



EUROPEAN COMMISSION

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Mr Peter Teffer
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION NO 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation No 1049/2001 - GESTDEM 2018/5395**

Dear Mr Teffer,

I refer to your e-mail of 15 November 2018, registered on 16 November 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 documents² (hereafter 'Regulation No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 17 September 2018, registered under reference number GestDem 2018/5395 and dealt with by the Directorate-General for Neighbourhood and Enlargement Negotiations, you requested access to 'all documents – including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines[-]to[-]take, e-mails, and presentations – related to the meeting [held on 1 October 2018] between Kyriacos Charalambous [Member of the Cabinet of Commissioner Hahn] and British American Tobacco'.

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

² Official Journal L 145 of 31.5.2001, p. 43.

The Cabinet of Commissioner Hahn, with the assistance of the Directorate-General for Neighbourhood and Enlargement Negotiations, identified e-mail exchanges between European Commission officials and a Member of this Cabinet, and between the latter and representatives of the company 'British American Tobacco', as falling within the scope of your request.

At the initial stage, the Directorate-General for Neighbourhood and Enlargement Negotiations, on behalf of the Cabinet of Commissioner Hahn, granted partial access to these e-mails on the grounds of Article 4(1)(a), third indent, of Regulation No 1049/2001 (protection of the public interest as regards international relations) and Article 4(3), second subparagraph, of the same Regulation (protection of the decision-making process).

Please note, however, that the above-referred correspondence was not registered in its entirety. Attached to this letter is the full registered version, with the reference number Ares(2018)6593848, dated 20 December 2018 (hereafter 'Document 1').

Please also note that the document attached to the initial decision contained personal data including names, surnames and contact details of third party representatives and European Commission staff members. This data has to be protected in accordance with Article 4(1)(b) of Regulation No 1049/2001 (protection of privacy and the integrity of the individual) and the new Data Protection Regulation³ (hereafter 'Regulation No 2018/1725').

I therefore ask you to disregard the document in question, to delete it from your records and, should you have circulated it to other recipients, to inform the latter and ask them to do the same.

In your confirmatory application, you request a review of the initial decision and you put forward a series of arguments in support of your request. These have been taken into account in the assessment, the results of which are detailed in the sections below.

You also contest that the only document identified as falling within the scope of your application is the one partially released at the initial level.

I would like to inform you that the European Commission has identified two documents that were drawn up after the date of the initial reply and that fall under your request:

- e-mail from an official of the European Commission to a Member of the Cabinet of Commissioner Hahn (reference Ares(2018)6061113, dated 27 November 2018, hereafter 'document 2'); and

³ Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, Official Journal L 205 of 21.11.2018, p. 39.

- e-mail exchanges between an official of the European Commission and representatives of British American Tobacco, reference Ares(2018)6061113, dated 27 November 2018 ('document 3').

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 1049/2001

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

Having carried out an assessment of your confirmatory application in light of the provisions of Regulation No 1049/2001, I can inform you that:

- partial access is granted to document 2, subject to the redaction of personal data only on the basis of Article 4(1)(b) of Regulation No 1049/2001 (protection of privacy and the integrity of the individual);
- partial access is granted to document 3, subject to the redaction of personal data only on the basis of Article 4(1)(b) of Regulation No 1049/2001 (protection of privacy and the integrity of the individual);
- further partial access is granted to document 1. The undisclosed parts of this document are covered by the exceptions relating to the protection of international relations and the protection of the decision-making process, provided for respectively in the third indent of Article 4(1)(a) and in the first and second subparagraphs of Article 4(3) of Regulation No 1049/2001.

The detailed reasons are set out below.

2.1. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation 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 [...]'.

In your confirmatory application, you do not question the applicability of the above-mentioned exception to the document identified at the initial stage. Nevertheless, I would like to provide additional explanations on how the public release of the relevant undisclosed parts of document 1 would undermine the public interest protected by this exception.

As per settled case law, the disclosure of European Union positions in international negotiations can damage the protection of the public interest as regards international relations.⁴ The above-mentioned exception can be invoked if the disclosure might entail negative repercussions for the European Union's relations with third countries.⁵

Furthermore, the Court of Justice stressed in the *In 't Veld* ruling that the institutions 'must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001] could undermine the public interest'.⁶

Consequently, 'the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.⁷

Parts of document 1 concern international negotiations between the European Union and Kosovo*.⁸ These parts have been examined in light of the above-mentioned case law.

In particular, the document contains a briefing note sent to a Member of the Cabinet of Commissioner Hahn concerning draft excise legislation in Kosovo* and the compatibility between the latter and the Stabilisation and Association Agreement signed between the European Union and Kosovo*.⁹ The note in question reflects preliminary views of European Commission staff members regarding these matters. It also contains sensitive comments regarding the practical consequences that this may have on compliance with the Stabilisation and Association Agreement.

As the Directorate-General for Neighbourhood and Enlargement Negotiations stated in its reply, public access to the relevant parts of the document concerned would reveal, even indirectly, the Union's opinion on this matter. This would, in turn, undermine the position of the European Union in the context of negotiations with Kosovo*, which are not finalised. Indeed, the issue has been recently raised in bilateral meetings with the authorities of Kosovo*, including in the framework of the Legislative Review Mechanism¹⁰.

⁴ Judgment of 19 March 2013, *In 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 123.

⁵ Judgment of 7 February 2002, *Aldo Kuijer v Council of the European Union*, T-211/00, EU:T:2002:30, paragraph 65.

⁶ Judgment of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁷ Judgment of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁸ References to Kosovo are without prejudice to positions on status. They are in line with United Nations Security Council Resolution 1244/99 and the opinion by the International Court of Justice on the Kosovo declaration of independence.

⁹ Official Journal L 71, 16.3.2016, p. 3–321.

¹⁰ The main role of the Legislative Review Mechanism in the EU/EUSR Office in Kosovo is to provide timely and effective guidance to the local authorities on the alignment of the draft legislation with the European Union *Acquis* standards and best practices.

See: https://eeas.europa.eu/delegations/kosovo_en/1387/Kosovo*%20and%20the%20EU

Furthermore, the disclosure of the above-referred information would negatively affect relations with Kosovo*, as it would undermine the climate of mutual trust in the context of the negotiations, which is necessary to ensure the smooth implementation of the Stabilisation and Association Agreement.

Against this background, there is a risk that the disclosure of the briefing note would have an adverse impact on ongoing negotiation procedures on the compliance of Kosovo*'s legislation with European Union standards and would compromise the position of the European Union in these discussions. I consider this risk as reasonably foreseeable and non-hypothetical, given the sensitivity of the issue and the relevance of the above-mentioned information in the ongoing negotiations.

Consequently, I conclude that the relevant withheld parts of document 1 are protected against public disclosure pursuant to the exception provided for in Article 4(1)(a), third indent, of Regulation No 1049/2001.

2.2. Protection of the decision-making process

Article 4(3) of Regulation No 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

As stated above, the briefing note included in document 1 contains internal discussions on the compatibility of the draft excise legislation of Kosovo* with the Stabilisation and Association Agreement. The subject matter of the note concerns a decision-making process that has not been finalised and the bilateral discussions with the authorities of Kosovo* are ongoing.

Hence, the disclosure of the briefing note would reveal internal opinions on a question on which no final decision has been taken by the European Union. This could potentially cause confusion to the public, by placing in the public domain preliminary statements of staff members of the European Commission that do not necessarily reflect the final position of the Union.

In addition, there is a real and non-hypothetical risk of self-censorship by the services of the European Commission that monitor relations between the European Union and Kosovo* and assist the relevant Cabinet in implementing the Union agenda in the territory. Public access to the briefing note would cause serious harm to the relevant decision-making procedure, as the staff of the relevant services would become more wary of sharing their views openly if they knew that their opinions on this sensitive topic would be released to the public.

Consequently, I consider that the briefing note contained in document 1 is also protected under Article 4(3), first subparagraph, of Regulation No 1049/2001.

The remaining undisclosed parts of document 1 contain opinions exchanged within the European Commission for internal use as part of preliminary consultations before the meeting with British American Tobacco took place.

Public access to these parts would reveal opinions of European Commission officials regarding the conduct of relations with stakeholders of the industry sector concerned and the interaction with its representatives. Releasing these internal opinions is likely to cause serious harm to the relevant decision-making process, as it would deter staff members of the European Commission from putting forward their views on this and other related matters in an open and independent way and without being unduly influenced by the prospect of disclosure.

Indeed, as the General Court has held, ‘the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process’.¹¹

Therefore, the public release of the relevant withheld parts of document 1 is likely to cause serious harm to the decision-making process by severely affecting the ability of the European Commission to hold frank internal discussions on issues related to the interaction with private stakeholders. Given the likelihood of the internal debate being severely impoverished by the disclosure of internal opinions, I consider that this risk is reasonably foreseeable and non-hypothetical.

Please note that, given the limited volume of the relevant redacted parts, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the opinion of the staff members and, thereby, depriving the exception of its very purpose.¹²

In light of the above, the relevant undisclosed parts of document 1 should be protected in accordance with Article 4(3), second subparagraph, of Regulation No 1049/2001.

¹¹ Judgment of 15 September 2016, *Phillip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87.

¹² Please see in this respect: Judgment of 24 May 2011, *NLG v Commission*, T-109/05 and T.444/05, EU:T:2011:235, paragraph 82. See also Judgment of 8 February 2018, T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, EU:T:2018:75, paragraph 71.

2.3. Protection of the privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data. The applicable legislation in this field is Regulation No 2018/1725.

The documents identified under your request, including the documents identified at confirmatory level, contain personal data, in particular the names, surnames and contact details of staff members of the European Commission who do not hold any senior management positions. The documents also contain personal data from third parties, such as names, surnames and contact details. Indeed, Article 3(1) of Regulation No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information that, by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.¹³

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.¹⁵

Pursuant to Article 9(1)(b) of Regulation No 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 No 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation No 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative,

¹³ Judgment of 20 December 2017, *Peter Novak v Data Protection Commissioner*, C-434/16, request for a preliminary ruling, EU:T:2018:560, paragraphs 33-35.

¹⁴ Judgment of 29 June 2010, *Commission v the Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378.

¹⁵ Whereas this judgment specifically related to Regulation 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, the principles set out therein are also applicable under the new data protection regime established by Regulation No 2018/1725.

establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory 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, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that 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 requested, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I must conclude that, pursuant to Article 4(1)(b) of Regulation No 1049/2001, access cannot be granted to the personal data contained in documents 1 to 3, 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 disclosure of the personal data concerned.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3), first and second subparagraph, of Regulation 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.

In your confirmatory application, you argue that the public interest in transparency in the interactions with representatives of tobacco companies may override the public interest protected by the exceptions invoked in the initial decision, notably in light of the World Health Organisation Framework Convention on Tobacco Control.

Whilst I agree that there can be a public interest in knowing how interest groups interact with public representatives, this public interest has, in my view, been fulfilled by the partial access to the documents that is herewith granted, including the new documents provided at the confirmatory level.

Moreover, as regards the parts of document 1 that are redacted on the grounds of Article 4(3), first and second subparagraphs, of Regulation No 1049/2001, I consider that the arguments that you put forward in support of your request do not establish sufficiently how, in the present case, the public interest in transparency of the relations with private stakeholders is particularly compelling so as to prevail over the reasons justifying the refusal set out in section 2.2 above.

I would like to refer to the judgment of the Court of Justice in the *Strack* case¹⁶, where the Court ruled that, in order to establish the existence of an overriding public interest in transparency, it is not sufficient to rely merely on that principle. The applicant has to show why in the specific situation the principle of transparency is especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.¹⁷

Please note that the parts of document 1 covered by the exception provided for under Article 4(3), first subparagraph, of Regulation No 1049/2001 also warrant protection under Article 4(1)(a), third indent, of the same Regulation, for which no balancing test between an overriding public interest in disclosure and the public interest protected by the exception (international relations) is foreseen in the Regulation.

Therefore, I consider that, in this case, it has not been established that the public interest in openness in relations with private stakeholders from the tobacco industry would outweigh the public interest in safeguarding the decision-making process that, as explained in section 2.2, warrant protection under Article 4(3), first and second subparagraphs, of Regulation No 1049/2001. The fact that the relevant undisclosed parts of document 1 do not relate to a legislative act, for which the Court of Justice has acknowledged the existence of a need for wider openness,¹⁸ provides further support to this conclusion.

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

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation No 1049/2001, I have also considered whether partial access could be granted to the documents identified under your request.

As stated above, further partial access is herewith granted to document 1. In addition, partial access is granted to documents 2 and 3.

The undisclosed parts of documents 2 and 3 and parts of document 1 contain personal data that cannot be released for the reasons set out in section 2.3 above.

With regard to document 1, I consider that further access to the undisclosed parts of this document would seriously undermine the protection of the decision-making process for the reasons described in section 2.2 above. These parts are entirely covered by the exception laid down under Article 4(3), first and second subparagraphs, of Regulation No 1049/2001. Consequently, no meaningful further partial access to those documents is possible without undermining the interests protected under this exception.

¹⁶ Judgment 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128.

¹⁷ *Ibid*, paragraph 129.

¹⁸ Judgment of 28 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60.

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 European Commission
Martin SELMAYR
Secretary-General

Enclosures: (3)