



EUROPEAN COMMISSION

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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 2019/7298**

Dear Mr Hoedeman,

I refer to your email of 4 February 2020, registered on 5 February 2020, in 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 (hereafter: 'Regulation (EC) No 1049/2001').

Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 17 December 2019, addressed to the Directorate-General for Competition, you requested access to the following documents:

- 'all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc., as well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry) during 2019;
- all correspondence (including e-mails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc., as

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry) during 2019;

- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meetings/correspondence).'

In your request you asked to exclude all documents you have already received as a result of your access to documents request of 11 December 2018 registered under reference number GESTDEM 2018/6667. It was replied to you on 22 January 2019.

In its initial reply of 16 January 2020, the Directorate-General for Competition mentioned that your request includes documents forming part of the case file in a pending antitrust case concerning an investigation under Article 102 of the Treaty on the Functioning of the EU, in which the procedure has not been finalised yet.

Therefore, the Directorate-General for Competition refused access to the requested documents, based on the exceptions protecting the purpose of inspections, investigations and audits provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 and the exception protecting commercial interests provided for in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You put forward a number of arguments to support your request. These have been taken into account in our assessment, of which the results are described below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 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 regret to inform you that the refusal to grant access to the documents requested has to be confirmed based on the exceptions relating to, respectively, the first and third indents of Article 4(2) (protection of the commercial interests and of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. In addition, the access to the requested documents is refused based on the exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

2.1. Protection of the purpose of investigations and of commercial interests

In accordance with the case-law of the Court of Justice, the European Commission, 'when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation (EC)

No 1049/2001’ and two different exceptions can, as in the present case, be ‘closely connected’³.

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’.

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that the ‘[i]nstitutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits’.

In its initial reply of 16 January 2020, the Directorate-General for Competition explained that the requested documents falling under the scope of your request are part of the ongoing antitrust investigation.

All the documents in the currently closed⁴ case AT.40681 ‘Excessive pricing of UID fees’ are covered by a general presumption of non-accessibility based on the exceptions of the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001. This means that the institution is not required to carry out a specific and individual assessment of the content of the requested documents.

In its judgment in *Commission v TGI*⁵, which concerned a request for documents in two State aid cases, the Court of Justice held that there exists, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. This reasoning was further confirmed in the *Sea Handling* judgment⁶. This presumption applies regardless of whether an application for access to documents concerns an investigation which has already been closed or an investigation which is pending⁷.

In the *Deutsche Telekom AG v Commission* judgement, which concerned procedures for the application of Article 102 of the Treaty on the Functioning of the EU, the General Court expressly acknowledged the existence of a general presumption of non-disclosure, concerning the right to consult documents in the European Commission’s file relating to those procedures, without there being any need to distinguish between internal

³ Judgment of the General Court of 13 September 2013, *Netherlands v European Commission*, T-380/08, EU:T:2013:480, paragraph 34.

⁴ It needs to be noted that on 6 February 2020 the complainant, namely the British-American Tobacco Company, withdrew its complaint.

⁵ Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau*, C-139/07, (hereafter *Commission v Technische Glaswerke Ilmenau*), EU:C:2010:376, paragraphs 52 to 61.

⁶ Judgment of the Court of Justice of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, (hereafter *Sea Handling v Commission*) EU:C:2016:557, paragraphs 36 to 47.

⁷ Judgment of the General Court of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraphs 57 and 58.

documents and documents exchanged with third parties, since the general presumption applies to the whole case file in the administrative procedure⁸.

The Court of Justice has upheld this reasoning in relation to documents in cases regarding the application of Articles 101 and 102 of the Treaty on the Functioning of the EU (i.e. antitrust cases), which are governed by the procedural rules set out in Regulation (EC) No 1/2003⁹.

Furthermore, in its *EnBW* judgment, the Court of Justice held that ‘there is, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of documents in cases regarding the application of Articles 101 and 102 TFEU would undermine the purpose of the privileged access rules introduced by Regulations 1/2003 and 773/2004’¹⁰. This presumption applies regardless of whether an application for access to documents concerns a proceeding which has already been closed or a proceeding which is pending¹¹.

Natural and legal persons submitting information under Regulation (EC) No 1/2003 have a legitimate right to expect that - apart from the publication of the final decision with any business secrets and other confidential information removed from it - the information they supply to the European Commission on an obligatory or voluntary basis will not be disclosed to the public. This legitimate right arises from the specific provisions concerning the professional secrecy obligation - which provide for documents to be used only for the purposes for which they have been gathered - and the special conditions governing access to the European Commission's file. Indeed, Article 28 of Regulation (EC) No 1/2003¹² and Article 15 of Regulation (EC) No 773/2004¹³ stipulate that such information may only be used for the purpose for which it was acquired. These articles also require that the European Commission respects the obligation of professional secrecy enshrined in Art 339 of the Treaty on the Functioning of the EU¹⁴.

Therefore, there is also a general presumption that the disclosure of documents that are part of antitrust investigation files (as is the case for the documents requested) would undermine the commercial interests of the company concerned. In this regard, the General Court held in the *Bitumen* case that publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether the proceedings are still pending¹⁵.

⁸ Judgment of the General Court of 28 March 2017, *Deutsche Telekom AG*, T-210/15, EU:T:2017:224, paragraph 43.

⁹ Judgment of the General Court of 27 February 2014, *European Commission v EnBW Energie baden-Württemberg*, C-365/12 P, EU:C:2014:112, paragraphs 81-88 and 114.

¹⁰ *Idem*, paragraph 88.

¹¹ Judgment of the General Court of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraphs 57 and 58.

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

¹³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24.

¹⁴ Judgment in *Netherlands v Commission*, cited above, EU:T:2013:480, paragraphs 49 and 50.

¹⁵ *Idem*, paragraph 43.

The general presumption can apply up to 30 years and possibly beyond¹⁶.

I note that for the specific cases where a general presumption of non-accessibility applies, all documents in the file are covered by that presumption. In the *AlzChem v European Commission* judgment, the Court of Justice held that the general presumption continues to apply regardless of whether the documents targeted by the application for access were specifically identified and few in number¹⁷.

According to the judgment of the General Court in *Agrofert*, '[...] documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties are likely to concern, amongst others, commercial strategies, turnover, market shares and business relations, and thus commercially sensitive information relating to the parties at issue'¹⁸.

In line with the *Deutsche Telekom AG v Commission* judgment of the General Court, the general presumption of non-disclosure '[...] applies regardless of whether the request for access concerns an investigation which has already been closed or one which is pending. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether an investigation is pending. [...]'¹⁹. In this regard, the Court held in the *European Commission v Agrofert Holding* judgment that the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond.²⁰ Finally, in the recent *Arca Capital Bohemia* judgment, the General Court underlined the importance of the exception relating to the protection of commercial interest of third parties, in the context of closed State aid investigation procedures.²¹

Against this background, I confirm that the documents falling under the scope of your application need to be protected against the risks associated with their public disclosure under the exceptions provided for in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

Having regard to the above, I consider that the use of the exceptions under the third indent of Article 4(2) (protection of the purpose of investigations) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001 is justified, and that access to the documents in question must be refused on that basis.

¹⁶ Judgment of the Court of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 67.

¹⁷ *Ibid*, paragraphs 31-32.

¹⁸ Judgment of the General Court of 7 July 2010, *European Commission v Agrofert Holding*, T-111/07, (hereafter *Commission v Agrofert Holding*) EU:T:2010:285, paragraphs 54, 56 and 62.

¹⁹ *Deutsche Telekom AG v European Commission*, paragraph 45.

²⁰ *Commission v Agrofert Holding*, C-477/10 P, paragraph 67.

²¹ Judgment of the General Court of 11 December 2018, T-440/17, *Arca Capital Bohemia v European Commission*, T-440/17, EU:T:2018:898, paragraphs 58-59.

2.2. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that ‘the 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’.

In its judgment in Case C-28/08 P (*Bavarian Lager*),²² 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 data²³ (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 the above-mentioned 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 data²⁴.

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 2018/1725.

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

The requested documents include the names, surnames, contact details (direct telephone numbers, office and email addresses) of staff members of the European Commission not holding any senior management position. They include also the names and surnames of third parties. This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725 and in the sense of the *Bavarian Lager* judgment²⁵.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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’.

²² Judgment of the Court of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59 (hereafter ‘*Bavarian Lager*’).

²³ Official Journal L 8 of 12.1.2001, p. 1.

²⁴ Official Journal L 205 of 21.11.2018, p. 39.

²⁵ *Bavarian Lager*, cited above, paragraph 70.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) No 2018/1725, can the transmission of personal data occur.

Furthermore, 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 data.²⁶ 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 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.

In this context, I would like to point out that the right to the protection of the privacy is recognised as one of the fundamental rights in the Charter of Fundamental Rights, as is the transparency of the processes within the Institutions of the EU. The legislator has not given any of these two rights primacy over each other, as confirmed by the *Bavarian Lager* case-law referred to above²⁷.

Based on the information at my disposal, I note that there is a risk that the disclosure of the names of the individuals appearing in the requested documents would prejudice the legitimate interests of the third-parties concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(1)(b) of Regulation (EU) 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.

²⁶ 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.

²⁷ *Bavarian Lager*, cited above, paragraph 56.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public (as opposed to any possible private interests of the applicant) and, secondly, overriding, it must outweigh the harm caused by disclosure.

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

In this context, I would like to point out that the effects of disclosure of a document under Regulation (EC) No 1049/2001 apply towards all (i.e. if disclosed to one requester, the document becomes accessible to any citizen).

In your application, you argue that the public interest in transparency in the interactions with representatives of tobacco companies may override the public interest protected by the exceptions invoked in the initial decision. Furthermore you state that the motivation behind your request for access is also ‘monitoring of the role of tobacco lobbying in EU decision-making.’

Please note however that the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance²⁸. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure²⁹. I consider that this interest constitutes a private and not a public one³⁰.

In the *Port de Brest v European Commission* judgment³¹, the General Court confirmed once again that the applicant must rely on specific circumstances to show that there is an overriding public interest, which is able to justify the disclosure of the documents. Moreover, in this judgment, the General Court held that among the limits with regard to the right of access to documents held by the European Commission, is the exception referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, protecting the purpose of inspections, investigations and audits of the institutions³².

In addition, I have not been able to identify any public interest that would outweigh the interests protected in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

²⁸ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128 (hereafter *Strack v Commission*).

²⁹ *Strack v European Commission*, cited above, paragraph 129.

³⁰ *AlzChem AG v European Commission*, cited above, paragraph 56.

³¹ *Port de Brest v European Commission*, T-39/17, cited above, paragraph 104.

³² *Ibid*, paragraph 112.

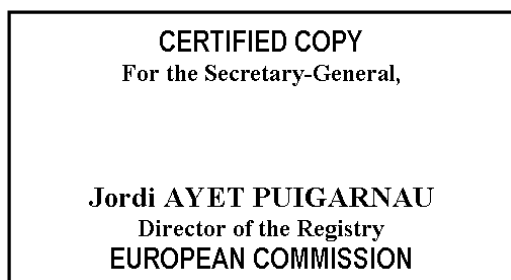
4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the document requested. However, as pronounced by the Court of Justice,³³ where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Ilze Juhansone
Secretary-General

³³ *Commission v Éditions Odile Jacob*, paragraph 133.