



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 2018/4928**

Dear [REDACTED],

I refer to your e-mail of 28 November 2018, registered on 13 December 2018, 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 (hereinafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your e-mail dated 20 September 2018, registered under reference GestDem 2018/4928 and dealt with by the Secretariat-General of the European Commission, you requested access to:

- 1) ‘a list of the members of the “executive working group”, which was set up by United States 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 United States;
- 2) the mandate of the group or any other descriptions of its tasks;
- 3) a list of all meetings of the “executive working group” as well as of individual members in the context of the group’s mandate. The list should include the names of the individuals and organisations attending, the date, and any agenda/minutes/notes produced’.

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

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

In its initial reply, dated 26 November 2018, Directorate H of the Secretariat-General of the European Commission identified the following documents, as falling within the scope of your request:

1. 'Report of meetings of Mr O'Sullivan, EU Ambassador to the United States, Mr Delvaux, Member of Cabinet of President Juncker and Mr Garcia Bercero, Director in the Directorate-General for Trade, with members of the offices of the United States Trade Representative and the National Economic Council on 20 August 2018, reference Ares(2018)4327738;
2. Report of a meeting between Commissioner Malmström and United States Trade Representative Lighthizer on 10 September 2018, reference Ares(2018)5574354'.

The Directorate H of the Secretariat-General of the European Commission refused access to these documents requested, based on the exception protecting the public interest as regards international relations laid down in third indent of Article 4(1)(a) and the exception protecting privacy and the integrity of the individual laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.

Furthermore, the Directorate H of the Secretariat-General of the European Commission informed you that in relation to point 2 above, the mandate of the group is described in the Joint US-EU Statement issued following President Juncker's visit to the White House on 25 July 2018 which is publicly available on *Europa* website³.

With regard to points 1 and 3, the Directorate H of the Secretariat-General of the European Commission confirmed that the European Commission does not hold any specific list of members and meetings of the executive working group. It also provided you general information about meetings in question, such as who participated in these meetings and the date.

Finally, you also question whether the European Commission has conducted a full search for documents falling under your request.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General of the European Commission conducts a fresh review of the reply given at the initial stage.

Against this background, the European Commission has carried out a renewed, thorough search for documents that would fall within the scope of your application as described above.

Following this renewed search, I confirm that the European Commission has not found any further documents that would fall under the scope of your request, other than the ones already identified at the initial level.

³ [http://europa.eu/rapid/press-release STATEMENT-18-4687 en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm).

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in this Regulation applies only to existing documents in the possession of the institution.

In light of the above, given that the European Commission has not found any other document falling under the scope of your request, the European Commission is not in a position to handle this part of your confirmatory application.

As regards the documents identified at the initial stage, I regret to inform you that I have to confirm the initial decision of Directorate H of the Secretariat-General of the European Commission to refuse access to those documents. The underlying exceptions are those protecting international relations, personal data and the decision-making process, which are provided for, respectively, in the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, Article 4(1)(b) and Article 4(3), first subparagraph of the said Regulation.

2.1. The Executive Working Group

The documents requested in your initial application, concern the trade relations between the EU and a third country, the United States of America (hereafter ‘the United States’). Indeed, they reflect discussions and negotiations with the authorities of the United States in the context of the Executive Working Group set up on 25 July 2018.

The Executive Working Group is co-chaired by Commissioner Malmström and United States Trade Representative Lighthizer in close cooperation with cabinet officials and senior advisors and officials of the National Economic Council on the United States side, and the Cabinet of President Juncker and the senior officials of the European Commission services on the EU side.

Following preparatory meetings at senior officials level in August 2018, Commissioner Malmström and Ambassador Lighthizer met in Brussels on 10 September 2018 to launch the exercise. Subsequent meetings at Ministerial level were also held in New York on 25 September 2018, in Washington on 14 November 2018, on 8 and 10 January 2019 and on 6 March 2019.

Contacts have taken place also between Secretary-General of the European Commission Martin Selmayr and Director of the United States National Economic Council Larry Kudlow on 7 March 2019.⁴ A number of additional discussions have taken place at technical level between EU and United States officials. In particular, regulatory issues were discussed in a meeting of the Executive Working Group at technical level in Washington on 23-26 October 2018 in which relevant regulatory Departments and Agencies of the United States Government and the European Commission participated.

⁴ http://europa.eu/rapid/press-release_IP-19-1531_en.htm.

Technical contacts also took place in the margins of political level meetings of 8 and 10 January 2019 between Commissioner Malmström and United States Trade Representative Lighthizer.⁵

As part of the European Commission's commitment to transparency, on 18 January 2019 the European Commission published the proposals for negotiating directives for its trade talks with the United States: one on conformity assessment, and one on the elimination of tariffs for industrial goods.⁶

On 30 January 2019, the European Commission published an Interim Report on the work of the Executive Working Group that is publicly available on the Europa website.⁷ The report provides a detailed overview on the state of play of the talks so far.

On 19 February 2019, the European Commission has submitted to the European Parliament and EU Member States an economic analysis on the benefits for EU and United States producers and consumers of eliminating tariffs on industrial goods across various sectors. The economic analysis was made public shortly after its discussion by Member States in the Council and will be complemented later in 2019 with a Sustainability Impact Assessment conducted by independent experts.⁸

2.2. Protection of the public interests as regards international relations and of the decision-making process

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 No 1049/2001' and two different exceptions can, as in the present case, be 'closely connected'⁹.

Article 4(1)(a), third 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 [...] the public interest as regards [...] international relations [...]'].

Article 4(3), first subparagraph of Regulation 1049/2001 provides that 'access 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'.

⁵ See Interim Report on the work of the Executive Working Group, 30 January 2019, page 2: http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157651.pdf.

⁶ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1971&title=EU-U.S.-Trade-Talks-European-Commission-presents-draft-negotiating-mandates>.

⁷ http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157651.pdf.

⁸ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1985&title=Economic-analysis-confirms-significant-gains-from-EU-US-industrial-tariff-agreement>.

⁹ Judgment of the General Court of 13 September 2013, *Kingdom of the Netherlands v European Commission*, T-380/08, EU:T:2013:480, paragraph 34.

As far as the protection of international relations is concerned, the EU Court has acknowledged that the institutions enjoy wide discretion when considering whether access to a document may undermine that public interest¹⁰.

Documents 1 and 2 contain detailed information on discussions between the high representatives of the EU and the United States on how to move forward and identify priorities on both sides, and on how to achieve concrete results in the short to medium term. They address each of the topics in the Joint Statement issued by President Trump and President Juncker on 25 July 2018, among others non-tariff and regulatory issues, standards settings, United States goods trade deficit with the EU and others.

I consider that public disclosure of the requested documents, would negatively affect the ability of the European Commission to effectively defend EU interests in the context of the ongoing trade discussions within the Executive Working Group. I consider that risk is reasonably foreseeable and non-hypothetical, as it would reveal the institution's approaches and preferences, as well as its political analysis, thus weakening its negotiation position towards its United States counterparts.

In case the European Commission were to disclose documents in question, the European Union's negotiating partner would have reason to believe that its positions expressed during sensitive negotiations could be made public by the European Commission. This would have an adverse effect on current and future international negotiations and limit the prospects for future cooperation with or within the Executive Working Group. Therefore, the release of the documents in question would thus seriously undermine the public interest as regards the European Union's international relations with the United States. Such disclosure would seriously undermine the atmosphere of mutual trust between the partners.

In this respect, the Court has underlined that 'in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. As the Commission emphasises, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise. The negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion. As the Commission points out, any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust.'¹¹ Consequently, if sensitive trade information submitted by the United States

¹⁰ Judgment of the Court of First Instance of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

¹¹ Judgment of the General Court of 19 March 2013, *In't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 119, 125 and 126.

representatives in this context were to be released or inferred, there would be a clear and non-hypothetical risk that the United States representatives would not share such information with the European Commission in the future. This means that the European Commission would be deprived of the possibility of obtaining precise and relevant trade information allowing it to assess objectively all the negotiating options. Given that this information is crucial to its negotiations, the European Union would be prevented from conducting effective trade negotiations with third countries, including in the framework of the European Union's international relations under the scope of the Executive Working Group. The negotiation power of the European Union would consequently be affected, and its position in ongoing and future negotiations weakened, which in turn would damage the protection of the public interest as regards international relations.

In addition, the public disclosure of the documents in question would seriously undermine the ongoing decision-making process of the European Commission in the context of the trade negotiations with the United States and reduce the margin of manoeuvre of the institution towards its negotiating partner. Once certain reflections about strategic positions are public, the tactical approach suggested will not be effective anymore.

Please note in this respect that, in Case T-144/05 (*Muñiz*)¹² the Court held that access to documents can be refused on the grounds of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, where disclosure of the documents requested would have a substantial negative impact on the decision-making process in question, in particular, where disclosure of the documents would lead to a real and reasonably foreseeable risk of external pressure and/or an objectively justified risk of self-censorship.

The information in the documents in question was shared within a climate of mutual trust between the high representatives of the European Commission and the United States and was not meant to be disclosed to the public at this stage. Disclosing those documents would seriously undermine the ongoing decision-making process, as it would reduce the free exchange of views between the negotiating partners by exposing views and considerations to undue pressure and unfounded conclusions, at a time when such free exchange of views is particularly important given the ongoing trade negotiations. It should be noted that the external pressure with regard to the trade negotiations within the Executive Working Group is tangible and concrete. The European Commission as well as the United States have been under considerable pressure from conflicting interests, including industry representatives, non-governmental organisations and other civil society representatives. In light of these circumstances, and in order to preserve its negotiating positions and strategies, the European Commission has to preserve a certain room for manoeuvre and thinking space in this decision-making process.

¹² Judgment of the General Court of 18 December 2008, *Muñiz v European Commission*, T-144/05, EU:T:2008:596, paragraphs 86, 89 and 90.

Indeed, the European Commission has an obligation to protect the soundness of the decision-making processes from undue influence, so as to ensure that, '[i]n carrying out its responsibilities, the Commission shall be completely independent', according to Article 17(3) of the Treaty of the Functioning of the EU. In this sense, it is important for the quality of the institution's decision-making process that documents drawn up for internal use and opinions exchanged during internal deliberations are protected, so as to ensure an adequate analysis and preliminary discussion within and between the European Commission services.

Having regard to the above, I consider that the use of the exceptions under Article 4(1)(a), third indent and Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 (on the grounds of protecting international relations and the ongoing decision-making process) is justified, and that access to the documents requested must be refused on that basis.

2.3. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that '[t]he 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*)¹³, 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 data¹⁴ (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 Regulation (EU) 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 and Decision No 1247/2002/EC¹⁵ (hereafter 'Regulation (EU) No 2018/1725').

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

In the abovementioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of

¹³ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager* judgment'), C-28/08 P, EU:C:2010:378, paragraph 59.

¹⁴ Official Journal L 8 of 12.1.2001, page 1.

¹⁵ Official Journal L 205 of 21.11.2018, p. 39.

the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’.¹⁶

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

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.¹⁷

The relevant documents contain the names and surnames of the staff members of the European Commission not holding any senior management position. They also contain the names and surnames of the third party representatives (United States administration).

The names¹⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) No 2018/1725.

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

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.¹⁹ 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,

¹⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and others*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁹ 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.

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

In your confirmatory 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 subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the 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 (EC) No 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 the disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) 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 put forward any reasoning pointing to an overriding public interest in disclosing fully the documents in question. Nor have I been able to identify any public interest capable of overriding the public interest protected by Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Whilst citizens and bodies may have an interest in following closely the trade negotiations with the United States, I take the view that this interest does not outweigh the public interest in protecting the European Commission's decision-making process.

The fact that the documents do not relate to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness²⁰, provides further support to this conclusion.

I therefore consider that no public interest in disclosure capable of overriding the public interests protected by Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 can be established.

²⁰ Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60.

As regards the exceptions provided in Article 4(1)(a), third indent and 4(1)(b) of Regulation (EC) No 1049/2001, they have an absolute character and do not include the possibility to demonstrate the existence of an overriding public interest.

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 documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, I conclude that the documents requested are manifestly and entirely covered by the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General