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

Mr Olivier Hoedeman  
Corporate Europe Observatory (CEO)  
Rue d'Edimbourg 26  
1050 Brussels

***Advance copy by email:***  
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Dear Mr Hoedeman,

**Subject: Your application for access to documents – Ref GestDem No 2018/6660**

We refer to your email dated 11/12/2018 in which you make a request for access to documents on the basis of Regulation (EC) No 1049/2001<sup>1</sup>, registered on the same date under the above-mentioned reference number.

### **1. Scope of your request**

In your request, you asked access on the basis of Regulation (EC) No 1049/2001 to:

- *all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc, as well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry), since 05 February 2018.*
- *all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc. as well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry), since 05 February 2018.*
- *a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence)*

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<sup>1</sup> Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

We also refer to our e-mail of 01/02/2019 (Ares(2019)598825) sent to you on the same day, in which we disclosed some reports and other notes from meetings between the European Commission and representatives of the tobacco industry falling within the scope of the first part of your request. As explained in this letter, considering the large number of documents concerned by your request as well as the need of consulting the third parties originators of the documents, we proposed to divide our reply in 4 batches.

We also refer to our e-mails of 22/02/2019 (Ares(2019)1135461), 21/05/2019 (Ares(2019)3328205) and 23/08/2019 (Ares(2019)5367190), in which we assessed and disclosed additional documents falling under the scope of your request.

Please note that this is the final batch of documents disclosed to you under your request of 11/12/2018. We would like to inform you that the work related to identifying and processing the documents which have been analysed under this request has amounted to a total of more than 40 working days of exclusive dedication of a full-time employee of the Commission. Should you wish to be granted access to other documents, we kindly invite you to lodge a new access to documents request, specifying as much as possible the documents you are requesting in order to allow the Commission services to process your request as efficiently as possible.

## **2. Assessment of the documents**

Under this final batch, we have identified 93 documents falling under the scope of your request.

Since some of the requested documents originate from third parties, the originators of the documents have been consulted in accordance with Regulation (EC) No 1049/2001, in order to assess whether an exception to the right of access to documents is applicable.

Having examined the documents and considered the opinions of these third parties, we have come to the conclusion that:

- i. full access can be granted to 12 documents indicated with "Yes" in the list of documents;
- ii. no access can be granted to 81 documents and indicated with "No" in the list of documents.

You may re-use Commission documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Documents originating from third parties cannot be re-used without the agreement of the originators.

## **3. Reasons for refusal**

***Protection of the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data - Article 4(1)(b) of Regulation (EC) No 1049/2001***

Pursuant to Article 4(1)(b) of Regulation (EC) 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 Union legislation regarding the protection

of personal data. The applicable legislation in this field is Regulation (EC) No 2018/1725<sup>2</sup> 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.

All documents to which no access can be granted contain personal data such as names and surnames as well as signatures of Chief Executive and Financial Officers, as well as Presidents of the interested companies. Indeed, Article 3(1) of Regulation 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, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data<sup>3</sup>.

In its judgment in Case C-28/08 P (Bavarian Lager)<sup>4</sup>, 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<sup>5</sup>.

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a 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, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your 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.

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<sup>2</sup> Official Journal L 205 of 21.11.2018, p. 39.

<sup>3</sup> Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Novak v Data Protection Commissioner, request for a preliminary ruling, ECLI:EU:T:2018:560, paragraphs 33-35.

<sup>4</sup> Judgment of 29 June 2010 in Case C 28/08 P, European Commission v The Bavarian Lager Co. Ltd, EU:C:2010:378, paragraph 59.

<sup>5</sup> Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, 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, we conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, 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.

***Protection of the commercial interests of a legal person – Article 4(2), first indent, of Regulation (EC) No 1049/2001***

Documents indicated with “No” in the table consist of all the documents required by the Commission (see Part A of Annex I to the Commission Implementing Regulation (EU) 2018/574) to assess the independence of the proposed data storage providers and data storage contracts to be concluded as part of the traceability system for tobacco products between manufacturers/importers with their chosen providers. These documents (i.e. data storage contracts, correspondence tables, written declaration of technical and operational expertise, written declaration of legal and financial independence) contain commercially sensitive business information, such as the price concluded between the parties, as well as intellectual property, trade secrets, business and know-how information. Its disclosure would provide information to competitors which may cause damage to the company.

Having analysed the documents in question, we concluded that no access can be granted to those documents in view of the exception laid down in Article 4(2), first indent, of Regulation (EC) No 1049/2001. We have further considered whether partial access could be granted to the documents requested, in accordance with Article 4(6) of the Regulation. It follows from the assessment made above that these documents are entirely covered by the exception laid down in Article 4(2), first indent.

**4. Overriding public interest**

The exception to the right of access provided for in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosing the requested documents. In your application, you did not submit any grounds concerning a public interest on the basis of which the interests protected in Regulation (EC) No 1049/2001 would have to be overridden, and we could not identify any such ground either. In these circumstances, we have to conclude that there is no evidence of an overriding public interest in disclosure, in the sense of Regulation (EC) No 1049/2001.

## **5. Means of redress**

In accordance with Article 7(2) of Regulation (EC) No 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  
Secretariat-General  
Transparency, Document Management and Access to Documents (SG.C.1)  
BERL 7/076  
B-1049 Brussels  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Anne Bucher