



EUROPEAN COMMISSION

Brussels, 6.3.2019
C(2019) 1930 final

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**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 2018/3460**

Dear ██████████,

I refer to your email of 4 December 2018, registered on the same date, in which you submitted 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 (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 15 May 2018 you submitted an initial application for access to documents under Regulation (EC) No 1049/2001, in which you requested access to 'all correspondence, including emails, agendas, records of meetings, minutes of meetings, participants lists and any other reports of such meetings involving officials/representatives/Commissioner/[C]abinet member[s] of [the] D[irectorate] G[eneral] [for Trade] and officials/representatives/Commissioner/[C]abinet member of the E[uropean] E[xternal] A[ction] S[ervice] about the international legally binding instrument on transnational corporations and other business enterprises with respect to

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

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

human rights being currently negotiated in the Human Rights [C]ouncil of the United Nations’.

Following the initial assessment, it was established that the subject matter of your initial application fell within in the remit of the Directorate-General for Trade of the European Commission and the European External Action Service. Consequently, your initial application was attributed to the above-mentioned Directorate-General and the European External Action Service, which provided their replies on, respectively, 22 November 2018 and 10 July 2018.

With regard to the reply of the Directorate-General for Trade, the European Commission identified 29 documents as falling under the scope of your application³. The European Commission identified two additional documents as falling under the scope of your application at the confirmatory stage⁴.

Please note that document 21 identified at the initial stage by the Directorate-General for Trade is an early version (draft) of document 21.1. It bears the reference number WK 10606/17 INIT, due to an administrative error. Indeed, the authentic version of document WK 10606/17 INIT is included in document 21.2.

In its reply, the Directorate-General for Trade granted full access to documents 1 to 7 and 12 and wide partial access to document 8, 9 and 11, with personal data redacted, based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001. The Directorate-General for Trade also granted partial access to document 10, with the relevant part redacted, based on the above-mentioned exceptions in Article 4(1)(b) of Regulation (EC) No 1049/2001 and in Article 4(1)(a), third indent, of the said regulation (protection of international relations).

With regard to the remaining documents 13 to 29, the Directorate-General for Trade refused access thereto, based on the exceptions protecting international relations, provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, and the decision-making process, provided for in Article 4(3) of the said Regulation.

In your confirmatory application, you requested a review of the position of the Directorate-General for Trade.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

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

³ A detailed list of documents was enclosed with the initial reply of the Directorate-General for Trade of 22 November 2018.

⁴ Non-Paper on preparation of the open ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights, WK 11654/2017 REV 1 and WK 10606/2017 INIT. These newly identified documents are referred to as ‘document 21.1’ and ‘document 21.2’ in this decision.

Having carried out a detailed assessment of your request in light of the provisions of Regulation (EC) No 1049/2001, I wish to inform you that partial access is granted to documents 13 to 16, 18 to 21, 21.1, 21.2, 23 to 26 and 29, to which access was refused in entirety at the initial stage. The relevant withheld parts of these documents contain personal data and were redacted, based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001. The remaining withheld information requires protection under the exceptions protecting international relations, provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, and the decision-making process, provided for in Article 4(3), first subparagraph, of the said regulation.

With regard to documents 10, 17, 22, 27 and 28, partially or fully withheld at the initial stage, I confirm the refusal to grant (further) access thereto. The underlying exceptions are those protecting privacy and the integrity of the individual, international relations and the decision-making process, provided for, respectively, in Article 4(1)(b) of Regulation (EC) No 1049/2001, the third indent of Article 4(1)(a) of the said regulation and Article 4(3), first subparagraph, of the above-mentioned regulation.

The detailed reasons are set out below. In my assessment, I took into account the position of the European External Action Service, as far as the documents originating therefrom are concerned.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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 judgment in Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when an application 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 data⁶ (‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 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/EC⁷ (‘Regulation (EU) No 2018/1725’).

⁵ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd.* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

⁶ Official Journal L 8 of 12.12.2001, p. 1.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

However, the case law issued with regard to Regulation 45/2001 remains relevant for the interpretation of Regulation (EU) No 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’.⁸

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.⁹

Documents 10, 13 to 16, 20, 23, 25 and 26 contain personal data such as the names, surnames and contact details (telephone and office numbers) of staff members of the European Commission who do not hold any senior management position.

The names¹⁰ 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 2(a) of Regulation (EU) No 2018/1725.

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

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data.¹¹ This is also clear from Article 9(1)(b) of Regulation (EC) No 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

⁸ *European Commission v The Bavarian Lager* judgment, quoted above, paragraph 59.

⁹ Judgment of the Court of Justice of 20 May 2003, preliminary ruling in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joint Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁰ *European Commission v The Bavarian Lager* judgment, quoted above, paragraph 68.

¹¹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

According to Article 9(1)(b) of Regulation (EU) 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 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 confirmatory application, you do not put forward any arguments to establish the necessity of having 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, 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 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 the disclosure of the personal data concerned.

2.2 Protection of the public interest as regards international relations and of the decision-making process

Article 4(1)(a), third indent of Regulation (EC) No 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 [...]'].

Article 4(3), first subparagraph of Regulation 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'.

In the case at hand, the two above-mentioned exceptions are interlinked and therefore the corresponding reasons justifying their applicability are closely related.

As far as the protection of international relations is concerned, the EU Court has acknowledged that the institutions enjoy wide discretion when considering whether access to a document may undermine that public interest¹².

¹² Judgment of the Court of First Instance of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

The relevant undisclosed parts of document 10 contains the opinions of the representatives of third parties and EU Member States concerning various aspects of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The relevant undisclosed parts of documents 13 to 16, 25 and 26 are the reports prepared by the delegation of the EU to the United Nations Office in Geneva. The undisclosed parts thereof include the reproduction of the positions of the representatives of various Members States of the United Nations, provided in the context of the negotiations regarding the above-mentioned international instrument on transnational corporations. They also include the comments of the various Member States concerning their expectations regarding the involvement of the EU in the negotiations. The documents in question also include assessments of the authors of the reports of these positions or comments or anticipations regarding the further stages of the process of negotiating the instrument.

Documents 18, 19, 20, 21, 21.1, 21.2, 22, 23, 24 and 29 are position papers, non-papers and internal notes regarding discussions on business and human rights. The undisclosed parts of these documents contain the reproduction of the positions of the representatives of various Members States of the United Nations and the assessment thereof by the services of the European Commission.

Documents 17¹³, 27 and 28 contain the proposals of the positions of the EU on a legally binding instrument on business and human rights, as well as the outline of the next steps of the actions for the EU in this context.

As explained by the Directorate-General for Trade in the initial reply, the public disclosure of documents 17, 22, 27 and 28 and the information included in the withheld parts of documents 10, 13 to 16, 18 to 26 and 29 would undermine the ongoing negotiations in the Council of Human Rights of the United Nations concerning an international legally binding instrument on transnational corporations.

In your confirmatory application, you contest this position and underline that ‘[...] anybody who has been following this process [negotiations concerning the international instrument on transnational corporations] can attest that the EU is hardly negotiating’. Furthermore, in your view, ‘[...] the EU has been blocking the process, even attempting to stop it altogether’.

Nonetheless, contrary to what you argue in your confirmatory application, the EU, represented by the European External Action Service, does participate in the negotiating process within its current remits. Furthermore, regardless of the EU’s involvement, the negotiation process as such is still fully ongoing. The public disclosure of the positions of

¹³ Document 17 contains also the series of emails concerning organisational aspects of the planned meeting, exchanged between the staff members of the European Commission and the European External Action Service. These exchanges fall outside the scope of your initial and confirmatory applications.

the EU, as well as the assessment of the positions of the Member States of the United Nations by the EU services, which are included in the documents in question, would undermine the position of the EU in the negotiations. Indeed, revealing the information regarding the EU assessment of the further stages of the negotiations would weaken that position by making the negotiating tactics known to the partners and the public at large. As confirmed by the case law of the EU Court, ensuring the room for negotiation needed by the EU and other partners represented in the Council of Human Rights of the United Nations is an interest that qualifies for protection under the exception in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, as it is necessary in order to bring those negotiations to a conclusion¹⁴.

Given that the positions of the Member States of the United Nations involved in the negotiations and the positions of the EU involved in the same negotiations are part of the same discussion concerning the ongoing negotiations and that the positions of the former have certainly a direct impact on the position and tactics employed in these negotiations by the latter, their public disclosure would also undermine the internal decision-making process within the EU linked to the shaping of that position.

I consider this risk as reasonably foreseeable and not purely hypothetical.

Having regard to the above, I consider that the use of the exceptions under Article 4(1)(a), third indent (protection of the public interest as regards international relations), of Regulation (EC) No 1049/2001 and Article 4(3), first subparagraph, of the said Regulation, is justified concerning (parts of) the documents in question and that access thereto must be refused on that basis.

3. PARTIAL ACCESS

Partial access is granted to documents 10, 13 to 16, 18 to 21, 21.1, 21.2, 23 to 26 and 29.

With regard to documents 17, 22, 27 and 28, no meaningful partial access is possible, given that the entire content of the documents concerned is covered in its entirety by the exceptions provided for in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 and Article 4(3), first subparagraph, of that regulation.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 do not need to be balanced against any possible overriding public interest in disclosure.

The exception laid down in Article 4(3) of Regulation (EC) 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.

¹⁴ Judgment of the Court of First Instance of 25 April 2007, *European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 41.

In your confirmatory application, you argue that such overriding public interest exists in the case at hand. You base your reasoning on two aspects.

Firstly, you underline that '[...] the international legally binding instrument [...] aims to protect citizens worldwide against corporate human rights violations'. In this context you point out that, '[i]n 2017, 207 activists around the world were killed opposing projects that would damage their communities, environment and land. More often than not, these projects are being developed by European transnational companies'. Consequently, in your view, '[d]iscussions at EU level about U[nited] N[ations] negotiations on a treaty that would hold these companies accountable has an overriding general interest [...]'

Secondly, you argue that, taking into account that '[...] a future binding EU treaty will need to be implemented in the EU and Member States as legislation', the involvement of the EU in the negotiation process in question falls under 'legislative capacity of the EU'.

In conclusion, you emphasise that '[c]itizens have right to know how the European Union [...] established its negotiating position before entering the negotiations at the Human Rights [C]ouncil of the United Nations'.

However, without prejudice to the question of whether there could indeed be a public interest in the subject matter and a general need for public transparency related thereto, I would like to refer to the judgment in the *Strack* case¹⁵, wherein 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. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁶.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the independence of the Commission's decision-making process, grounded in Article 4(3) of Regulation (EC) No 1049/2001.

The fact that the document requested was not drafted in the framework of the legislative activities of the European Commission, for which the Court of Justice has acknowledged the existence of wider openness¹⁷, provides further support to this conclusion.

¹⁵ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission* (hereafter referred to as '*Strack v Commission* judgment'), C-127/13 P, EU:C:2014:2250, paragraph 128.

¹⁶ *Strack v Commission* judgment, quoted above, paragraph 129.

¹⁷ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60.

5. MEANS OF REDRESS

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 Commission
Martin SELMAYR
Secretary-General