EUROPEAN COMMISSION

Brussels, 26.1.2021
C(2021) 537 final

Ms Vicky Cann
Corporate Europe Observatory
Rue d'Edimbourg 26
1050 Brussels
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents – GESTDEM 2020/4017

Dear Ms Cann,

I am writing in reference to your email of 30 September 2020, registered on 8 October 2020, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’).

1. Scope of Your Request

Through your initial application of 2 July 2020, you requested access to, I quote, ‘[…] a list of all lobby meetings (including phone calls, conference calls etc) since 1 January 2019 where the EU’s Digital Services Tax proposal, or the [Organisation for Economic Co-operation and Development]’s negotiations on a similar tax, were discussed. The list should include the names of the individuals and organisations participating; the date; the agenda; and any minutes / notes produced’. In your initial application, you explained that it covers also, I quote, ‘[…] any emails or other correspondence related to proposals for a Digital Services Tax received or sent since 1 January 2019’.

2 OJ L145, 31.05.2001, p. 43.
Your application was addressed to the Directorate-General for Communications Networks, Content and Technology. The above-mentioned application was one of the series of similar initial applications addressed to other Directorates-General and services of the European Commission³, which provided you the separate replies.

With regard to application Gestdem 2020/4017, the Directorate-General for Communications Networks, Content and Technology provided its initial reply on 25 September 2020, in which it informed you that it does not hold any documents that would correspond to the description given in your application.

Indeed, the Directorate-General for Communications Networks, Content and Technology explained that its initial reply, I quote, ‘[…] concerns only the area for which [the Directorate-General for Communications Networks, Content and Technology] was lead service within the [European] Commission’.

You asked for the review of that position by submitting the confirmatory application on 30 September 2020. In the confirmatory application, you underlined that, I quote, ‘[…] the scope of [your] initial query was about any lobby contacts that [the Directorate-General for Communications Networks, Content and Technology] had had regarding the Digital Services Tax. The remit of [the Directorate-General for Communications Networks, Content and Technology] is not relevant and [you are] concerned that [the] interpretation of [your] request could end up excluding some documents relevant to [your] request’.

Consequently, you requested that European Commission could, I quote ‘[…] clarify whether there are some documents which indicate lobbying of [the Directorate-General for Communications Networks, Content and Technology] on the digital services tax but which have been excluded from the scope of [the initial] answer?’.

2. ASSESSMENT AND CONCLUSION 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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

The Secretariat-General together with the Directorate-General for Communications Networks, Content and Technology carried out the renewed, thorough search for the documents falling under the scope of your initial application 2020/4017. Following this search, it identified the following (new) documents:


³ Directorate-General for Taxation and Customs Union (Gestdem 2020/4014), Secretariat-General of the European Commission (Gestdem 2020/4018), Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (Gestdem 2020/4021), Directorate-General for Budget (Gestdem 2020/4027), Directorate-General for Economic and Financial Affairs (Gestdem 2020/4187) and the Directorate-General for Competition (Gestdem 2020/4272).
Having examined the above-mentioned documents, I inform you that (wide) partial access is granted thereto. The limited undisclosed parts of the documents contain personal data, redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual). In the assessment, I took into account the position of the third party originator, consulted in line with Article 4(4) of the said regulation.

The detailed reasons are set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that ‘the 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), 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 data (‘Regulation (EC) No 45/2001’) becomes fully applicable.


However, the case-law issued with regard to Regulation (EC) No 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 (EC) No 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’.

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

7 European Commission v The Bavarian Lager judgment quoted above, paragraph 59.
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’.  

The relevant undisclosed parts of the documents concerned contain the name and function of the staff member of the European Commission, not holding any senior management positions. They also contain the name and contact details (email address and telephone number) pertaining to the representative of third party (Interactive Advertising Bureau).

The names of the persons concerned as well as other data from which their identity can be deduced 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 [...] the 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.  

This is also clear from Article 9(1)(b) of Regulation (EU) No 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 (EU) No 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 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 weighted the various competing interests.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

---

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

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

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the document concerned has not been established. 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 disclosure of the personal data reflected in the document, 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 disclosure of the personal data concerned.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against the overriding public interest.

4. **PARTIAL ACCESS**

(Wide) partial access is hereby granted to the documents concerned.

5. **MEANS OF REDRESS**

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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*

*Ilze JUHANSONE*

*Secretary-General*