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Secretariat-General

The Secretary-General

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By registered mail with acknowledgement of receipt

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**Decision by the Secretary General within the meaning of Article 4 of the
Detailed rules for the application of Regulation (EC) No 1049/2001¹**

**Subject: Your confirmatory request for access to documents under Regulation
1049/2001 - GESTDEM 2013/3967**

Dear Mr Hoedeman,

I refer to your e-mail of 23 December 2014, registered on the same day, by which you submit 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 ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

Through your initial application of 5 September 2014, addressed to the Directorate-General for Internal Market and Services (DG MARKT), you had asked for access to the following documents covering the period between 1 January 2013 and 16 June 2014:

- *a list of meetings between management of DG MARKT dealing with financial services and "industry representatives".*

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

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

You referred to a list sent to you by DG MARKT on 10 July 2014 in response to an earlier initial request introduced by you, registered under reference *Gestdem* 2014/1683, which in your view was *very rudimentary* and did *not mention which officials were present at the meetings, nor what topics were discussed*. You also asked for clarification whether *the list indeed includes all meetings of DG MARKT officials/representatives (including the European Commissioner and the Cabinet) and representatives of industry*.

- *all minutes and reports of these meetings*, as you had, by letter of 10 November 2014, only received access to those minutes and reports which DG MARKT had qualified as having a "formal" nature, corresponding to five out of the 67 minutes and reports identified.

As clarified in subsequent correspondence between yourself and the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA)³, you agreed to limit the scope of your request to cover only those meetings held by Directorates F, G and H, Unit 02 and the Director-General and Deputy Director-General in charge of financial services of former DG MARKT.

In its initial replies of 10 and 27 November 2014, DG FISMA:

- regarding the first part of your request, provided a list of meetings held by staff in management positions forming part of the above-mentioned administrative entities of DG MARKT with industry representatives. It specified that that information was provided to you outside the framework of Regulation 1049/2001 as such a list did not previously exist;
- regarding the second part of your request, refused access to 31 documents and provided partial access to the remaining 36 (out of the 67) documents identified as falling under the scope of your request, listed in annex.

It based its refusal to the undisclosed (parts of the) documents on the exceptions of Article 4(2), first indent (protection of commercial interests), 4(1)(b) (protection of personal data) and 4(1)(a), fourth indent (protection of the financial, monetary or economic policy of the EU) of Regulation 1049/2001.

Through your confirmatory position, you request a review of this position.

As regards the first part of your request, pertaining to the list of meetings, you ask to have access to participants' names and the subject matters discussed, to complement the information (entities met and meeting dates) already provided to you by DG MARKT/FISMA. In respect to this part of your request, I regret to inform you that it cannot be dealt with within the framework of this decision taken under Regulation 1049/2001, as it pertains to information compiled specifically for you at the stage of the initial decision and not to (pre-existing) documents in the meaning of that Regulation.

The scope of this decision is therefore limited to the second part of your request, pertaining to meeting reports and minutes. You back up that part of your request with various arguments, which I will address in the corresponding sections below.

³ The successor DG of DG MARKT for those activities falling under the scope of your request.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage.

Having examined your request and the documents concerned, I am pleased to inform you that wide access is granted to those parts that had been redacted at the initial stage. Indeed, documents 2-8, 10, 13, 15-23, 25, 26, 28, 29, 31-37, 39-43, 51-55 and 59 are released in their entirety, subject to the protection of the personal data contained therein.

As regards documents 1, 9, 11, 12, 14, 24, 27, 30, 33, 38, 44, 45, 46, 47, 48, 49, 50, 56, 58, 60 and 61, only limited sections remain redacted. The refused parts of the documents fall under the exceptions of Article 4(2)(1) (protection of commercial interests), Article 4(1)(b) (protection of the privacy and integrity of the individual) and 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001, for the reasons set out below.

Please note that the documents do not reflect any official position of the Commission or of third parties, and cannot be referred to as such.

2.1. Article 4(2)(1) - protection of commercial interests

Article 4(2), first 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 [...] commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.*

The redacted parts of documents 1, 9, 11, 12, 14, 24, 27, 30, 33, 38, 44, 45, 46, 47, 48, 49, 50, 56, 58, 60 and 61 contain reflections, by representatives of specific firms, on the expected effect of regulatory measures on their business strategies and perspectives, their cost components and/or their specific vulnerabilities. These elements would, if disclosed publicly, including to the firms' competitors, make the respective firms more vulnerable in the markets in which they operate. This, in turn, would undermine their commercial interests.

This type of sensitive information about undertakings is protected by Article 339 of the TFEU, which provides that *[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*

Other redacted parts of the above-mentioned documents reflect comments made, by representatives of specific firms, on other firms or on the actions or policies of certain Member States or third countries. There is a real and non-hypothetical risk that these

parts of the documents, if disclosed, would lead to retaliation measures and hence have negative repercussions for the firms that uttered these comments.

Having regard to the above, access to the corresponding parts if the documents must be refused based on the exception of Article 4(2), first indent of Regulation 1049/2001, as such access would undermine the commercial interests of a natural or legal person.

I would like to point out that, contrary to what you indicate in your confirmatory application, the use of the exception of Article 4(2), first indent of Regulation 1049/2001 has, at least in this case, no link with the data protection rules of Regulation 45/2001 and the related exception of Article 4(1)(b) of Regulation 1049/2001. Indeed, the latter exception pertains to the protection of the privacy and integrity of individuals, whereas the former exception is used here to protect the commercial interests of legal persons.

2.2. Article 4(3) - protection of the decision-making process

Article 4(3) of Regulation 1049/2001 provides that:

[a]ccess 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 institution's decision-making process, unless there is an overriding public interest in disclosure.

The redacted parts of documents 12, 27 and 50 reflect personal opinions, expressed by non-senior Commission staff, about the issues under discussion, the firms met, their staff or statements made by the latter in the course of the meetings. These parts do not reflect any formal position of the Commission or by one of its administrative entities. They go beyond a merely factual account of the discussion held with the third parties met, as they include positive or negative appreciations by the Commission staff concerned.

Release of these preliminary, personal views would lead to misinterpretations and premature conclusions regarding the Commission's formal position on the issues discussed in the meetings, or about the Commission's positions towards the firms encountered or their staff. Such release would also make the Commission's decision-making process vulnerable to external pressure in ongoing and future debates on the issues under discussion.

Consequently, access to the respective parts of the documents has to be refused as such access would seriously undermine the Commission's decision-making process protected by Article 4(3), second subparagraph of Regulation 1049/2001.

2.3. Exception of Article 4(1)(b) – protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [the] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

The documents to which you request full access contain the names and/or phone numbers and (e-mail) addresses of non-senior Commission staff and third parties' representatives who participated in meetings with DG MARKT/FISMA staff.

These names constitute personal data in the sense of Article 2(a) of Data Protection Regulation 45/2001⁴. I would also like to draw your attention to the ruling of the Court of Justice in case C-465/00 (*Rechnungshof*)⁵, which confirmed that *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*.

Furthermore, document 12 contains additional personal information about specific individuals working for a private firm.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that, when a request is made for access to documents containing personal data, the Data Protection Regulation, and in particular its Article 8(b), becomes fully applicable. This means that the necessity of disclosing the personal data must be established, and that there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. These two conditions are cumulative.

As regards the first condition, I consider that you have not demonstrated the necessity for obtaining access to these personal data

You state that *there is a public interest in knowing which Commission officials met with which financial industry lobbyists*. However, that argument does not in my view substantiate a *need* to obtain the personal data concerned in the meaning of Regulation 45/2001, but merely an *interest* in obtaining access to those names.

⁴ 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, Official Journal L 8 of 12.1.2001.

⁵ Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof* and *Österreichischer Rundfunk*, paragraph 73.

Furthermore, whilst I recognise that there can be a public interest in knowing which lobby firms met with the Commission, that interest is in my view sufficiently satisfied by the full disclosure of the names of legal entities who participated in the meetings with DG MARKT/FISMA staff. It is not clear to me how publishing, in addition to the names of these firms, the names of the individuals representing them, brings any additional transparency in that respect.

I also draw your attention in this respect to the fact that the legislator has not envisaged any possibility to balance the private interests protected by Article 4(1)(b) of Regulation 1049/2001 against a public interest in disclosure.

As regards the second condition flowing from Regulation 45/2001 as interpreted by the above-mentioned *Bavarian Lager* case, I consider that release of the personal data would expose the Commission and third party staff concerned to pressure and unsolicited contacts from external entities, thereby resulting in prejudice to the privacy and the integrity of the individuals concerned.

It follows that DG MARKT/FISMA's refusal of access to the individuals' names appearing in the documents has to be confirmed, as there are reasons to think that such access would undermine the privacy and integrity of the individuals concerned in the meaning of Article 4(1)(b) of Regulation 1049/2001 and the need for obtaining such access has not been established.

In your confirmatory application you argue that *removing the names* [of non-senior Commission and third-party staff] *is an excessive use of the data protection rules*. As explained above, I consider, to the contrary, that the use of the exception in this specific case is proportionate to the aim of protection of the privacy and integrity of the individuals pursued whilst not substantially affecting the degree of transparency achieved.

2.4. No overriding public interest in disclosure

The exceptions laid down in Article 4(2) and 4(3) of Regulation 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 explicitly put forward an overriding public interest in obtaining access to the redacted parts of the documents requested, apart from the ones dealt with above under point 2.3.

I certainly understand the interest of the public of being informed as comprehensively as possible about meetings held by the Commission with third-party representatives. However, as explained above, I consider that this need has been fully satisfied by the wide partial access which is granted to you.

In this respect I would like to underline that there is an inevitable tension between the need to take in a wide range of views from stakeholders and the need to respect the applicable confidentiality obligations and to preserve trust of the above-mentioned stakeholders. The need to strike the right balance between these objectives requires, as explained above, that certain sensitive information is kept confidential. Consequently, a very detailed assessment has been made of what can be made public or not, in accordance with the obligation laid down in Regulation 1049/2001 to balance the public interest in transparency against other public and private interests deserving protection.

Having regard to the above, I consider that the interests protected by the refusal of the undisclosed parts of the documents outweigh the public interest in access to these parts of the documents. Nor have I been able to identify, for the undisclosed parts, any public interest capable of overriding the public and private interests protected by Article 4(2), first indent and Article 4(3) of Regulation 1049/2001.

For the reasons set out above, I conclude with respect to the redacted parts of the documents that safeguarding the interests protected by Article 4(2), first indent and Article 4(3) of Regulation 1049/2001 prevails over the public interest in transparency in this case. The fact that wide partial access is herewith being granted confirms this conclusion.

Please note also that the exception of Article 4(1)(b) cannot be overridden by any overriding public interest.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, the widest possible access is herewith granted to the documents requested. Further partial access is not possible without undermining the public and private interests protected by Article 4(1)(a), second and third indents, Article 4(2), first indent, Article 4(3) and Article 4(1)(b) of Regulation 1049/2001.

4. PARTS OF YOUR REQUEST FALLING OUTSIDE THE SCOPE OF THIS DECISION

In your confirmatory application you also seem to express an interest in obtaining access to *all correspondence (including emails) between DG MARKT officials/representatives (including the Commissioner and his Cabinet) and industry (including lobby consultancies and law firms, and/or industry associations) between 1 January 2013 and 16 June 2014*. As you did not ask for such correspondence in your initial request as clarified through subsequent correspondence with DG MARKT/FISMA, the corresponding part of your application cannot be dealt with within the scope of this confirmatory decision, as the confirmatory review stage is limited to documents refused fully or partially at the initial stage.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink, reading "Catherine Day". The signature is written in a cursive style with a large, stylized 'C' and a checkmark-like flourish at the end.

Catherine DAY