EUROPEAN COMMISSION

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Ms Nina RENSHAW
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/1754**

Dear Ms Renshaw,

I refer to your email of 8 June 2018, registered on 18 June 2018, in 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[2] (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 22 March 2018, addressed to the Directorate-General for Trade, you requested access to:

> '- all reports (and other notes) from meetings between Directorate-General Trade and representatives of the tobacco industry (producers, distributors, importers etc., as well as trade associations and chambers of commerce, or other organisations and individuals that work to further the interests of the tobacco industry) related to the negotiations [between the European Union and the Southern Common Market[3]], since [1] January […] 2017;

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.
3 The Southern Common Market is also called Mercosur.

- all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc., as well as trade associations and chambers of commerce, or other organisations and individuals that work to further the interests of the tobacco industry) since [1] January […] 2017;

- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence).'

In its initial reply of 25 May 2018, the Directorate-General for Trade identified five documents as falling under the scope of your request[4]. It gave you wide partial access to three of them (documents 1, 3 and 4), where only personal data was redacted based on the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual). The two remaining documents (documents 2 and 5) contained redactions based on Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(1)(a), third indent (protection of international relations), and Article 4(2), first indent (protection of commercial interests of a natural or legal person), of Regulation (EC) No 1049/2001.

The exception applicable to each redacted part of the documents was clearly indicated in the documents that the Directorate-General for Trade transmitted to you. It also clearly marked those parts of documents not falling within the scope of your request.

Through your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I address in the corresponding sections below.

Please note that, subsequent to your confirmatory application, three further documents were identified:

- an e-mail from Japan Tobacco International (document 6), including an attachment (annex to document 6), addressed to the Directorate-General for Trade and dated 1 December 2017 (Ares(2018)2903806);
- an e-mail from Philipp Morris International (document 7), addressed to the Directorate-General for Trade and dated 5 October 2017 (Ares(2018)2903706); and
- an e-mail from Philipp Morris International (document 8), addressed to the Directorate-General for Trade and dated 24 October 2017 (Ares(2018)2903569).

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

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

[4] Please see Annex I of the initial reply.

Following this review, I would like to inform you that:

- wider partial access is granted to documents 2 and 4 (see point 2.1);
- wide partial access is granted to document 6, subject to the redaction of personal data only on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual); and
- partial access is granted to document 8, where the redactions are based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(1)(a), third indent (protection of international relations), and Article 4(2), first indent (protection of commercial interests of a natural or legal person), of Regulation (EC) No 1049/2001.

As regards the annex to document 6, document 7 and the remaining redacted parts of the documents disclosed at the initial stage, I have to inform you that I have to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(1)(a), third indent (protection of international relations), and Article 4(2), first indent (protection of commercial interests of a natural or legal person), of Regulation (EC) No 1049/2001.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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 the names of natural persons not occupying any senior management position in the European Commission or not being a main representative of the company in question, or information from which their identity can be deduced.

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 45/2001[5] (hereafter 'Data Protection Regulation') becomes fully applicable[6].

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

[5] 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, p. 1.

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

[…] nature from the notion of "private life"'[7]. The names[8] 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 (EC) No 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.[9] Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EC) No 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'[10]. I also refer 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 data[11].

Your confirmatory request does not contain any motivation as to the necessity of the transfer of the non-disclosed personal data. You merely argue that 'this information should be accessible to the public in order to enable scrutiny of who is influencing EU decision-making processes' and that 'there is also no clear reason why one dat[a] should be redacted, but the other not'.

In this respect, I would like to underline that the names of the companies were disclosed, which enables the scrutiny you mention above to be carried out. I equally would like to clarify that the European Commission discloses the names of natural persons occupying a senior position in the European Commission's Cabinets or its administration, as well as the names of the main representative(s) of third parties such as companies. The reason for this disclosure is that these persons are public figures who have a responsibility for representing the views of their respective organisations towards the outside. This does, however, not mean that the names of natural persons occupying lower-level functions must be disclosed.

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7 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.

8 Idem, paragraph 68.

9 Idem, paragraphs 77-78.

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

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

I have to conclude, therefore, that you have not established the necessity of having the data in question transferred to you.

Therefore, the use of the exception under Article 4(1)(b) of Regulation (EC) No 1049/2001 is justified, as there is no need to disclose publicly 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.

I note, however, that documents 2 and 4 contain unjustified redactions of two names of the main representatives of third parties as well as the validation date you mention in your confirmatory application. Consequently, please find attached new versions of these documents, where the parts in question are not redacted.

2.2. Protection of international relations

Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 provides that the 'institutions shall refuse access to a document where disclosure would undermine the protection of […] the public interest as regards […] international relations […]'.

As explained by the Directorate-General for Trade in its initial reply, the (parts of) documents in question were meant for internal use as a basis to establish European positions, strategies, objectives and the way forward on specific aspects of the trade negotiations between the European Union and the Southern Common Market, which are still ongoing. During such negotiations, the European Commission gathers privileged information from external stakeholders to feed into the definition of its negotiating position on individual issues and its overall negotiating strategy. External stakeholders share such information so that the European Commission can determine how best to position itself in the negotiations in order to protect its strategic interests as well as those of its industry, workers and citizens.

The (parts of the) documents in question would reveal the concerns, strategic interests, and priorities of relevant stakeholders as well as allow conclusions on their internal assessment of the ongoing negotiations with the Southern Common Market. At the same time, this information would indirectly reveal negotiating priorities, strategic objectives and tactics which the European Commission could consider pursuing in its trade negotiations more generally. This would weaken the negotiating position of the European Union in these negotiations and would hence damage the protection of the public interest as regards international relations.

More generally, releasing this information submitted by external stakeholders would constitute the clear and non-hypothetical risk that external stakeholders would no longer provide similar information to the European Commission in the future. This means that the European Commission would be deprived of the possibility to obtain precise and relevant information allowing it objectively to assess its negotiating options in these negotiations with the Southern Common Market as well as with other partners. The negotiation power of the European Commission would consequently be affected and its

position in the negotiations weakened, which in turn would more generally damage the protection of the public interest as regards international relations.

The Court of First Instance[12] has ruled in this respect that 'in considering that disclosure of that note could have undermined relations with the third countries which are referred to in the note and the room for negotiation needed by the Community and its Member States to bring those negotiations to a conclusion, the Council did not commit a manifest error of assessment and was right to consider that disclosure of the note would have entailed the risk of undermining the public interest as regards international relations'.[13]

The General Court equally clarified 'that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiation'.[14]

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 on the grounds of protecting the public interest as regards international relations is justified, and that access to the (parts of) documents in question must be refused on that basis.

2.3. Protection of commercial interests of a natural or legal person

Article 4(2), first indent, 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'.

As explained under point 2.2, the (parts of) documents in question could reveal external stakeholders' main business concerns, strategic interests, priorities and their internal assessment and input for the ongoing negotiations with the Southern Common Market. This information was submitted to the European Commission based on the assumption that it would remain confidential. As explained by the Directorate-General for Trade in its initial reply, there is a clear and non-hypothetical risk that the disclosure of the withheld information could be used by competitors, giving them an unfair advantage, and hence undermine the commercial interests of the companies. Bringing into the public domain specific business-related information that companies share with the Commission in this context may also prevent the Commission from receiving access to such information in the future.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent, of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests is justified, and that access to the (parts of) documents in question must be refused on that basis.

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12 Please note that the Court of First Instance became the General Court.

13 Judgment of 25 April 2007, *WWF European Policy Programme v Council of the European Union*, T-264/04, EU:T:2007:114, paragraph 41.

14 Judgment of 19 March 2013, *Sophie in't Veld v European Commission*, T-301/10, ECLI:EU:T:2013:135, paragraph 120.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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.

In your confirmatory request, you state that there would be an overriding public interest, namely 'the public interest in protecting […] public health'. I note that these considerations are of a general nature and have no direct link with the particular circumstances of this case. However, general considerations cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question[15]. Based on the elements at my disposal, I have also not been able to establish the existence of such an overriding public interest.

Tobacco is an agricultural product that is legal both in the European Union and outside, and is therefore traded freely on the world market.

There are of course serious public health concerns related to tobacco and tobacco products, and they are therefore highly regulated products in the European Union and third country markets.

However, as in any other free trade agreement, such an agreement with the Southern Common Market is expected to reduce import duties on nearly all products imported by the European Union. Thus, import tariffs on tobacco could be removed as in all other sectors. Import tariffs are a tool for the protection of domestic industries. Thus, rather than using import tariffs as a tool to achieve public health objectives, non-discriminatory excise duties, which apply to all tobacco products marketed and not just to imports, are a better tool for achieving these.

As in any other free trade agreement, each party will retain the right to tax and regulate tobacco products as much as it deems appropriate. In consequence, I consider that in this case, there is no overriding public interest that would outweigh the public interest in safeguarding the commercial interests protected by Article 4(2), first indent, of Regulation (EC) No 1049/2001.

The fact that the documents requested relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[16], provides further support to this conclusion.

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15 Judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

16 Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, paragraphs 53-55 and 60; judgment of 29 June 2010, *Commission* v *Bavarian Lager*, C-28/08 P, paragraphs 56-57 and 63.

With regard to the protection of international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001) and privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001), please note that these exceptions are absolute exceptions that do not require the institution to balance the exceptions defined therein against a possible public interest in disclosure.

4. PARTIAL ACCESS

As indicated above under point 2,

- wider partial access is granted to documents 2 and 4; and
- partial access is granted to documents 6 and 8.

These partially redacted documents are attached to the present Decision. The exception applicable to each redacted part of the documents is clearly indicated in these documents.

As regards the annex to document 6 as well as document 7, I have also examined the possibility of granting partial access in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, no meaningful partial access is possible once all parts of the document protected by Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(1)(a), third indent (protection of international relations), and Article 4(2), first indent (protection of commercial interests), of Regulation (EC) No 1049/2001 are redacted.

5. 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
Martin SELMAYR
Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Enclosures: (4)