above, by letter of 24 October 2017 we provided you with 64 documents falling under points (1) and (2) of your request. This reply covers 12 remaining documents under point (1).

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,³ 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. 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 pose 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 Articles 4.2 and 4.3 of Regulation 1049/2001, the institution is required *"to ascertain whether there is any overriding public interest justifying disclosure"*.⁴

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁵ *"the exceptions to that right [...] must be interpreted and applied strictly"*.⁶

² In your of email of 12 July 2017 you agreed to reduce the scope of your application by excluding from your request *"minutes and other reports of the meetings with stakeholders like AccessNow, BEUC or other NGOs, which are not private providers"*.

³ 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.

⁴ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁵ See Regulation (EC) No 1049/2001, recital (4).

⁶ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

Having carefully examined the documents identified above in light of the applicable legal framework, I am pleased to **release all 12 documents**. A list of these documents is provided in Annex 1,⁷ and copies are enclosed.

In all documents except document 11, personal data were removed pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001").⁸ However, names of senior managers of the Commission (at Director level and above), members of Cabinet, senior managers of private entities and public figures, are disclosed.

Certain passages in document 8 were redacted as they are protected by the exception set out in Article 4.2 first indent (commercial interest of a natural or legal person).

The reasons justifying the application of these exceptions are set out below in Sections 2.1 and 2.2. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

Please note also that certain parts of documents 3, 4, 10 and 11 were marked "out of scope" as they concern topics that are unrelated to the subject matter of your application.

2.1. Protection of privacy and integrity of the individual

Article 4.1(b) of Regulation 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 "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety."⁹

Article 2(a) of Regulation 45/2001 provides that "'personal data' shall mean any information relating to an identified or identifiable natural person [...]". In this respect, the jurisprudence of the EU Courts has clarified that activities of a professional nature may fall

⁷ For each of the documents the list provides a registration number, date and the name of the organization, and it indicates whether parts are withheld and if so under which ground pursuant to Regulation 1049/2001.

⁸ Regulation (EC) No 45/2001 of the European Parliament and the 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, OJ L 8, 12.1.2001, p. 1.

⁹ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64

within the notion of 'private life'¹⁰ and that "surnames and forenames may be regarded as personal data"¹¹, including names of the staff of the institutions¹².

In accordance with Article 8(b) of Regulation 45/2001, personal data may be transferred to recipients if they establish *"the necessity of having the data transferred"* and additionally *"if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data."*¹³

Documents 1 to 10 and document 12 contain names and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

2.2. Protection of commercial interests

Article 4.2 first indent of Regulation 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"*.

Not any information concerning a company and its business is protected under Article 4.2 first indent.¹⁴ However, information which is covered by the obligation of professional secrecy is likely to fall within the scope of this exception.¹⁵ Therefore, it must be information that is *"known only to a limited number of persons "*, *"whose disclosure is liable to cause serious harm to the person who has provided it or to third parties"* and for which *"the interests liable to be harmed by disclosure must, objectively, be worthy of protection."*¹⁶

Certain passages in documents 8 have been withheld because they contain commercially sensitive information of individual companies, and reveal their views, interests and

¹⁰ Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹¹ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹² Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹³ Judgment in C-127/13 P *Guido Strack v Commission*, EU:C:2014:2250, paragraph 107 and judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

¹⁴ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁵ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁶ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

concerns regarding specific markets and elements that they would like to be tackled in certain negotiations. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the stakeholders concerned, as it could be exploited to the detriment of their interests by competitors, and harm the relations that these operators have with regulators and other relevant actors on the market.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4.2 of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. Accordingly, we have also considered whether the risks attached to the release of the withheld parts of document 8 are outweighed by the public interest in accessing these passages. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions for its ongoing negotiations with third countries without undermining the commercial position of the entities involved.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make 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 Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Brussels

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

Yours sincerely,



Jean-Luc DEMARTY