



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels
MOVE/HH

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Subject: Your application for access to documents – GESTDEM 2021/8064

Dear Sir,

We refer to your application dated 9 December 2021 in which you make a request for access to documents, registered on 13 December 2021 under the abovementioned reference number, as well as to our holding reply dated 10 January 2022.

You request access to all documentation, including but not limited to, attendance lists, agendas, background papers, minutes/notes and email correspondence about or summarising, the meetings held by Director-General Henrik Hololei with the following organisations:

- “1. Meeting with Transportes Aéreos Portugueses, S.A. (TAP Air Portugal) on the 03/09/2021 on COVID-19 recovery, Fit for 55;*
- 2. Meeting with A.P. Møller - Mærsk A/S (APMM) on the 28/09/2021 on Fit for 55;*
- 3. Meeting with International Air Transport Association (IATA) on the 30/09/2021 on aviation recovery;*
- 4. Meeting with Deutsche Post DHL Group (DPDHL) on the 13/10/2021 on aviation recovery”.*

Having examined your request, we have identified the following documents as falling within the scope of your application:

- **Annex 1:** Briefing for Director-General Henrik Hololei for the meeting to be held with Transportes Aéreos Portugueses, S.A. on 3 September 2021;
- **Annex 2:** Minutes from the meeting held by Director-General Henrik Hololei with Transportes Aéreos Portugueses, S.A. on 3 September 2021;
- **Annex 3:** Briefing for Director-General Henrik Hololei for the meeting to be held with A.P. Møller - Mærsk A/S on 28 September 2021;
- **Annex 4:** E-mail exchange between a representative of A.P. Møller - Mærsk A/S and Commission staff, between 15 and 21 September 2021, with the subject matter “*Dinner Invitation - 28/29 September*”;
- **Annex 5:** Flash report on the meeting held between DG MOVE and A.P. Møller - Mærsk A/S on 28 September 2021;
- **Annex 6:** E-mail from a representative of the International Air Transport Association to Commission staff, dated 27 September 2021, with the following attachment:
 - **Annex 6.1:** Draft speech from a representative of the International Air Transport Association for its Annual General Meeting;
- **Annex 7:** Briefing for Director-General Henrik Hololei for the meeting to be held with International Air Transport Association on 30 September 2021;
- **Annex 8:** Report of the meeting held between Director-General Henrik Hololei and IATA on 30 October 2021;
- **Annex 9:** Briefing for Director-General Henrik Hololei for the meeting to be held with DHL on 13 October 2021.

As regards all documents listed above, we have come to the conclusion that they may be partially disclosed. Firstly, a complete disclosure of these documents is prevented by the exception concerning the protection of privacy and the integrity of individuals outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter ‘Regulation (EC) No 1049/2001’), because they contain the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- other information relating to identified or identifiable natural persons, in particular references to functions of natural persons, to the extent that these would enable their identification.

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 (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons

¹ OJ L 145, 31.5.2001, p. 43.

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/EC² (hereinafter ‘Regulation (EU) 2018/1725’, or ‘Data Protection Regulation’).

In particular, Article 3(1) of Regulation (EU) 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 data³.

In its judgment in Case C-28/08 P (Bavarian Lager)⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁵.

In your application, you indicate that your address is in the United Kingdom. Transfers of personal data from the Commission to countries that are not members of the European Economic Area (EEA) are regulated under Chapter V of the Data Protection Regulation.

According to Article 47(1) of this Regulation, a transfer of personal data to a third country or to an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that country, or the international organisation in question, ensures an adequate level of protection, and where the personal data are transferred solely to allow tasks within the competence of the controller to be carried out.

Based on the information available, the country of your residence is recognised by the Commission as ensuring an adequate level of protection. However, we would further like to inform you that pursuant to Article 9(1)(b) of the Data Protection Regulation, 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 handling, in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of the Regulation (EU) 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

² 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 data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 205 of 21.11.2018, p. 39).

³ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

⁴ Judgment of 29 June 2010 in Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378, paragraph 63.

⁵ 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 (EU) 2018/1725.

necessary to have the data transmitted to you for a specific purpose in the public interest. It is only in that case the European Commission has to examine whether there is a reason to assume that the legitimate interests of the data subject 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 request, you do not express any particular interest to have access to these personal data, nor do you 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 these 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 contained in these documents, 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.

Regarding **Annexes 1 and 2**, some parts of these documents have also been redacted as their disclosure is prevented by the exception to the right of access laid down in Article 4(2), third indent of this Regulation.

Article 4(2), third indent of this Regulation defines that “*The institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure*”.

Indeed, some redacted parts of both documents have been identified as relating to sensitive matters that are the subject of an ongoing investigation by the Commission concerning State aid measures. The disclosure of those parts of the requested documents, at this moment in time, would undermine the purpose of the ongoing investigation, as well as jeopardise the climate of mutual trust between the European Union and the entities concerned. It is to be noted that access granted in response to an application is to be considered as disclosure to the public at large (*erga omnes*)⁶.

Therefore, the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 also applies to these documents.

As regards **Annexes 2 and 5**, some parts of these documents have also been redacted because their disclosure is prevented by the exception to the right of access laid down in Article 4(2), first indent of this Regulation.

⁶ Judgment of the General Court of 21 October 2010 in case T-439/08, ECLI:EU:T:2010:442, *Agapiou Joséphidès v Commission and EACEA*, para 116.

Article 4(2), first indent of this Regulation sets out that “*The 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*”.

Some redacted parts of these documents have been identified as containing commercially sensitive information of the companies concerned, which if put in the public domain, could affect their competitive positions on the market. Indeed, Annex 2 contains information on business plans, market shares, relations with other parties and specific commercial strategies of Transportes Aéreos Portugueses, S.A. which, if made public, could be detrimental for the achievement of its commercial objectives, whereas Annex 5 contains information on market issues, relations with other parties and commercial strategies of A.P. Møller – Mærsk A/S which, if made public, could also undermine the commercial purposes of this company.

Therefore, the exception laid down in Article 4(2), first indent of Regulation (EC) No 1049/2001 applies to some redacted parts of these documents.

Concerning **Annexes 3, 5, 7 and 8**, some parts of these documents have also been redacted given the fact that their disclosure is prevented by the exception to the right of access laid down in Article 4(1)(a), third indent of this Regulation.

Article 4(1)(a), third indent of the Regulation establishes that “*The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: (...) — international relations (...)*”.

Some redacted parts of these documents have been identified as containing sensitive information which, if disclosed, could seriously undermine the protection of the public interest as regards international relations. Indeed, given the fact that the disclosure of the document takes place *erga omnes*, the release of certain parts of these documents to the public could be detrimental to the international relations between the European Union and certain third countries, or between the European Union and certain international organisations. There is a clear and foreseeable risk that the disclosure of such information, given its sensitivity, could bring harmful consequences to the climate of mutual trust between the authorities of those States and international organisations and the European Union.

Therefore, the exception laid down in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 also applies to some redacted parts of these documents.

Finally, regarding **Annex 3**, a part of this document has also been identified as being covered by the exception laid down in Article 4(3) of Regulation (EC) No 1049/2001.

Pursuant to Article 4(3) of Regulation (EC) No 1049/2001, “*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*”.

Indeed, this document contains an opinion of the services of the Commission on positions still to be adopted by this institution on the context of international negotiations. The Commission services must be free to explore all possible options in preparation of a decision free from external pressure; the disclosure of such positions, at this moment in

time, would risk seriously undermining the decision-making freedom of the Commission, as the disclosure of those opinions to the public could deter staff from formulating them independently, and without being unduly influenced by the prospect of wide disclosure.

Therefore, we conclude that, pursuant to Article 4(3) of Regulation (EC) No 1049/2001, access also cannot be granted to the parts of these documents that would undermine the Commission's decision-making process.

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in the disclosure of the documents. We have examined whether there could be overriding public interests in the disclosure of the documents concerned by this request. However, we have not been able to identify such interests.

Please note that documents originating from third parties are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

Please also note that the disclosed reports, minutes and briefings of meetings were drawn up for internal use under the responsibility of the relevant services of the Directorate-General for Mobility and Transport. They solely reflect the authors' or the services' interpretation of the interventions made, and do not set out any official position of the third parties to which the documents refer. They also do not reflect the position of the Commission, and cannot be quoted as such.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to submit 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 Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels,

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

The COVID-19 outbreak undoubtedly has an impact on the process of handling access to documents requests under Regulation (EC) No 1049/2001. Given the large-scale teleworking of the Commission services, all replies, which should normally be sent via registered post, currently are sent only by e-mail. In this regard, we kindly ask you to confirm receipt of this email.

Yours faithfully,

Henrik HOLOLEI

Enclosure: Annexes 1, 2, 3, 4, 5, 6, 6.1, 7, 8 and 9, better described above.