EUROPEAN COMMISSION

Brussels, 5.12.2019
C(2019) 8860 final

Steptoe & Johnson
Avenue Louise 489 3rd Floor, 1050
Brussels
Belgium

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


Dear [Name],


1. SCOPE OF YOUR REQUEST

In your initial applications of 17, 18 and 19 June 2019, addressed to the Directorate-General for Trade, you requested access to the following documents whose details were published in the Comitology Register:

1. ‘S034294 – Summary record – Trade Defence Instruments Committee meeting on 12 March 2014’, (hereafter ‘document 1');

---

2. S034295 – Summary record – Trade Defence Instruments Committee meeting on 9 April 2014 ⁴, (hereafter ‘document 2’);
3. S061784 – Summary record – Trade Defence Instruments Committee meeting on 27 March 2019 ⁶, (hereafter ‘document 3’);
5. S060642 – Summary record – Trade Defence Instruments Committee meeting on 18 December 2018 ⁸, (hereafter ‘document 5’);
7. S059542 – Summary record – Trade Defence Instruments Committee meeting on 3 October 2018 ¹⁰, (hereafter ‘document 7’);
8. S058862 – Summary record – Trade Defence Instruments Committee meeting on 11 September 2018 ¹¹, (hereafter ‘document 8’);
10. S058271 – Summary record – Trade Defence Instruments Committee meeting on 26 July 2018 ¹³, (hereafter ‘document 10’);
12. S057454 – Summary record – Trade Defence Instruments Committee meeting on 14 June 2018 ¹⁵, (hereafter ‘document 12’);
14. S056950 – Summary record – Trade Defence Instruments Committee meeting on 17 May 2018 ¹⁷, (hereafter ‘document 14’);
15. S056163 – Summary record – Trade Defence Instruments Committee meeting on 22 March 2018 ¹⁸, (hereafter ‘document 15’);
16. S055515 – Summary record – Trade Defence Instruments Committee meeting on 8 February 2018 ¹⁹, (hereafter ‘document 16’);

---

⁴ As you submitted two applications for this document, your first application was registered under reference number GESTDEM 2019/3443 and the second one under reference number GESTDEM 2019/3445.
⁵ This application was registered under reference number GESTDEM 2019/3444.
⁶ This application was registered under reference number GESTDEM 2019/3472.
⁷ This application was registered under reference number GESTDEM 2019/3473.
⁸ This application was registered under reference number GESTDEM 2019/3474.
⁹ This application was registered under reference number GESTDEM 2019/3476.
¹⁰ This application was registered under reference number GESTDEM 2019/3477.
¹¹ This application was registered under reference number GESTDEM 2019/3478.
¹² This application was registered under reference number GESTDEM 2019/3480.
¹³ This application was registered under reference number GESTDEM 2019/3481.
¹⁴ This application was registered under reference number GESTDEM 2019/3482.
¹⁵ This application was registered under reference number GESTDEM 2019/3483.
¹⁶ This application was registered under reference number GESTDEM 2019/3484.
¹⁷ This application was registered under reference number GESTDEM 2019/3485.
¹⁸ This application was registered under reference number GESTDEM 2019/3486.
¹⁹ This application was registered under reference number GESTDEM 2019/3487.
In its initial reply of 6 August 2019, the Directorate-General for Trade refused access to these documents based on the exceptions of Article 4(2), third indent (protection of the purpose of investigations) and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

---

20 This application was registered under reference number GESTDEM 2019/3488.
21 This application was registered under reference number GESTDEM 2019/3536.
22 This application was registered under reference number GESTDEM 2019/3537.
23 This application was registered under reference number GESTDEM 2019/3538.
24 This application was registered under reference number GESTDEM 2019/3539.
25 This application was registered under reference number GESTDEM 2019/3540.
26 This application was registered under reference number GESTDEM 2019/3541.
27 This application was registered under reference number GESTDEM 2019/3542.
28 This application was registered under reference number GESTDEM 2019/3543.
29 This application was registered under reference number GESTDEM 2019/3544.
30 This application was registered under reference number GESTDEM 2019/3546.
31 This application was registered under reference number GESTDEM 2019/3547.
32 This application was registered under reference number GESTDEM 2019/3548.
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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I can inform you that partial access is granted to all the requested documents. In accordance with Article 19(5) of Regulation (EU) 2016/1036 [33] (and similarly also in accordance with Article 29(5) of Regulation (EU) 2016/1037 [34]), the ‘exchanges of information between the Commission and Member States shall not be divulged except as specifically provided for in this Regulation’. To the extent that the requested documents contain information falling within the above confidentiality provision, they cannot be disclosed. The partial refusal is, therefore, based on the confidentiality provisions of Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037 and the exceptions of Article 4(2), third indent (protection of the purpose of investigations) and Article 4(3), second subparagraph (protection of the decision-making process), as well as Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001, for the reasons set out below.

### 2.1. Protection of the purpose of the investigations and of the decision-making process

Article 4(2), 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 purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.’

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provides that ‘[a]ccess 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 institution’s decision-making process, unless there is an overriding public interest in disclosure.’

The Court of Justice stated that an institution of the European Union, when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation (EC) No 1049/2001 [35].

The withheld parts of the documents are exchanges of information between the Member States and the Commission in the context of mandatory consultations in the Trade Defence Instruments Committee pursuant to the basic anti-dumping and anti-subsidy regulations. These exchanges include details on the dialogue between the Commission and the Member States, such as positions of Member States, questions, explanations provided by the Commission, detailed voting results, as well as opinions provided by the Commission.

---


Commission Legal Service in the context of these discussions. They also contain information and details of the discussions concerning anti-dumping investigations. Pursuant to Article 19(5) of the basic anti-dumping regulation and Article 29(5) of the basic anti-subsidy regulation, ‘[e]xchanges of information between the Commission and Member States, or any internal documents prepared by the authorities of the Union or the Member States, shall not be divulged except as specifically provided for in this Regulation.’ Therefore, any information contained in the requested document that falls within the scope of the confidentiality provisions of the basic anti-dumping and basic anti-subsidy regulation is redacted from the documents released.

Moreover, the withheld parts of the documents relating to anti-dumping investigations files cannot be disclosed, as they form part of the investigation file. The Commission considers that there is a general presumption in favour of protection of the confidentiality of the anti-dumping investigation file, similar to the one established by the Court of Justice in the field of anti-trust, merger, State aid and infringement investigations. Indeed, the Commission considers that information exchanged between the Commission and the Member States in the context of anti-dumping procedures forms part of the anti-dumping investigation file. Its public disclosure would undermine, in principle, both the protection of the objectives of investigation activities and that of the decision-making process of the institution. Parts of the documents reflecting such exchanges, as the requested summary records, contain the same type of confidential information. The legislation, which governs anti-dumping procedures, provides for strict rules regarding the treatment of information obtained or established in the context of such procedures. There is no specific provision allowing the divulgation of such information to the public.

The privileged access rules of the basic anti-dumping regulation cannot in any way be invoked as a ground for requesting public access to documents under Regulation (EC) No 1049/2001, as each set of rules has a different scope, purpose and effect. Moreover, Article 6(7) of the basic anti-dumping regulation and Article 11(7) of the basic anti-subsidy regulation expressly exclude from the privileged access of any party to the investigation ‘internal documents prepared by the authorities of the Union or its Member States’.

The requested summary records are internal documents prepared by the Commission. They contain details on the progress of the anti-dumping investigations and the reflections and concerns of Member States and the Commission. Their full public disclosure, irrespective of whether they concern an anti-dumping procedure, which is already closed or a pending one, is likely to harm the purpose of the investigation and the protection of the decision-making of the institution. The purpose of an anti-dumping investigation is to protect the internal market from undue damage created by dumping. Full public disclosure of the information exchanges between Member States and the Commission about these investigations would allow parties with knowledge of the market, for example, about where the production in the EU is situated, to exercise pressure to the Member State(s) concerned, thus undermining the purpose of the anti-dumping investigation. This is a realistically foreseeable and not purely hypothetical risk, as anti-dumping investigations regularly concern products that are only produced by very few companies in very few Member States. Detailed knowledge of the exchanges between Member States and the Commission about these investigations would make it easier for organised interests to exercise pressure on Member States, thus undermining not only the purpose of the investigation but also seriously undermining the decision-making process of the Commission in the context of the Trade Defence Instruments Committee.
Anti-dumping investigations rely on the active participation of Member States in the decision-making process leading to measures. This is why Article 19(5) of the basic anti-dumping Regulation provides a specific and clear protection for the exchange of information between the Commission and the Member States. Full public disclosure of the exchanges between the Member States and the Commission on anti-dumping investigations, against the explicit provisions of the basic-anti-dumping regulation and the anti-subsidy regulation, would be contrary to the confidentiality requirements. Moreover, they would adversely affecting the willingness of the Member States to cooperate constructively with the Commission and harm the mutual trust between the Commission and the Member States. As mutual trust is essential for the Commission to be able to carry out its tasks throughout the different stages of the procedure, disclosure of the withheld information would seriously undermine the Commission’s decision-making process.

It follows that the European Commission cannot grant public access under Regulation (EC) No 1049/2001 to the parts of the documents containing references to confidential detailed discussions and positions of Member States, particularly, when expressed by individual Member States identified in the record in the framework of Trade Defence Instruments committee meetings, as this would result in the above-mentioned confidentiality requirements being deprived of their meaningful effect. Such a public disclosure would undoubtedly affect mutual trust between the European Commission and the Member States and would therefore be at odds with the principle of sincere cooperation. Please note that documents 10, 12, 13, 15, 21, 23-25 contain references to individual positions of Member States.

The summary records of the Trade Defence Instruments Committee are internal documents, which are submitted to members of the committee. Partial access is now granted to these documents with the exception to the parts that relate to the committee’s detailed discussions, including on anti-dumping investigations.

In its Corporate Europe Observatory judgment 36, the General Court confirmed that minutes circulated to participants in the framework of an advisory committee meeting which was not open to the public, are to be considered as ‘internal documents’ within the terms of Article 4(3) of Regulation (EC) No 1049/2001, and deserve protection on that basis. The same reasoning applies to the detailed discussions taking place in the context of the Trade Defence Instruments Committee.

Full public disclosure on the detailed discussion on anti-dumping measures would seriously undermine the Commission's leverage to consult Member States' representatives, in the framework of its decision-making processes, free from external pressure. Indeed, Member States' participation in Trade Defence Instruments Committee is of crucial importance for the decision-making process as it allows the Commission to take into consideration the opinion of the Member States at an early stage of the decision-making process.

Concerning your argument that several of the requested documents are old, I would like to draw your attention to the provision of Article 4(7) of Regulation (EC) No 1049/2001. This article states that the exceptions shall apply for the period during which protection is justified based on the content of the document. The exceptions may apply for a period of 30 years and even beyond. In this context, it has to be underlined that the same product

concerned by an investigation and discussed with Member States can at any point in time become subject to a review procedure; in case anti-dumping measures are imposed, it will in principle be subject to a review procedure after five years. Furthermore, importers are entitled to challenge before national Courts any decision of the customs to levy duties on their imports, even after a regulation to impose measures has become final. This regularly happens, while in some cases the case comes before a national Courts years after the adoption of the regulation imposing anti-dumping measures. For the reasons explained above, the protection of parts of the documents relating to ongoing but also to closed anti-dumping files is justified. I consider that the content of the withheld parts of the documents justifies the application of the exceptions also today.

Against this background, there is a real and non-hypothetical risk that the release of the documents requested would undermine both the purpose of the investigations and the decision-making process, protected respectively by Article 4(2), third indent and Article 4(3), first and second subparagraph of Regulation (EC) No 1049/2001.

2.2. Protection of the public interest as regards international relations

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

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 No 1049/2001] could undermine the public interest’ 37.

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 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’ 38.

As per settled case-law, disclosure of European Union positions in international negotiations can damage the protection of the public interest as regards international relations 39. The above-mentioned exception can be invoked, if the disclosure might entail negative repercussions for the European Union’s relations with third countries 40.

The withheld parts of the documents reflect detailed discussions of the Member States and the Commission on anti-dumping measures for example questions and concerns expressed by the Member States and/or the Commission, including on legal matters and hearings before the Hearing Officer. Public disclosure of these parts would reveal, even indirectly, possible concerns or positions, which may undermine the legitimacy of the position taken by the Union in the eyes of the international partner. This in turn would undermine the international relations of the Union. Public disclosure of the withheld parts

---

could also be exploited by third parties to weaken the negotiating stance of the Commission and the effectiveness of the trade defence policy of the Union.

In that context, it has to be underlined that public disclosure of the detailed discussions between the Commission and the Member States on anti-dumping measures, even though the detailed positions of its international trade partners on trade defence policy instruments remain confidential, is sufficient to establish a risk that the interest of the Union as regards international relations can be undermined. The EU Courts have acknowledged that, in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. These findings are applicable also in the case at hand. Public disclosure of the detailed discussions of the Member States and the Commission, even without always indicating the individual positions of each Member State participating to the discussion, would undermine the mutual trust among the Member States and the Commission and jeopardise the effectiveness of the trade defence measures by making possible to exercise pressure on concerned Member States, thus weakening the Commission’s international standing and undermining the international relations of the Union. Indeed, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise.

Based on the above, I consider that the risk of undermining the public interest as regards international relations based on Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 is reasonably foreseeable and non-hypothetical, given the sensitivity of the issues relating to the trade defence policy.

3. **Overriding Public Interest in Disclosure**

The exceptions laid down in Article 4(2) third indent and Article 4(3), second indent 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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) third indent and Article 4(3), second indent of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness, provides further support to this conclusion.

---

Please note also that Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

The fact that the requested documents are now been made partially publicly available only reinforces this conclusion.

4. **Partial Access**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access is now granted to all the requested documents.

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

---

Enclosures: (29)

---

CERTIFIED COPY
For the Secretary-General,

---

EUROPEAN COMMISSION