



EUROPEAN COMMISSION

Brussels, 12.10.2021
C(2021) 7479 final

Mr Diogo Augusto
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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 2021/1737**

Dear Mr Augusto,

I refer to your letter of 4 May 2021, registered on the same day, 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

In your initial application of 20 March 2021, attributed to the Secretariat-General of the European Commission, you requested access to ‘all documents - including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines to take, briefings, e-mails, and presentations - related to all meetings between member of the Commission and representatives of BusinessEurope from July 2020 to the present’.

Due to its wide scope, your request has been split between different services of the Commission. The case registered under 2021/1737 concerns the documents linked to a meeting between Executive Vice-President Dombrovskis and representatives of BusinessEurope that took place on 20 November 2020.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

This case was handled by the Secretariat-General of the European Commission, which identified the following documents:

- Minutes of the meeting with BusinessEurope held on 20 November 2020, registered under reference Ares(2021)2506110 (hereafter ‘document 1’);

- Briefing for the meeting with BusinessEurope held on 20 November 2020, registered under reference Ares(2021)2760479 (hereafter ‘document 2’).

In its reply of 5 May 2021, the Secretariat-General granted full access to document 1 and partial access to document 2 based on the exceptions laid down in the third indent of Article 4(1) (protection of international relations) and Article 4(1)(b) (protection of personal data) of Regulation EC (No) 1049/2001.

In your confirmatory application, you request a review of this position concerning document 2.

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 a wider partial access is given to document 2. The remaining redacted parts need to be withheld based on the exceptions laid down in the third indent of Article 4(1) (protection of international relations) and Article 4(1)(b) (protection of personal data) of Regulation EC (No) 1049/2001.

The reasons are explained below.

2.1. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) 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 [...]’.

As far as the interests protected by virtue of Article 4(1)(a) of Regulation (EC) No 1049/2001 are concerned, the Court of Justice has confirmed that it ‘is clear from the wording of Article 4(1)(a) [of Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements

connected to the protection of those interests against those which stem from other interests’³.

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 1049/2001] could undermine the public interest’⁴.

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’⁵.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care.

Such a decision requires, therefore, a margin of appreciation’⁶. This was further confirmed by the Court of Justice⁷.

Document 2 contains the Commission’s and EU lines to take and defensive points on a number of cross-cutting issues currently under discussion with a wide range of international partners. This includes, for example EU-US trade relations (e.g. Civil aircraft dispute, Digital services taxes investigations etc.), EU-China and EU-Mercosur trade relations, EU’s digital trade agenda etc. In addition, this document also contains the Commission’s internal assessment of the policies and positions likely to be held by its negotiating partners concerning these issues.

Public access to this information would reveal strategic objectives of the Commission and the EU relevant in the framework of current trade and political relations with a number of third countries and in a number of ongoing and future trade negotiations. Disclosing the redacted passages would put in the public domain evolving and preparatory Commission internal policy considerations on strategic directions to address

³ Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison v Council*, EU:C:2007:75, paragraph 46.

⁴ Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁵ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁶ Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁷ Judgment of the Court of Justice of 19 March 2020, *ClientEarth v European Commission*, C-612/18 P, EU:C:2020:223, paragraphs 68 and 83.

the open issues currently under discussion, thus jeopardising the successful outcome of the related ongoing exchanges. Moreover, this information could also be used by third countries to bring undue pressure on the Commission in support of their own interests, unduly limit the room for manoeuvre of the EU on the international stage, and jeopardise the EU's international position.

Public disclosure of this information would also risk undermining the relations between the EU and those countries as it would affect the atmosphere of mutual trust between the EU and the countries concerned. This would also, in turn, risk undermining EU's negotiating position on the international stage.

In this regard, the General Court found that 'it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations' and 'have a negative effect on the negotiating position of the European Union' as well as 'reveal, indirectly, those of other parties to the negotiations'⁸. Moreover, 'the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union'⁹.

There is therefore a reasonably foreseeable and not purely hypothetical risk that the disclosure of the parts redacted under this exception would undermine the international relations between the EU and a number of third countries. In this context, I would like to remind you that the documents released under Regulation (EC) No 1049/2001 become available to the public at large ('erga omnes'), and not only to the applicant who had requested them.

Consequently, I must conclude that the redacted parts of document 2 need to be redacted under the exception laid down in the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and that access must be therefore refused on that basis.

2.2. 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'.

⁸ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ *Id.*, paragraph 125.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹⁰, the Court of Justice ruled that when a request 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 data¹¹ (hereafter ‘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) 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/EC¹² (hereafter ‘Regulation (EU) 2018/1725’).

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 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’¹³.

Article 3(1) of Regulation (EU) 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’¹⁴.

Document 2 contains personal data such as the names and photos of persons who do not form part of the senior management of the European Commission. The names¹⁵ 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 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies

¹⁰ 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.

¹¹ OJ L 8, 12.1.2001, p. 1.

¹² OJ L 295, 21.11.2018, p. 39.

¹³ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹⁴ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁵ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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) 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 by itself the existence of a need for transferring personal data¹⁶. This is also clear from Article 9(1)(b) of Regulation (EU) 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) 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 to have 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 subjects' 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.

¹⁶ 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Articles 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

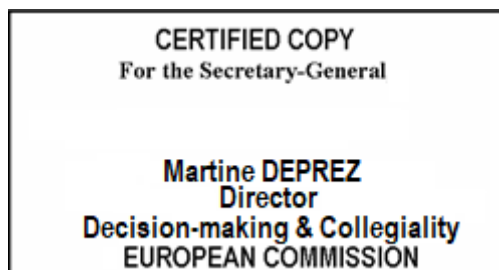
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

As explained above, wider partial access was granted to document 2. The remaining redacted parts cannot be disclosed as their disclosure would undermine the interests protected by the exceptions laid down in the third indent of Article 4(1) (protection of international relations) and Article 4(1)(b) (protection of personal data) of Regulation EC (No) 1049/2001, for the reasons explained above.

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

Enclosure: 1