EUROPEAN COMMISSION

Brussels, 18.3.2024
C(2024) 1923 final

Mr Maximilian Henning
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The Netherlands

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - EASE 2022/4759

Dear Mr Henning,

I refer to your e-mail, registered on 17 November 2022, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in the handling of your confirmatory request.

1. SCOPE OF YOUR REQUEST

In your initial application of 23 August 2022, handled by the Directorate-General for Trade, you requested access to, I quote,

- 'The flash report on the WTO e-commerce negotiation round in July;
- All documents on the small group negotiations on privacy'.

The European Commission's Directorate-General for Trade considered your request to cover documents held prior to the date of your application, i.e., prior to 23 August 2022.

The Directorate-General for Trade identified the following documents as falling under the scope of your request:

1 OJ L 345, 29.12.2001, p. 94.
2 OJ L 145, 31.5.2001, p. 43.

- Flash report WTO e-commerce plenary of 19 July 2022, 19 July 2022, reference Ares(2022)6679242 (hereafter 'document 1');

- e-JSI – Small group discussion reports/texts – Plenary 14 July 2022, 21 July 2022, reference Ares(2022)6683922 (cover e-mail) (hereafter 'document 2'), which includes two attachments related to the small group on privacy[3]):

  - document entitled 'Report Privacy Small Group 14 July' (hereafter 'document 2.1'); and

  - document entitled '220714 Privacy text' (hereafter document 2.2');

- contribution of Japan for the homework questions of the July meeting – e-JSI – Small Group Privacy, 8 July 2022, reference Ares(2022)6979737 (hereafter 'document 3');

- contribution of the United Kingdom for the homework questions of the July meeting – e-JSI – Small Group Privacy, 7 July 2022, reference Ares(2022)6979737 (hereafter 'document 4');

- contribution of Hong Kong for the homework questions of the July meeting – e-JSI – Small Group Privacy, 7 July 2022, reference Ares(2022)6979737 (hereafter 'document 5');

- contribution of China for the homework questions of the July meeting e-JSI – Small Group Privacy, 8 July 2022, reference Ares(2022)6979737 (hereafter 'document 6');

- contribution of the United States for the homework questions of the July meeting e-JSI – Small Group Privacy, 8 July 2022, reference Ares(2022)6979737 (hereafter 'document 7');

- contribution of Australia for the homework questions of the July meeting e-JSI – Small Group Privacy, 8 July 2022, reference Ares(2022)6979737 (hereafter 'document 8'); and

- contribution of Singapore for the homework questions of the July meeting e-JSI – Small Group Privacy, 8 July 2022, reference Ares(2022)6979737 (hereafter 'document 9').

[3] Whereas document 2 contains 13 attachments, only two of them (documents 2.1 and 2.2) concern the small group negotiations on privacy and fall therefore under the scope of your request.

In its initial reply of 18 October 2022, the Directorate-General for Trade refused access to these documents based on the exceptions laid down in the third indent (protection of the public interest as regards international relations) of Article 4(1)(a) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request the Commission to review its position as regards the disclosure of documents 1 and 2, noting that, I quote, 'I have already requested several flash reports on the WTO e-commerce negotiations and received them. I would therefore request that you re-examine document (1) and (2) as to whether their contents have changed in such a manner from previous flash reports that they can now no longer be disclosed'.

Therefore, the scope of this confirmatory review will be circumscribed to the analysis of these two documents. The arguments that you put forward in support of your request will be addressed in the corresponding sections below.

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 conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I can inform you that:

- partial access is granted to document 1, with parts redacted based on the exceptions laid down in the third indent (protection of the public interest as regards international relations) of Article 4(1)(a) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;

- access to document 2, including its attachments, cannot be granted based on the exceptions laid down in the third indent (protection of the public interest as regards international relations) of Article 4(1)(a) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning this assessment are set out below.

2.1. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) 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 […]'.

As far as the interests protected by virtue of Article 4(1)(a) of Regulation (EC) No 1049/2001 are concerned, the Court of Justice has confirmed that it 'is clear from the wording of Article 4(1)(a) [of Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine

the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests'[4].

The Court of Justice stressed in the *In 't Veld* ruling that the institutions 'must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest'[5]. Consequently, 'the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exception […] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'[6].

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, '[…] it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution 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 complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation'[7]. This was further confirmed by the Court of Justice[8].

In December 2017, a group of 71 World Trade Organization (WTO) members agreed at the 11th Ministerial Conference to initiate exploratory work towards future WTO negotiations on trade-related aspects of e-commerce. In January 2019, 76 WTO members confirmed in a joint statement their intention to start these negotiations (Joint Statement Initiative on Electronic Commerce, hereafter 'JSI')[9].

In 2023, the Members of the JSI reached substantial conclusion of a number of global digital trade rules. At the final round of e-commerce negotiations for 2023, taking place from 27 to 30 November, the co-convenors of the talks — Australia, Japan, and Singapore — drew up a roadmap for negotiations for the remainder of the year and the first quarter of 2024[10]. Therefore, the JSI negotiations continue in 2024.

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4 Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison* v *Council*, EU:C:2007:75, paragraph 46.

5 Judgment of the Court of Justice of 3 July 2014, *Council* v *In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

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

7 Judgment of the General Court of 11 July 2018, *ClientEarth* v *European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council* v *In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

8 Judgment of the Court of Justice of 19 March 2020, *ClientEarth* v *European Commission*, C-612/18 P, EU:C:2020:223, and paragraphs 68 and 83.

9 https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm.

10 https://www.wto.org/english/news_e/news23_e/jsec_30nov23_e.htm.

Indeed, several topics, including data flows and localisation, and source code, represent important issues for many participants. The discussion on these topics is fully ongoing.

The documents to which you seek access concern the WTO e-commerce negotiation round of July 2022. Document 1 is an internal report prepared by Commission services, while documents 2, 2.1 and 2.2 consist respectively of a cover e-mail with a report to the closing plenary containing a summary of the positions expressed by third countries and the draft text prepared by the facilitator of the small group on privacy, at the plenary meeting on 14 July 2022.

Public access to the redacted parts of document 1 and to document 2 (including documents 2.1 and 2.2) would put in the public domain the negotiation text and information about the negotiating positions of several WTO Members participating in the JSI, which are not public. Such disclosure would severely affect the mutual trust between participating Members and would have a detrimental impact on the ongoing JSI negotiations. Indeed, the quality of the relations with third countries in the JSI negotiations, which are important for the EU Member States and the Commission, would be undermined if the Commission were to unilaterally disclose documents with the details of the ongoing discussions. Since several issues remain outstanding and negotiations are continuing, the disclosure of the details of parties' negotiating positions would undermine the mutual trust in the context of the ongoing negotiation.

In this regard, the General Court underlined in its judgment in case T-643/21, *Foodwatch eV* v *Commission*, that '[t]he unilateral disclosure by one of the parties of the position defended by another party may be such as to seriously undermine the climate of mutual trust which is essential in the delicate context of international relations'[11].

Moreover, the redacted parts of document 1 contain information relating to the EU strategic objectives and negotiating position. Disclosure of this information would undermine the EU position and interests in the context of the ongoing JSI negotiations.

As regards document 1, the General Court has acknowledged that disclosure of information of the kind included in this document (internal assessments of the progress of international negotiations, intended for internal circulation only) is bound to limit the ability of Commission staff to express themselves freely and exhaustively in documents for internal use. This self-censorship would, in turn, have a negative impact on the success of exchanges in international negotiations[12]. Furthermore, disclosure of the Union's positions can affect its negotiating capacity and risks leading to undue pressure exerted by third countries on the Commission to influence the positions defended by that institution in the context of those negotiations[13].

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11 Judgment of the General Court of 6 September 2023, *Foodwatch eV* v *European Commission*, T-643/21, EU:T:2023:519, paragraph 114.

12 Idem, paragraphs 106-110.

13 Idem, paragraphs 110-111.

Although you excluded documents 3-9 (contributions from several countries) from the scope of this confirmatory review, please note that the above considerations are also relevant for these documents.

In your confirmatory application, you refer to the initial decision of the Directorate-General for Trade and you state that, I quote, '[t]he definition of public interest as regards international relations is overly broad'. You added that, 'I have already requested several flash reports on the WTO e-commerce negotiations and received them. I would therefore request that you re-examine document (1) and (2) as to whether their contents have changed in such a manner from previous flash reports that they can now no longer be disclosed'.

Each document considered in the context of a request for public access to documents is assessed on its own merits and a document or parts thereof is only disclosed if such disclosure is not prevented by the exceptions included in Article 4 of Regulation (EC) No 1049/2001. The fact that (partial) access has been granted to a particular document or to parts thereof does not prejudge the treatment given to other documents as part of other requests under the regulation. Nevertheless, as it will be explained in section 4 below, partial access is herewith granted to document 1.

Please also note that while document 1 is a report prepared by Commission services, this is not the case of document 2, which consists of a cover e-mail sent by the Co-convenors of Joint Statement Initiative on Electronic Commerce with a report and the draft text prepared by the facilitator of small group on privacy, attached to the said e-mail. As already stated above, document 2, including its two relevant attachments, cannot be disclosed as public access would undermine the trust between the participants in the context of the ongoing negotiation and would put in the public domain the negotiation text and negotiating positions and strategies of third countries.

In your confirmatory application, you also argue that, I quote, 'the General Court of the Court of Justice has confirmed that simply because a document concerns an interest protected by an exception, that is not sufficient to make it subject to that exception. It is not sufficient that the disclosure of a document could bring a hypothetical harm to a protected interest; there must be a reasonably foreseeable risk[14]. A claim of harm does not concretely demonstrate the potential of this harm to such an extent that it would compensate denying the fundamental right of access to documents'.

As explained above, the redacted parts of document 1, and documents 2, 2.1 and 2.2 concern substantive topics that are being discussed in the negotiations. They contain preliminary considerations regarding the abovementioned negotiations such as internal considerations of Commission staff on the state of play of the negotiations, the views of the parties concerned, the desired and expected outcomes, etc. The disclosure of the protected parts of the documents would reveal the negotiating position and the strategies of the parties to the discussions, including the Commission.

[14] Judgment of the General Court of 22 March 2011, *Access Info Europe* v *Council of the European Union*, T-233/09, ECLI:EU:T:2011:105.

In this regard, the General Court, in its judgment in Case T-307/16 concluded that 'the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country. Indeed, the pursuit and the quality of those relations depend on that perception'[15]. This position was confirmed by the judgment in Case T-166/19, in which the General Court concluded that 'the pursuit and the quality of those relations depend on that perception'[16]. According to the same judgment, 'it is not required to establish the existence of a definite risk of undermining the protection of the European Union's international relations, but merely the existence of a reasonably foreseeable and not purely hypothetical risk'[17].

The General Court also 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'[18]. 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'[19].

Consequently, the substantive arguments outlined in this decision clearly demonstrate the reasonably foreseeable and non-purely hypothetical risk for the protection of the international relations of the European Union and its Member States if the documents concerned were fully disclosed.

Please also note that documents disclosed under Regulation (EC) No 1049/2001 are disclosed to the public at large ('erga omnes') and not only to the applicant who originally requested the documents.

Consequently, the Secretariat-General concludes that the parts redacted of document 1 and document 2 in its entirety (including its attachments) need to be protected under the exception laid down in the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

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15 Judgment of the General Court of 27 February 2018, *CEE Bankwatch Network* v *Commission*, T-307/16, EU:T:2018:97, paragraph 90.

16 Judgment of the General Court of 25 November 2020, *Marco Bronckers* v *European Commission*, T-166/19, EU:T:2020:557, paragraph 61.

17 Idem, paragraph 60.

18 Judgment of the General Court of 19 March 2013, *Sophie in 't Veld* v *Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

19 Idem, paragraph 125.

2.2. 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*)[20], 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 data[21] (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) 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[22] (hereafter 'Regulation (EU) 2018/1725').

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

In the above-mentioned 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 the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation'[23].

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or 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'[24].

Documents 1 and 2 contain personal data such as the name, surname, and contact details (e-mail addresses) of WTO staff and the names, surnames and e-mail addresses of persons who do not form part of the senior management of the Commission.

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20 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.

21 OJ L 8, 12.1.2001, p. 1.

22 OJ L 295, 21.11.2018, p. 39.

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

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

The names[25] 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) 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[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 Commission must 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 Commission must 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 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 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.

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

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.

Consequently, the Secretariat-General concludes 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

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

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting (further) partial access to the documents requested.

In your confirmatory application, you argue that Article 4(6) of the Regulation 'does not include a provision on partially released documents having to be of use'. You requested the Commission 're-examine a potential application of this provision'.

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access is granted to document 1. No further partial access to this document can be granted without undermining the interests described above.

Although Article 4(6) of the Regulation does not make its application conditional to the applicant's interest, the jurisprudence of the Union Courts has interpreted the duty to grant partial access as follows:

'[…] the principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information. In light of this, it is clear that the Council and the Commission are in any event entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant'[27].

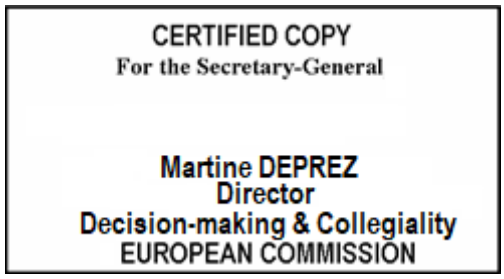
Therefore, as regards document 2, partial access thereto would be meaningless because the parts of the cover e-mail that could be disclosed would be of no use. These parts consist merely of a courtesy e-mail (containing salutations and trivial logistic information) transmitting the enclosures. The attachments in question, which contain the discussions of the parties, cannot be disclosed for the reasons explained above.

[27] Judgment of the Court of First Instance of 12 July 2001, *Mattila* v *Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69. See also judgment of the General Court of 15 September 2016, *Herbert Smith Freehills LLP* v *Council of the European Union*, T-710/14, EU:T:2016:494, paragraphs 80-81.

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
Ilze JUHANSONE
Secretary-General

Enclosures: 1