



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL
MARKETS UNION

Director General

Brussels,

FISMA/B4/GSV/av
fisma.b.4(2020)3313749

Ms Pia Eberhardt
Corporate Europe Observatory (CEO)
Rue d'Edimbourg 26
1050 Brussels
Belgium

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

Advance copy by email:
[ask+request-7685-
4c1b1547@asktheeu.org](mailto:ask+request-7685-4c1b1547@asktheeu.org)

Subject: Your request for access to documents (ref GESTDEM 2020/995)

Dear Ms Eberhardt,

Thank you for your e-mail of 19 February 2020, requesting access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

Your request is as follows:

“Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting

1) a list of all lobby meetings held by DG FISMA since 1 January 2019, in which intra-EU investment protection (after the termination of EU member states' intra-EU investment treaties) has been discussed. The list should include: date, Commission attendees, the name of the organisation(s) attending, and a more precise topic if that exists;

2) minutes and other notes from these meetings;

3) *all correspondence between DG FISMA and lobby groups, in which intra-EU investment protection (after the termination of EU member states' intra-EU investment treaties) has been discussed (since 1 January 2019)*".

After a search, twenty-one documents have been identified as falling within the scope of your access to documents request. We have considered the documents in question. Our conclusion is that we can give access to five documents which are public, we cannot give access to one document (minutes of a meeting with a private organization) linked to ongoing infringements (see point (1) below) and we can give partial access to fifteen documents because of personal data included in these documents (see point (2) below).

- 1) It appears from our examination that one of these documents falls within the category of exceptions to disclosure provided for in Article 4(2), third indent, of Regulation No 1049/2001.

That Article states that '(t)he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.

The decision not to grant access to the document you wish to have access to is based on the negative effects that disclosure would have on the conduct of investigations of the Commission in the framework of infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union.

This infringement investigation calls for genuine co-operation and an atmosphere of mutual trust between the Commission and the competent administrative body of the concerned Member State. Only in such a climate, both sides can aspire to a rapid solution of the legal disputes and also reach such a solution.

This approach has been notably confirmed by the General Court in its recent judgment of 13 September 2013 in case T-111/11 *ClientEarth*:

'58. First, it must be observed that, in accordance with settled case-law, the Commission may legitimately rely on the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 in order to refuse access to documents relating to investigations of a possible contravention of European Union law which might lead to the initiation of infringement proceedings or which have in fact led to the initiation of such proceedings. In those circumstances, refusal of access has been considered justified because the Member States concerned are entitled to expect the Commission to observe confidentiality as regards investigations, even where a period of time has elapsed since the closure of those investigations (see API v Commission, paragraph 52 above, paragraph 120 and case-law cited).

59. In particular, it is clear from the case-law that the disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement proceedings inasmuch as its purpose, which is, as stated in paragraph 52 above, to induce the Member State concerned to comply voluntarily with Treaty requirements or, if appropriate, to give it an opportunity to justify its position, could be jeopardised. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State concerned regarding the latter's voluntary compliance with Treaty requirements may continue during the court proceedings and up to the delivery of the

judgment. The preservation of that objective, namely an amicable settlement of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, therefore justifies refusal of access to those documents (see API v Commission, paragraph 52 above, paragraph 121 and case-law cited)'.

The Court specified in paragraph 75 “*that in a situation where, when the decision to refuse access was made, the infringement proceedings were ongoing, the Commission was necessarily required to start from the principle that that general presumption applied to the documents concerned in their entirety*”. This case law thus introduces an exception to the general rule of concrete and individual checking established by earlier jurisprudence.

In examining your request, the possibility of granting partial access to the requested document has been taken into consideration. However, it turned out that, after examination of the document and for the reasons cited above, the document is covered in its entirety by the exception above mentioned, so that the release of parts of the document cannot be envisaged.

We note that in your application, you do not put forward any arguments demonstrating that the documents requested are not covered by the general presumption or that there is an overriding public interest in disclosure .

For these reasons, we regret to inform you that we cannot grant access to one of the documents requested, based on the exception of Article 4(2), third indent of Regulation 1049/2001.

- 2) Having examined the other fifteen documents (see reference below) requested which are not public¹ under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that they may be only partially disclosed as they contain personal data, in particular names and contact details. Therefore, some parts of the documents have been blanked out and their disclosure is prevented by exception to the right of access laid down in Article 4 of this Regulation, for data protection reasons.

Personal data can only be transmitted under specific exceptional conditions, including if ‘*the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest*. According to Article 9(1)(b) of Regulation 2018/1725, the European Commission also only has to examine the further conditions for a lawful processing of personal data if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

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.

Consequently, I 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

¹ References: Ares(2020)2838492 - Ares(2019)4258046, EMT FISMA/9952, EMT FISMA/9951, EMT FISMA/9622, EMT FISMA/9542, EMT FISMA/9270, EMT FISMA/8530, EMT FISMA/8287, EMT FISMA/8286, Ares(2019)4889105, Ares(2019)3773812, Ares(2019)4453273, Ares(2020)2797752, Ares(2019)4258046.

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.

Should you disagree with the assessment that the redacted data are personal data which can only be disclosed if such disclosure is legitimate under the applicable rules on the protection of personal data, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to submit a confirmatory application requesting the Commission to review this position.

The Secretary-General will inform you of the result of his review within 15 working days of receipt of your request, and will either grant you access to the document or confirm the refusal. In the latter event, the Secretary-General will indicate what avenues of appeal are open to you.

Any correspondence should be sent to the following address:

European Commission
Secretariat-General

Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076

B-1049 Bruxelles, or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

(e-signed)

John BERRIGAN

Enclosure: Position papers publicly available: Eurochambers, AFEP, Business Europe, DIHK, Eurocommerce. Documents partially redacted: Ares(2020)2838492 - Ares(2019)4258046, EMT FISMA/9952, EMT FISMA/9951, EMT FISMA/9622, EMT FISMA/9542, EMT FISMA/9270, EMT FISMA/8530, EMT FISMA/8287, EMT FISMA/8286, Ares(2019)4889105, Ares(2019)3773812, Ares(2019)4453273, Ares(2020)2797752, Ares(2019)4258046.