



EUROPEAN COMMISSION
Directorate-General for Trade

The Director-General

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

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**Subject: Your application for access to documents – Ref GestDem No
2018/6527**

Dear Ms Martí,

I refer to your email of 6 December 2018 in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the 7 December 2018 under the reference number GestDem No 2018/6527.

1. SCOPE OF YOUR REQUEST

In your application, you requested access to:

- 1) all the trade agreement drafts (and/ or proposals) submitted by both parties (EU-Mercosur) since October 2016.*
- 2) all the agendas/ minutes/ notes produced in the negotiation rounds since October 2016.*
- 3) a list of Commission services and officials as well as Mercosur regulatory agencies and officials who have been involved in EU-Mercosur discussions on regulatory issues in the context of the trade agreement, which started in October 2016.*
- 4) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of individual companies and/or*

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.

industry federations, in which EU-Mercosur trade relations and possible new negotiations have been discussed (since October 2016). The list should include the names of the individuals and organisations attending; the date; the place; and any agendas / minutes / notes produced.

5) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and her Cabinet) and representatives of companies and/ or industry federations, relating to EU-Mercosur trade relations and possible new negotiations (since October 2016).

On 9 January 2019, you provided an additional clarification, which helped us to reduce the scope of your original request to a more targeted number of documents. The modifications concern point 4 and 5 of your request where you agreed to receive a list of meetings specified under point 4 but without any additional document related to these meetings. As regards point 5, you confirmed that the new period from which the correspondence will be considered would be from October to December 2018.

I regret the time it has taken to provide a reply, but given the broad nature of your request you will understand that it has been necessary to make an extensive search.

2. ASSESSMENT CONCLUSIONS UNDER REGULATION 1049/2001

In reply to the points 1 and 2 please note that the European Commission is publishing all its original textual proposals of the different trade agreement chapters as well as the reports from the negotiating rounds as from October 2016 until the last 37th round that took place in December 2018. All these documents can be found under the following link: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1769>

With regard to the point 3, please note that the negotiations for a free trade agreement between the EU and Mercosur have been conducted at political and technical level as follows:

- 1) for the EU side by the EU Trade Commissioner - Ms Cecilia Malmström and the EU Chief Negotiator Ms Sandra Gallina, Deputy Director General of DG TRADE
- 2) for MERCOSUR: by the Ministers of Foreign Affairs of Argentina, Brazil, Uruguay and Paraguay and by the respective Chief Negotiators for each country.

The names are listed per country as follows:

Argentina: Mr. Jorge Marcelo Faurie, Minister of Foreign Affairs (as of June 2017), Ms. Susana Malcorra, Minister of Foreign Affairs (from 2015 until 2017), and Chief Negotiators: Mr. Horacio Reyser, Secretary for Regional Economic Integration and MERCOSUR, MFA ; Mr. Vittorio Carpintieri, acting Under Secretary for Regional Economic Integration and MERCOSUR, MFA.

Brazil: Mr. Aloysio Nunes Ferreira Filho, Minister of Foreign Affairs (as of 2017), Mr. Mauro Vieira, Minister of Foreign Affairs (from 2015 to 2017); and

Chief Negotiators: Mr. Ronaldo Costa Filho, Ambassador, Director of the Department of Extra-regional Trade Negotiations, MFA, and Mr. André Odenbreit Carvaço, Director of the Department of Extra-regional Trade Negotiations, MFA.

Uruguay: Mr Rodolfo Nin Novoa, Minister of Foreign Affairs and Ms. Valeria Csukasi - Minister Counsellor, MFA, Chief Negotiator.

Paraguay: Mr. Luis Castiglioni, Minister of Foreign Affairs (as of 15 August 2018), Mr. Eladio Loizaga Caballero, Minister of Foreign Affairs (until August 2018), and Mr. Juan Ángel Delgadillo, Minister, Chief Negotiator of Paraguay.

In reply to the point 4 of your request, Article 2(3) of Regulation 1049/2001 specifies the right of access as defined in that regulation applies only to existing documents in the possession of the institution. Unfortunately, we do not have such a list as a self-standing document.

In order to assist you however, we have compiled the information you have requested in line with the Code of Good Administrative Behavior. You will find the corresponding list in the document attached to this reply (Annex1).

As for the point 5, we have identified 11 documents, that fall within the scope of your request (see the attached list of documents).

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 1049/2001².

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 would undermine the protection of the interest covered by the exception. Third, the risk of that interest being undermined must be "reasonably foreseeable and not purely hypothetical"³.

If the institution takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2) and 4(3) of Regulation 1049/2001, the institution is required "*to ascertain whether there is any overriding public interest justifying disclosure*"⁴.

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008: 374, paragraph 35.

³ Id., paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Id., paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁵, *"the exceptions to that right [...] must be interpreted and applied strictly"*⁶.

Having carefully examined your request in light of the applicable framework, I am pleased to inform you that access can be granted to the content of **documents 1, 3, 4, 6, 7 and 8** where only some personal data has been withheld in accordance with Article 4(1) (b) of Regulation 1049/2001. Please note that information not related to the scope of your request has been marked as falling outside the scope. Copies of the accessible documents are enclosed. The names of officials at Director level or above are released.

In documents 2 and 5 in addition to personal data, some parts have been redacted pursuant to Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations and Article 4(3) of the same regulation concerning the protection of ongoing decision making process.

I regret to inform you that access is not granted **to documents 9, 10 and 11** pursuant to Article 4 (1) (a) third indent of the Regulation 1049/2001 concerning the protection of the public interest as regards international relations and Article 4(3) of the same regulation concerning the protection of ongoing decision making process. The annex of document 11 is withheld in accordance with Article 4 (2) first indent related to the protection of the public interest as regards commercial interests.

The reasons justifying the application of the previously mentioned exceptions are set out below in sections 2.1, 2.2, 2.3, and 2.4. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

2.1 Protection of the privacy and the 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.

Regulation (EC) No 2018/1725⁷ 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 repealed Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725') in the field of data protection.

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 due to its content, purpose or effect, is linked to a

⁵ Regulation (EC) No 1049/2001, recital (4).

⁶ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

particular person is to be considered as personal data.⁸ 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.⁹

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, the Data Protection Regulation becomes fully applicable¹¹.

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 *"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 to 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 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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 the Regulation 2018/1725.

Consequently, I conclude that pursuant to Article 4(1)(b) of Regulation 1049/2001 and Article 9(1) (b) of Regulation 2018/1725, 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.

2.2 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: (a) 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 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"*.¹² In this context, the Court of Justice of the EU 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"*.¹³

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"*.¹⁴ 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"*.¹⁵

Certain parts of **documents 2 and 5** and the entire **documents 9, 10 and 11** have been withheld, since they reflect the EU's position as regards the ongoing negotiations with Mercosur with regard to the treatment of relevant agricultural goods subject to the letters. Releasing that information would pose a significant risk to the good relations between the EU and the concerned third countries or undermine the EU's interest. That information has therefore to remain protected.

¹² Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

¹³ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63

¹⁴ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU: T:2013:135, paragraphs 123-125

¹⁵ *Id.*, paragraph 125.

2.3 Protection of the public interest as regards ongoing 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.”

The jurisprudence of the EU Courts has recognized that “the protection of the decision making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process”¹⁶ and that the capacity of its staff to express their opinions freely must be preserved¹⁷ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court noted, the result of such self-censorship “would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]”¹⁸.

Certain parts of documents 2 and 5 have been withheld and the access to documents 9, 10 and 11 is refused as they contain information that was shared with the Commission in order to provide useful input and support for the EU’s objectives in its trade negotiations with Mercosur. Economic operators typically share information with the Commission so that the latter can determine how to best position itself in the negotiations in order to protect its strategic interests and those of its industry, workers and citizens. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission, are key elements for the success of the internal and external policies of the EU and its international negotiations. Placing in the public domain specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

In particular, exposing internal views and considerations expressed in the context of discussions would be premature at this stage and would subject the Commission to external pressure, potential manipulation and unfounded conclusions both from external stakeholders and negotiating partners. It would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches and proposals. This would consequently undermine the decision-making process of the EU institutions by revealing specific elements taken into account for the ongoing discussions.

¹⁶ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹⁷ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89

¹⁸ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

2.4 Protection of the public interest as regards 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”.

The annex to document 11 has been withheld because its disclosure would reveal specific data, concerns and interests of external stakeholder. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the entity concerned, as it could be exploited by competitors to undermine its competitive positions in third countries and their relationship with the other economic operators in such markets.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Articles 4(2) first indent and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have also considered whether the risks attached to the release of the protected passages and documents are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding protected interests. The public interest in this specific case lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions for its ongoing negotiations with third countries without undermining the commercial position of the entities involved or the ongoing decision-making process.

4. 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 **documents 9, 10 and 11**.

After a careful review, we have concluded that all three documents are entirely covered by the exceptions described above as it is impossible to disclose any parts of these documents without undermining the protection of the interests identified in the reply.

In case you disagree with the assessment contained in this reply you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, 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 (SG.C.1)
BERL 7/076
B - 1049 Brussels

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

Yours sincerely,



Jean-Luc DEMARTY

Enclosures:

- ☐ Annex I: List of documents
- ☐ Annex II: List of meetings between DG TRADE and industry
- ☐ Documents (partially) disclosed