



EUROPEAN COMMISSION

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Mr Pascoe SABIDO
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 – GESTDEM 2018/484**

Dear Mr Sabido,

I refer to your email of 9 February 2018, registered on 12 February 2018, by which you request, pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents², a review of the position taken by the Directorate-General for Taxation and Customs Union in reply to your initial application of 22 January 2018.

1. SCOPE OF YOUR REQUEST

By your initial application of 22 January 2018, you had requested access to ‘documents which contain the following information:

- a list of all lobby meetings held by DG TAXUD, since 24 June 2016 on Brexit and the [A]rticle 50 [TEU] negotiations on the UK’s exit from the EU. The list should include: date, Commission attendees, the name of the organisation(s) attending, and a more precise topic if that exists.
- minutes of all lobby meetings held by DG TAXUD, since 24 June 2016 on Brexit and the [A]rticle 50 [TEU] negotiations on the UK's exit from the EU.
- any correspondence with lobbyists held by DG TAXUD, since 24 June 2016 on Brexit and the article 50 negotiations on the UK’s exit from the EU.’

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.05.2001, p. 43.

Through its initial reply dated 8 February 2018, the Directorate-General for Taxation and Customs Union:

- informed you that only one meeting is covered by your request, which took place on 23 June 2017 with the European Travel Retail Confederation regarding the impact, in the framework of Brexit, of reintroducing duty and tax free sales; and
- refused access to the requested documents based on the exceptions of Article 4(2), first indent (protection of commercial interests) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001.

Through your confirmatory application, you request a review of the position of the Directorate-General for Taxation and Customs Union. You put forward a number of arguments to support your request. These have been taken into account in our assessment, of which the results are described below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

The European Commission has identified two documents as falling under the scope of your request:

- the minutes of the meeting with the European Travel Retail Confederation mentioned under point 1 (document 1); and
- an exchange of e-mails with the International Road Transport Union that took place in June 2017 (document 2).

Having examined your confirmatory application, I would like to inform you that, after consultation of the third-party author in accordance with Article 4(4) of Regulation 1049/2001, wide partial access is granted to both documents, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual), for the reasons set out below.³

Article 4(1)(b) of Regulation 1049/2001 provides that ‘the 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 requested documents contain personal data such as names or e-mail addresses.

³ The decision to provide wide partial access in this case is without prejudice to the need to protect other documents related to the ongoing ‘Article 50 TEU negotiations’ in order to safeguard the interests protected by the exceptions of Article 4 of Regulation 1049/2001.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁴ (hereafter ‘Data Protection Regulation’) becomes fully applicable⁵.

Article 2(a) of the Data Protection Regulation provides that personal data ‘shall mean any information relating to an identified or identifiable person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’. According to the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”’⁶. The names⁷ of the persons concerned as well as other data from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.⁸ Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In its judgment in the *ClientEarth* case, the Court of Justice ruled that ‘whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access’⁹. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹⁰.

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you.

⁴ 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, Official Journal L 8 of 12 January 2001, page 1.

⁵ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

⁶ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁷ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

⁸ *Idem*, paragraphs 77-78.

⁹ Judgment of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

¹⁰ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. NO PARTIAL ACCESS

As indicated above, wide partial access is granted to both documents identified, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual). Please find attached the redacted versions of these documents.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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
Martin SELMAYR
Secretary-General

Enclosures: 2