



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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***By registered letter with acknowledgment
of receipt***

Ms Pia Eberhardt
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Belgium

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Subject: Your application for access to documents – Ref GestDem 2018/6323

Dear Ms Eberhardt,

I refer to your application dated 28/11/2018, in which you make a request for access to documents under Regulation (EC) No 1049/2001¹, registered on the same date under the above mentioned reference number.

In your request, you asked for access to the following:

“1) a list of Commission services and officials as well as US regulatory agencies and officials who have been involved in EU-US discussions on regulatory issues in the context of the “executive working group”, which was set up by US President Donald Trump and European Commission President Jean-Claude Juncker in July 2018 to explore a path forward on trade talks between the EU and the US.

2) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of individual companies and/or industry federations such as BusinessEurope, the European Services Forum (ESF), AmCham EU, the Transatlantic Business Council (TABC), the European Federation of Pharmaceutical Industries (EFPIA), the European Chemical Industry Council (CEFIC), FoodDrinkEurope and the European Automobile Manufacturers' Council (ACEA), in which EU-US trade relations and possible new negotiations have been discussed (since July 2018). The list should include the names of the individuals and organisations attending; the date; and any agendas / minutes / notes produced.

3) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

companies and/ or industry federations, relating to EU-US trade relations and possible new negotiations (since July 2018)."

After the preliminary search we have identified, under point 2 and 3 of your request, a list of 53 meetings and 17 correspondence documents, which after an initial assessment we considered to lead to a too large number of documents to be treated within the legal deadline.

Further to the fair solution negotiations you indicated that the meetings in which civil society organisations or the European Economic and Social Committee participated should be left out of consideration (you have indicated 9 items from the provided table that have been excluded). Finally, after the final evaluation of the workload and resources needed to handle this request we proposed to assess for disclosure 44 documents related to the list of meetings and 4 other documents selected by you (from the list of documents provided for point 3 of your request).

Additionally, we would like to clarify that most of the listed meetings did not focus on future negotiations, but rather on the broader issue of overall EU-US trade relations (including the USMCA negotiations and US sanctions against Russia) and on the US section 232 measures and EU rebalancing. Only 15 meetings from the list of meetings were held specifically to discuss aspects of potential EU-US voluntary regulatory co-operation and standards in the framework of the executive working group. The Commission welcomes comments on potential areas for regulatory co-operation with the US from all interested stakeholder groups, and to this end has recently launched a public call for proposals.² The results of this consultation will be published on the website of DG Trade.

1. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In relation to **point 1 of your request**, I can confirm that the Commission does not hold any specific list of members and meetings of the executive working group. As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

However, by way of information, we can confirm that this executive working group is co-chaired by Commissioner Malmström and USTR Lighthizer in close cooperation with cabinet officials and senior advisors of the National Economic Council on the US side, and the Cabinet of President Juncker, the Secretariat-General of the European Commission and Commission Services on the EU side, as indicated in our public report. There is no participation of persons or organisations other than officials from the respective administrations.

In accordance with settled case law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question pose a "reasonably foreseeable and not purely hypothetical"

² http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157722.pdf

risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Article 4(2) 3 and Article 4(3) of Regulation 1049/2001, the institution is required "to ascertain whether there is any overriding public interest justifying disclosure". In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents, "the exceptions to that right [...] must be interpreted and applied strictly".

After a careful review of all the documents related to the point 2 and 3 of your request, we have finally identified a **total of 41 documents (37 reports from the meetings and 4 other documents) falling within the scope of your request** (Annex 1). In the process of this review, we realised that three of the meetings initially listed were actually outside the scope of your request. Of the 41 meetings, we have received reports for 37 of them. No report has been found for two meetings, while one report listed in the preliminary search was simply a duplicate of another report and finally one of the meeting identified in the preliminary search never actually took place.

Having examined these documents under the applicable legal framework, full access is granted to document **38**, and partial access is granted to documents **1 - 2, 4 - 37**, and **39 – 41**. In particular, in **documents 6-10, 12, 13, 16-18, 20, 22, 24-28, 31-35, 37 and 39-41** only personal data have been redacted pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance to Regulation No 2018/1725.

In **documents 1, 2, 4 11, 15, 19, 21, 23, 30 and 36**, in addition to personal data, information was redacted in accordance with article 4(1)(a) third indent (protection of the public interest as regards international relations), because there is a reasonably foreseeable and not purely hypothetical risk that its disclosure would undermine the protection of the public interest as regards international relations, as set out in Article 4(1)(a) third indent of Regulation (EC) 1049/2001. In particular, the documents contain opinions for internal use regarding the deliberations of US interlocutors, or which would place the EU in a sensitive position vis à vis third countries. Disclosure of these elements would undermine the protection of the public interest as regards international relations because it would reveal information that can be used by third countries to bring an undue pressure on the Commission in support of European interests and unduly limit the room for manoeuvre of the European Union on the international stage as well as jeopardise the European Union's international position.

In addition to personal data, in **documents 1, 2, 5, 14 and 29** some parts were redacted in accordance with article 4.2 first indent in order to protect the public interest as regards commercial interests.

Finally, in relation to **document 3** access cannot be granted, since the entirety of the document has been redacted on the basis of the three provisions mentioned above.

The reasons justifying the application of the exceptions are set out below in Sections 1.1, 1.2. and 1.3. Section 2 contains an assessment of whether there exists an overriding public interest in the disclosure.

Please note that some parts of the documents are related to the issues not covered by the scope of this request so they have been redacted as out of scope.

1.1. PROTECTION OF PRIVACY AND INTEGRITY OF THE INDIVIDUAL

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation (EC) 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/EC³ ('Regulation 2018/1725').

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data "*means any information relating to an identified or identifiable natural person [...]*". The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁴ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.⁵

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁶, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁷.

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 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 has established 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

³ Official Journal L 205 of 21.11.2018, p. 39.

⁴ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

⁵ Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

⁶ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁷ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that 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 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 1049/2001, access cannot be granted to the personal data included in documents **1-37** and **39-41**, 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.

1.2. PROTECTION OF THE PUBLIC INTEREST AS REGARDS INTERNATIONAL RELATIONS

Article 4(1)(a) third indent, of Regulation 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."

According to settled case-law, "the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, 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 complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation". In this context, the Court of Justice has acknowledged that the institutions enjoy "a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest".

Certain passages of the **documents 1, 2, 4, 11, 15, 19, 21, 23, 30 and 36** as well as **the whole document 3** have been withheld as their disclosure would undermine the protection of the public interest as regards international relations, as set out in Article 4(1)(a) third indent of Regulation (EC) 1049/2001. The documents contain opinions for internal use regarding the deliberations of US interlocutors.

The documents reveal information that can be used by third countries to bring an undue pressure on the Commission in support of European interests and unduly limit the room for manoeuvre of the European Union on the international stage and jeopardise the European Union's international position.

1.3. PROTECTION OF COMMERCIAL INTERESTS

Article 4.2 first indent of Regulation 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”.

Not any information concerning a company and its business is protected under Article 4.2 first indent.⁸ However, information which is covered by the obligation of professional secrecy is likely to fall within the scope of this exception.⁹ Therefore, it must be information that is “known only to a limited number of persons”, “whose disclosure is liable to cause serious harm to the person who has provided it or to third parties” and for which “the interests liable to be harmed by disclosure must, objectively, be worthy of protection.”¹⁰

The redacted parts of documents **1, 2, 5, 14 and 29** as well as the entire **document 3** contain sensitive information on the companies’ commercial strategies and consequences for the EU, in the context of the US section 232 tariffs on steel and aluminium and EU rebalancing measures, the US section 232 investigation on cars and car parts, the renegotiation of US FTA’s, and the US sanctions on Russia. Putting these elements in the public domain would undermine the commercial interests of these companies, or could reflect negatively on their reputation.

2. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Article 4(2) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. Accordingly, the presence of an overriding public interest in disclosure has also been assessed. In the present case, there is no such evidence. On the contrary, the prevailing interest in this case rather lies in protecting the purpose of the Commission's internal consultations at the heart of these consultations.

3. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 “[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”. Accordingly, we have also considered whether partial access can be granted to **document 3**. After careful review, we have concluded that **document 3** is entirely covered by the exceptions described above as it is impossible to disclose any parts of this document without undermining the protection of interests identified in this reply, notably the exceptions laid down in Article 4(1)(a) third indent, Article 4(1)(b) second paragraph, and Article 4.2 first indent of Regulation 1049/2001.

⁸ Judgment in Terezakis v Commission, T-380/04, EU:T:2008:19, paragraph 93.

⁹ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁰ Judgment in Bank Austria v Commission, T-198/03, EU:T:2006:136, paragraph 29.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency, Document Management & Access to Documents unit SG-C-1
BERL 7/076
1049 Bruxelles

Or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Jean-Luc DEMARTY

Annexes: 1.List of documents
2.List of meetings
3.Disclosed documents