



EUROPEAN COMMISSION

Brussels, 23.12.2018
C(2018) 9224


FFII




**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - Gestdem 2017/5658**

Dear ,

I refer to your email of 8 August 2018, registered on the same day, 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 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 20 October 2017, you requested access to the negotiation mandate and negotiating documents related to the Free Trade Agreement between the European Union and the Republic of Korea.

In its reply, the Directorate-General for Trade identified 15 documents, listed in the annex to its reply, as falling under the scope of your application. It granted partial access to documents 9 to 15. The redactions were based on Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of the public interest as regards international relations) with regard to documents 9 to 12 and Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual) with regard to documents 13 to 15.

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

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

With regard to documents 1 to 8, access was fully refused, based on the protection of the public interest as regards international relations and the protection of privacy and the integrity of the individual, provided for respectively by Article 4(1)(a), third indent, and Article 4(1)(b) of Regulation 1049/2001.

In your confirmatory application, you request a review of this position and present arguments supporting this request. You also ask for the following additional documents:

- ‘the EU proposal on intellectual property rights sent to [the Republic of Korea] via an email dated April 20, 2009;
- the Korean message sent to the EU on May 7, 2009;
- letter of the EU Chair [...] that the criminal enforcement should be included in the final text of the Agreement;
- record of a telephone conversation agreed on June 5, 2009;
- negotiation documents [exchanged] between the [Republic of Korea] and [the] EU on the [intellectual property rights] criminal proposal until September 2009’.

Your arguments have been taken into account in our assessment, the results of which 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 relevant Directorate-General at the initial stage.

Following a renewed search for documents, the Commission services have identified the following additional documents:

- cover e-mail containing a flash report of a videoconference with the Republic of Korea and its attachment (the Korean counter-proposal), dated 12 June 2009 (‘document 16’);
- cover e-mail containing details on the videoconference with the Republic of Korea and its attachment (the same Korean counter-proposal), dated 10 June 2009 (‘document 17’);
- cover e-mail and its attachment containing the EU’s proposal on intellectual property rights enforcement dated 20 April 2009 (‘document 18’);
- cover e-mail and its attachment containing the criminal enforcement provisions to be inserted into the Free Trade Agreement between the EU and the Republic of Korea dated 22 May 2009 (‘document 19’);
- cover e-mail and its attachment containing the negotiating document representing the position of EU Member States on criminal provisions, dated 9 July 2009 (‘document 20’).

Please find attached an updated list of documents.

Following the review by the Secretariat-General of the reply given by the Directorate-General for Trade at the initial stage, I can inform you that:

- partial access is granted to documents 1 to 8 identified at the initial stage, as well as to documents 16 to 20 identified at the confirmatory stage; and
- no further access is granted to documents 9 to 15, to which partial access was given at the initial stage.

The redacted parts of the documents are based on the exceptions relating to the protection of the public interest as regards international relations and the protection of privacy and the integrity of the individual, provided for respectively by Article 4(1)(a), third indent, and Article 4(1)(b) of Regulation 1049/2001. Please note that, in the annexes, the applicable exceptions are indicated beside each redaction by reference to the applicable Article of Regulation 1049/2001.

Consultation of the national authorities and the Council

According to Articles 4(4) and 4(5) of Regulation 1049/2001, the institution shall consult the Member States with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document(s) shall or shall not be disclosed.

Two of the documents requested originate respectively from the (then) Czech and Swedish presidencies of the Council. Under the provisions of Article 4(4) of Regulation 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, the consultation of the Czech and Swedish authorities was initiated by the Secretariat-General at the confirmatory stage.

The Czech authorities agreed with the disclosure of document 19, provided that personal data was redacted from the cover e-mail. The Swedish authorities agreed with the disclosure of document 20.

The Council of the European Union was also re-consulted at the confirmatory stage regarding the possible further disclosure of parts of the negotiating mandate (documents 13, 14 and 15). In its reply, the Council of the European Union indicated that the disclosure of further information would reveal nuances of the EU's negotiating strategy, weakening its position in future negotiations on free trade agreements.

Therefore, having due regard to the protection of the public interest as regards international relations, as provided for by Article 4(1)(a), third indent, of Regulation 1049/2001, the Council of the EU opposed further public access to the documents in question beyond what has been provided so far.

Taking into account the reply provided by the above-mentioned authorities, partial access is granted to documents 19 and 20, subject only to the redaction of personal data in accordance with Article 4(1)(b) of Regulation 1049/2001.

No further access to the documents emanating from the Council of the European Union is granted pursuant to the exception of Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of the public interest as regards international relations).

2.1 Protection of the public interest as regards international relations (concerning documents 1 to 8 and 13 to 17)

Article 4(1)(a), third indent, of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]’.

In accordance with settled case law, ‘disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union’³.

The Court of Justice has held that elements revealing the specific contents of an agreement under negotiation or the EU's strategic objectives can warrant protection according to the above-mentioned provision⁴.

Moreover, in the *In 't Veld* case, the General Court expressly alluded to the possibility that the protection of the public interest as regards international relations within the meaning of Article 4(1)(a), third indent, of Regulation 1049/2001 ‘can justify maintaining the confidentiality of the negotiating documents for a certain period after the end of those negotiations’⁵.

Furthermore, the General Court stressed that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, that 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’⁶.

Documents 1 to 8 are internal reports that do not represent the official positions of the European Union and the Republic of Korea on the negotiations. The undisclosed parts of these documents represent the personal opinions of Commission staff regarding the Republic of Korea’s role, motivations and stance with respect to the international negotiations related to the free trade agreement. They also indicate prospects for the future EU-Korea relationship and the EU’s policy options and approach towards the Republic of Korea and other third countries on questions that are not only related to

³ Judgment of 19 March 2013 in Case T-301/10, *In 't Veld v Commission*, EU:T:2013:135, paragraph 125.

⁴ Judgment of 3 July 2014 in Case C-350/12, *Council v In 't Veld*, EU:C:2014:2039, paragraph 109.

⁵ Judgment of 19 March 2013 in Case T-301/10, *In 't Veld v Commission*, EU:T:2013:135, paragraph 127.

⁶ Judgment of 25 April 2007 in Case T-264/04 *WWF European Policy Programme v Council*, EU:T:2007:114, paragraph 40.

intellectual property rights issues. They include sensitive issues, the release of which would undermine the climate of confidence between the European Union and the Republic of Korea, and more widely between the European Union and other third countries.

More specifically, some of the undisclosed parts of documents 1 to 8 contain sensitive comments regarding the EU's approach, tactics and options in the context of the negotiations with the Republic of Korea. Even if the negotiations with the Republic of Korea have been concluded and the agreement was signed in 2010 and has been provisionally applied since 2011, there is a reasonably foreseeable risk that the public disclosure of these comments would undermine the position of the EU in its ongoing negotiations with other third countries. Indeed, disclosure at this stage would reveal negotiation tactics, sequencing and potential trade-offs discussed, which, if they were known to the trading partners of the EU, would allow them to foresee and calculate the EU's behaviour in international trade negotiations. If it were to be foreseen how the EU reacts in certain situations during trade negotiations, the ability of the EU to negotiate the best possible deal for its citizens would be seriously hampered.

At the same time, even if the free trade agreement with the Republic of Korea is now being implemented, discussions with the Republic of Korea on the implementation of this agreement and potentially its renegotiation continue, in order to ensure proper and effective implementation of the commitments taken and potentially to upgrade those commitments. As explained above, the information reflected in the undisclosed parts of documents 1 to 8 remains relevant in the framework of the ongoing discussions within the EU, and between the EU and the Republic of Korea, as part of the implementation of the Free Trade Agreement. These discussions take place in particular within the various committees established under the free trade agreement, which aim to ensure proper and effective implementation of all the commitments taken. For example, the EU continues to discuss certain elements of implementation related to copyright and geographical indications. These may eventually also lead to legal dispute settlement procedures being initiated. Pursuant to Article 17(3) of the Treaty on the Functioning of the European Union, '[i]n carrying out its responsibilities, the Commission shall be completely independent'.

In order to preserve its negotiating capacity and strategic space in the context of these ongoing discussions with the counterparts of the Republic of Korea, the European Commission has the obligation to ensure that opinions reflected in the documents drawn up for internal use do not reveal the EU's approach, tactics and options in the context of future negotiations with third countries as well as in the implementation of the agreement with the Republic of Korea.

Finally, some parts of the documents reveal directly or indirectly the position of the Republic of Korea or contain sensitive comments and information about third countries and the intentions of the EU on future negotiations. On the one hand, the disclosure of such parts is likely to upset the mutual trust between the EU and not only the Republic of Korea, but also other trading partners, as these partners would fear that their position

would be exposed in the future. Revealing the negotiating tactics (and timing of certain statements in the negotiations) as well as elements of the Korean positioning could therefore harm the EU's interests in future similar negotiations as it would make the Republic of Korea and potentially other trading partners less willing to discuss certain matters in confidence during negotiations. Revealing such details would consequently jeopardise the future relationship between the EU and the Republic of Korea by making the Korean representatives more guarded about sharing information and positions with European Commission's staff. On the other hand, the disclosure of sensitive information and the intentions of the EU on future negotiations regarding third countries would harm bilateral relations with those countries.

Against this background, I consider that the public disclosure of the redacted parts of documents 1 to 8 would negatively affect the ability of the European Commission to defend effectively the EU's interests in the context of ongoing discussions with the Republic of Korea regarding the implementation of the free trade agreement, or with any other third country with which the EU is or may be negotiating. I consider that risk as reasonably foreseeable and non-hypothetical, as such public disclosure would reveal the institution's approaches and preferences, as well as political analysis, thus weakening its negotiation position towards its counterparts.

Documents 13 to 15 are the final negotiating directives, i.e. the above-mentioned negotiating mandate given by the Council of the European Union. As explained by the Directorate-General for Trade in its initial reply, there is a reasonably foreseeable risk that the public disclosure of the undisclosed parts of these documents would undermine the position of the European Union in its ongoing trade negotiations with other third countries, as it would allow the latter to draw conclusions with respect to certain detailed positions, concerns, views and strategies of the European Commission and its Member States.

Access to the Republic of Korea's counter-proposal attached to the cover e-mails of documents 16 and 17 has to be refused, as any unwarranted disclosure of documents shared in confidence by the EU's partners would risk seriously jeopardising future negotiations. Indeed, as any form of negotiation necessarily entails a number of tactical considerations by the negotiators, cooperation between the parties depends to a large extent on the existence of a climate of mutual trust. In this context, please note that the cover e-mails, which contain the technical details of the video-conference between the EU and the Republic of Korea as well as the flash report of the meeting with the Republic of Korea, are the relevant documents with regard to your request for access to the 'records of a telephone conversation as agreed upon on 5 June 2009'.

Even if access is refused to the Republic of Korea's counter-proposal attached to documents 16 and 17, full access is granted to the EU's proposals on criminal enforcement provisions to be inserted into the free trade agreement (attached to the cover e-mails of documents 18, 19 and 20).

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of 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.

2.2 Protection of the privacy and integrity of the individual (concerning documents 1 to 3, 5 to 12 and 16 to 20)

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’.

In its *Bavarian Lager* judgment⁷, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data⁸ (‘Regulation 45/2001’) becomes fully applicable.

Please note that, on 11 December 2018, Regulation 45/2001 was repealed by Regulation (EU) 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/EC⁹ (‘Regulation 2018/1725’).

However, the case law issued with regard to Regulation 45/2001 remains relevant for the interpretation of Regulation 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’.¹⁰

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

⁷ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 63.

⁸ Official Journal L 8 of 12.1.2001, page 1.

⁹ Official Journal L 205 of 21.11.2018, p. 39.

¹⁰ Judgment in *European Commission v the Bavarian Lager Co. Ltd*, cited above, EU:C:2010:378, paragraph 59.

confirmed that ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.¹¹

The relevant undisclosed parts of the documents in question contain the names, surnames and contact details (e-mail addresses) of staff members of the European Commission and of the Korean delegation who do not hold any senior management position. Documents 19 and 20 also contain personal data of (non-senior) national representatives of the presidency of the Council.

The names¹² 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 3(1) of Regulation 2018/1725.

According 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.

In its judgments in the *ClientEarth* and *Strack* cases, the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data.¹³ This is also clear from Article 9(1)(b) of Regulation 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation 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 establishes 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 initial and confirmatory applications, you do not establish the necessity of having the data in question transferred to you for a specific purpose in the public interest.

¹¹ Judgment of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Österreichischer Rundfunk*, EU:C:2003:294, paragraph 73.

¹² Judgment in *Commission v the Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

¹³ Judgment of 16 July 2015 in Case C-615/13 P, *ClientEarth v European Food Safety Agency*, EU:C:2015:489, paragraph 47; judgment of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 106

Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

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

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as the need to obtain access to the personal data included therein 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 such disclosure.

3. PARTIAL ACCESS

In line with Article 4(6) of Regulation 1049/2001, I have examined the possibility of granting partial access to documents 1 to 8, which were withheld in their entirety at the initial stage. Partial access is provided to these documents. Please find attached the redacted versions of these documents. The limited undisclosed parts are covered by the exceptions provided for by Article 4(1)(a), third indent, and Article 4(1)(b) of Regulation 1049/2001.

I have also examined the possibility of granting further access to documents 9 to 15, which were partially disclosed at the initial stage. No further access is, however, possible, given that the undisclosed parts of these documents are covered by the above-mentioned exceptions.

In addition, please note that partial access is granted to documents 16 to 20, which were identified at the confirmatory stage. Please find attached the redacted versions of these documents. Please note that the annexes to documents 16 and 17, which are in both cases the same document, are not attached, as these annexes are, for the reasons mentioned under point 2.1, entirely covered by the exception provided for by Article 4(1)(a), third indent. As to documents 18 to 20, only personal information is redacted in accordance with Article 4(1)(b) of Regulation 1049/2001.

As mentioned above, the applicable exceptions are indicated in the annexes beside each redaction by reference to the applicable Article of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(a) and Article 4(1)(b) of Regulation 1049/2001 are absolute exceptions, i.e. their applicability does not need to be balanced against any overriding public interest in disclosure. Therefore, the Commission is not obliged to examine the existence of an overriding public interest in disclosure.

I note, however, that you invoke in your confirmatory application an overriding public interest that warrants, according to you, public disclosure of the (parts of) the documents

concerned. You argue indeed that ‘the [European] Commission's assessment is not in line with its new transparency initiative. For instance, in new negotiations, mandates, textual proposals and position papers are published. Publication of these texts does not harm the public interest.’

In this context, I would like to clarify that while there could indeed be a public interest in this sense, I consider that any pressing need in favour of full public disclosure of the requested documents has not been substantiated in this case. Such a public interest has already been satisfied by the partial disclosure of the above-mentioned documents. In this context, please note that the Court of Justice 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 and its importance, but that an applicant has to show in a specific situation why the principle of transparency is in this case especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁴.

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 European Commission
Martin SELMAYR
Secretary-General*

Enclosures: 18

¹⁴ Judgment of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraphs 128 and 129.