Brussels,

Subject: Your application for access to documents – Ref GestDem 2020/2581

Dear Mr Hoedeman,

I refer to your application dated 6 May 2020¹, addressed to the Secretariat General of the European Commission, in which you make a request for access to:

“Minutes, notes and other records from the following meetings (listed on the Commission’s website and on Integritywatch.eu):
- 23/01/2020: Juraj Nociar (member of Maroš Šefčovič's cabinet) meeting with Philip Morris International Inc. (PMI). Subject: "Working priorities of the new European Commission”
- 01/10/2018: Kyriacos Charalambous, then member of Johannes Hahn's cabinet, meeting British American Tobacco (BAT). Subject: Meeting to discuss economic climate and business environment in Kosovo.
- 09/11/2017: Eduard Hulicius, then member of Věra Jourová's cabinet, meeting with Philip Morris International Inc. (PMI). Subject: new technologies diminishing harm to tobacco user
- 26/01/2017: Lubomira Hromkova, then member of Maroš Šefčovič's cabinet, meeting with Philip Morris International Inc. (PMI). Subject: Energy Union, Occasion of the Slovak New Year Concert.”

Due to the wide scope of your request covering four different meetings, the Secretariat-General has split your request with three others Directorate-Generals². This reply relates

¹ Ref. Ares(2020)2402734
² GESTDEM 2020/2580 Secretariat General; GESTDEM 2020/2582 DG JUST; GESTDEM 2020/2583 DG ENER.

Mr Olivier Hoedeman
Corporate Europe Observatory

By email only:
ask+request-7938-73793911@asktheeu.org
only to the documents held by the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR). You will receive separate replies from the other respective Directorates-General.

Based on the description provided in your application, DG NEAR has identified the following documents:

- Document 1: E-mail exchanges between European Commission and a Member of the former Cabinet of Commissioner Hahn, and between the latter and representatives of the company ‘British American Tobacco’;
- Document 2: E-mail from an official of the European Commission to a Member of the former Cabinet of Commissioner Hahn;
- Document 3: E-mail exchanges between an official of the European Commission and representatives of British American Tobacco.

Since some of the documents concerned originate from a third party, the originator of the documents has been consulted.

Having examined the documents that you requested under the provisions of Regulation (EC) No 1049/2001, and taking into account the opinion of the third party, I have come to the following conclusions:

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

The justifications are as follows.

1. Protection of the privacy and the integrity of the individual

Full disclosure of the three documents is prevented by the exception concerning the privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001. In particular, these documents contain 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.

In its judgment in Case C-28/08 P (Bavarian Lager), 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.

---

The information contained in these documents constitutes personal data as per Article 3 of the Data Protection Regulation.

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subjects might be prejudiced. 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.

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

2. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation No (EC) 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 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. The above-mentioned exception can be invoked if the disclosure might entail negative repercussions for the European Union’s relations with third countries.

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 (EC) No 1049/2001] could undermine the public interest’.

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

---


6 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.


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’.

Parts of document 1 concern international negotiations between the European Union and Kosovo. 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 former 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. 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.

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 constant assessment of Kosovo’s compliance.

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 (EC) No 1049/2001.

3. **Protection of the decision-making process**

Article 4(3) of Regulation (EC) 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

---

11 This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.
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 ongoing decision-making processes and bilateral discussions with the Kosovo authorities. I can inform you, however, that the measure in question was subsequently revised by a new government in March 2020, following continuous dialogue with the European Commission, to comply with the relevant part of the Stabilisation and Association Agreement.

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 (EC) 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’."13

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.\textsuperscript{14}

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 (EC) No 1049/2001.

\textbf{4. No overriding public interest in disclosure}

Pursuant to Article 4(3) of Regulation (EC) No 1049/2001, the exceptions to the right of access defined therein must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest first has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(3) of Regulation (EC) No 1049/2001.

In your request, you do not put forward any arguments demonstrating the existence of an overriding public interest in disclosure. Similarly, the Commission has not identified any public interest that would override the interests protected by Article 4(3) of Regulation (EC) No 1049/2001.

\textbf{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 its position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles/Brussel
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

\[e\text{-signed}\]

Christian Danielsson

Encl/: Documents 1-3