



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels,
TRADE/SW

By registered letter with acknowledgment of receipt

Mr Hans Wetzels
Hereweg 164
6371LZ, Landgraaf
Netherlands

Advance copy by email:
ask+request-7196-79fbce28@asktheeu.org

Subject: Your application for access to documents – Ref. GestDem N° 2019/4589

Dear Mr Wetzels,

I refer to your e-mail dated 5/08/2019 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on 7/08/2019 under the above mentioned reference number.

Please accept our apologies for the delay in answering to your request, which is mainly due to a high number of access to documents requests being processed at the same time and also to the nature of your request that required numerous searches in our database.

1. SCOPE OF YOUR REQUEST

In your application, you request access to:

- 1) Any study, impact assessment, forecast, paper or other document - commissioned or authored by any part of the European Commission, or received from (or representatives from) ACEA (European Automobile Manufacturers' Association) or Volkswagen concerning or mentioning negotiations for a EU-Mercosur Free Trade Agreement between January 2015 and October 2017.*

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.

2) *a list of meetings including detailed minutes and any other reports of such meetings between DG TRADE's officials (including the Commissioner and his Cabinet members) and (or representatives from) ACEA (European Automobile Manufacturers' Association) or Volkswagen concerning or mentioning negotiations for a EU-Mercosur Free Trade Agreement between January 2015 and October 2017.*

3) *All correspondence (including emails) by DG TRADE's officials (including the Commissioner and his Cabinet members) sent to or received from ACEA (European Automobile Manufacturers' Association) or Volkswagen concerning or mentioning negotiations for a EU-Mercosur Free Trade Agreement between January 2015 and October 2017.*

We understand from your application that you request access to the documents specified under point 1-3 that concern specifically the automobile sector and/or Volkswagen in the context of EU-Mercosur Free Trade Agreement.

With regard to this scope, we have identified 10 documents. A list of all identified documents is enclosed in the Annex1 to this reply.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², 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

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(commercial interest) of Regulation 1049/2001. Finally, one Commission internal document only (**document 6**) has been withheld according to Article 4.1(a) (international relations and Article 4(3) (decision making process of Regulation 1049/2001. The justification of the application of exceptions from article 4 of Regulation 1049/2001 is included in section 2.1-2.3.

Please note that the parts of the documents falling outside the scope of this application have been redacted as out of scope.

2.1. 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/EC⁶ ('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.⁷ 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.⁸

In its judgement in Case C-28/08 P (*Bavarian Lager*)⁹, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.¹⁰

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*

⁶ Official Journal L 205 of 21.11.2018, p. 39.

⁷ Judgement 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.

⁸ Judgement 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.

⁹ Judgement of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹⁰ Whereas this judgement 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.

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 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, 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.

All the identified documents contain names and other personal information that allows the identification of natural persons. Additionally, in several documents the signatures have been removed to avoid the risk of fraudulent use of such signatures.

2.2 Protection of the public interest as regards to 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 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".*¹¹ 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"*.¹²

Parts of **documents 4 and document 6** contain information that could risk to undermine the dialogue, trust and relations with Mercosur if those parts were disclosed.

More generally, it remains important for the EU when negotiating with its counterpart to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Exposing internal views and considerations would weaken the negotiating capacity of the EU and consequently, the protection of the public interest as regards international relations.

I conclude that pursuant to Article 4(1)(a) of Regulation 1049/2001, access cannot be granted to the parts of the documents falling within the scope of your request related to the EU's position with regard to or assessment of third countries in so far as it would undermine the protection of international relations.

2.3 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"*.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent¹³, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy¹⁴. Accordingly, 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"*.¹⁵

Some passages in **document 4** have been withheld because they contain business sensitive information pertaining to an organisation, a company or group of companies, including details about commercial priorities, objectives, strategies, concerns and interests that they pursue in their respective domains.

¹¹ Judgement in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

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

¹³ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁴ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁵ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

All this information was shared with the Commission in order to provide useful input and support for the EU's objectives in its trade negotiations. 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. Sharing publicly specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

2.4 Protection of the institution's decision-making process

Article 4(3), second subparagraph of Regulation 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”.

Furthermore, 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 the individuals involved 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 has recognized, the result of such self-censorship would be that the institutions *"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 [...]"*.

Document 6 contains inter alia sensitive information related to preliminary views and exchanges of the Commission services. The disclosure of the document in question would restrict the “space to think” among directorates-general of the Commission and the room for maneuver and undermine the necessary atmosphere of trust during discussion and negotiation processes in future similar situations.

It follows from the above that disclosure of some of the information contained in the requested document would hamper a free exchange of views and the possibility for the Commission to analyse and draw conclusions in documents intended for internal purposes in this and also future similar cases, thereby impairing the decision-making process. In consequence, the exception laid down in Article 4(3) of Regulation 1049/2001 applies.

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

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

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) second indent of Regulation 1049/2001 applies 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 withheld parts of **document 4** 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 the commercial interests of the companies concerned.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, we have also examined the possibility of granting partial access to **document 6**. However, it follows from the assessment made above that **document 6** is manifestly and entirely covered by the exception laid down in Article 4.1(a) and 4.3 second indent of Regulation 1049/2001.

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
BE - 1049 Bruxelles

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

Yours sincerely,



Sabine WEYAND
p.o. Sandra GALLINA

Annexes: - List of the identified documents related to Gestdem 2019/4589
 - Disclosed documents

