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Secretariat-General

The Secretary-General

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By registered mail:
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**DECISION OF THE SECRETARY GENERAL PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Confirmatory application for access to documents under Regulation
1049/2001 - Gestdem 2015/1635**

Dear Mr Hoedeman,

I refer to your e-mail of 30 June 2015, registered on 1 July 2015, by which you request, pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents², a review of the position taken by the Directorate-General for Trade (hereafter 'DG TRADE') in reply to your initial application of 13 March 2015.

1. SCOPE OF YOUR REQUEST

By your initial application of 13 March 2015, you had requested access to:

- *a list of meetings between DG Trade officials and representatives of the tobacco industry (including tobacco companies and tobacco industry groups, but also lobby consultancies, law firms and others working for tobacco industry clients or otherwise representing the tobacco industry) in the period between January 1st 2014 and today;*
- *minutes and other reports of these meetings;*

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

² Official Journal L145 of 31.05.2001, p.43.

- *all correspondence (including emails) between DG Trade officials and representatives of the tobacco industry (including tobacco companies and tobacco industry groups, but also lobby consultancies, law firms and others working for tobacco industry clients or otherwise representing the tobacco industry) between January 1st 2014 and today.*

The Commission has identified the following documents as falling under the scope of your request:

1. meeting request from Japan Tobacco International addressed to DG TRADE on 30 October 2014 (ref. Ares(2014)3651078);
2. e-mail exchange within DG TRADE of 7 November 2014 (ref. Ares(2014)3703403);
3. letter from DG TRADE to British American Tobacco (hereafter 'BAT') dated 4 February 2014 (ref. Ares(2014)266204);
4. minutes of a meeting between BAT and DG TRADE on 6 June 2015 (ref. Ares(2015)2831363);
5. letter from BAT to DG TRADE dated 15 May 2015 (ref. Ares(2014)1629106);
6. minutes of a meeting between Philip Morris and DG TRADE on 5 June 2015 (ref. Ares(2015)2831735).

In its initial reply dated 12 June 2015, DG TRADE gave partial access to documents 1 and 2 and based its refusal to the redacted parts of these documents on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(1)(b) (protection of the privacy and the integrity of the individual) of Regulation 1049/2001. It refused access to the remaining four documents based on the exceptions of Article 4(1)(a), third indent (protection of international relations), Article 4(2), first indent (protection of commercial interests of a natural or legal person) and Article 4(3) (protection of the institution's decision-making process) of Regulation 1049/2001.

Through your confirmatory application, you request a review of DG TRADE's position. You underpin your request with detailed arguments, which will be addressed in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage in light of the provisions of Regulation 1049/2001.

Having carried out such a detailed examination of the documents requested, I am pleased to inform you that partial access is granted to documents 3, 4, 5 and 6. The redactions in these documents are based on the exceptions of:

- Article 4(1)(a), third indent (protection of international relations) regarding documents 3, 4 and 5;

- Article 4(2), first indent (protection of commercial interests of a natural or legal person) regarding documents 5 and 6;
- Article 4(3) (protection of the institution's decision-making process) regarding documents 3, 4 and 5; and
- Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001 regarding all four documents.

I have, however, to inform you that the decision of DG TRADE regarding documents 1 and 2 has to be confirmed on the basis of:

- Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation 1049/2001 regarding document 2; and
- Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001 regarding both documents.

The reasons for applying the above-mentioned exceptions are set out below.

2.1. Protection of international relations (documents 3, 4 and 5)

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations.*

Documents 3, 4 and 5 contain elements that relate to the Commission's negotiating positions with regard to tobacco in the ongoing bilateral negotiations for a free trade agreement with the USA and Japan. The withheld parts relate to an assessment of the legality of a third country's measures and comprise precise questions in this regard the Commission posed to BAT, as well as the latter's answers. Their disclosure at this stage would undermine the protection of the public interest as regards international relations.

The disclosure of these elements would reveal the Commission's negotiating positions and tactical considerations. This, in turn, would weaken the EU's position in the ongoing negotiations, as it would make known strategic elements on the side of the Commission, thereby reducing the margin of manoeuvre of the Commission in the context of the free trade agreement negotiations. The negotiation power of the Commission would therefore be affected and its position in these negotiations would be weakened, which in turn would damage the protection of the public interest as regards international relations.

The Court of First Instance has ruled in this respect that *in considering that disclosure of that note could have undermined relations with the third countries which are referred to in the note and the room for negotiation needed by the Community and its Member States to bring those negotiations to a conclusion, the Council did not commit a manifest error of assessment and was right to consider*

*that disclosure of the note would have entailed the risk of undermining the public interest as regards international relations*³.

The General Court has confirmed 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 that it should be noted that, in the context of international negotiations, the positions taken by the European 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. As has already been noted, the formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.*

The General Court equally clarified that *public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations.*⁴

Furthermore, I would like to reassure you that, contrary to what you argue in your confirmatory application, the Commission has not shared with tobacco companies the Commission's negotiating positions and tactical approach; it has remained in listening mode when meeting these organisations. In fact, the Commission received information from these companies that, in case its content is known, would enable one to deduce such positions and approach concerning the relative importance of different barriers and their assessment of what might or might not be achievable in the negotiations. If this information was revealed, it would enable the negotiating partner to deduce such positions and tactical approach.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent of Regulation 1049/2001 on the grounds of protecting international relations is justified, and that access to the withheld parts of the documents in question must be refused on that basis.

2.2. Protection of commercial interests of a natural or legal person (documents 2, 5 and 6)

Article 4(2), first indent, of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection*

³ Judgment of the Court of First Instance of 25 April 2007 in Case T-264/04, *WWF European Policy Programme v Council of the European Union*, paragraph 41.

⁴ Judgment of the General Court of 19 March 2013 in Case T-301/10, *Sophie in 't Veld v European Commission*, paragraphs 120, 123 and 125.

of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

The withheld parts of the documents contain sensitive business information that the companies shared with the Commission on a confidential basis, namely an economic assessment of market access problems, commercial priorities, strategies and concerns that the companies pursue. Disclosing such information would harm the commercial interests of these companies, as it would severely affect their position in the market and reveal their commercial strategies and assessment of current market conditions, and signal regulatory priorities in a way that would harm future prospects on those markets.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent of Regulation 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the withheld parts of the documents in question must be refused on that basis.

2.3. Protection of the institution's decision-making process (documents 3, 4 and 5)

Article 4(3) 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.*

The withheld parts of the documents contain information, the disclosure of which would have an important impact on decisions that the Commission still has to take. Disclosure of this information would prejudice the institution's margin of manoeuvre and consequently seriously undermine the institution's decision-making process. More details cannot be revealed, as the very nature of these decisions to be taken would reveal the Commission's tactical approach, so that they cannot be precisely identified in the present Decision. The Court of First instance ruled in this respect that, *as the Council rightly observed, it is not possible to provide all the information as to why the note cannot be disclosed without revealing its contents and without thereby depriving the exception of its very purpose*⁵.

Moreover, by revealing information provided in confidence by the organisations concerned, the Commission is likely to find that similar organisations are unwilling to provide frank and useful input to its negotiations, which would inevitably undermine the quality of future Commission decision-making around this or other trade agreements. It is this latter aspect in particular that has a far-reaching impact from any decision to release the withheld parts in the current case.

Having regard to the above, I consider that the use of the exception under Article

⁵ Judgment of the Court of First Instance of 25 April 2007 in Case T-264/04, *WWF European Policy Programme v Council of the European Union*, paragraph 37.

4(3) of Regulation 1049/2001 on the grounds of protecting the institution's decision-making process is justified, and that access to the withheld parts of the documents in question must be refused on that basis.

2.4. Protection of privacy and the integrity of the individual (all 6 documents)

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.*

Certain redacted parts of the disclosed documents contain names, addresses and functions of Commission staff and representatives of the companies concerned.

You argue that the *Commission staff members were active in their role of public servants, not as private individuals* and there would therefore be *no reason to "protect the privacy" of these Commission staff members, nor is there any risk to the "integrity of the individual" in releasing their names.* As to the representatives of Japan Tobacco International, you allege that *they were acting as lobbyists for JTI, which means there should be transparency around who they are.* According to you, citizens would *have the right to know who is lobbying the EU institutions.*

Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would undermine *the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁶ (hereafter 'Data Protection Regulation') becomes fully applicable⁷.

Article 2(a) of the Data Protection Regulation provides that *'personal data' shall mean any information relating to an identified or identifiable person [...].* According to the Court of Justice, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*⁸. The names⁹ of the persons concerned as well as their e-mail addresses and functions (from which their identity can be deduced), undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

Pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit

⁶ 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, OJ L 8 of 12 January 2001, page 1.

⁷ Judgment of the Court of Justice of 29 June 2010 in Case C-28/08P, *Commission v Bavarian Lager*, paragraph 63.

⁸ Judgment of the Court of Justice of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk and Others*, paragraph 73.

⁹ Judgment of the Court of Justice of 29 June 2010 in Case C-28/08P, *Commission v Bavarian Lager*, paragraph 68.

personal data to a recipient subject to Directive 95/46/EC if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.¹⁰

To the extent that your considerations, according to which citizens should have the right to receive such personal data, may demonstrate an interest in receiving the requested data, they do not provide any express and legitimate justification or any convincing argument in order to demonstrate the necessity for the personal data in question to be transferred¹¹. These considerations do not establish that, in order to attain the objectives for the purposes of which you are requesting disclosure of the documents in question, it is necessary to obtain disclosure of the names, e-mail addresses and functions of the persons concerned¹².

The names of the companies and relevant Directorates-General have been disclosed to you. Only the names, addresses and functions of Commission staff and representatives of the companies concerned have been withheld. In this respect, I would like to inform you that the Commission discloses, with due regard to transparency and accountability, the names and meetings of those who bear political responsibility within the Commission¹³. This is not the case regarding the persons whose personal data has been redacted. Based on the information at my disposal, there is no reason to think that the legitimate rights of the individuals concerned would not be prejudiced by the transfer of their personal data.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, in accordance with Article 4(1)(b) of Regulation 1049/2001, access to the personal data in question has to be refused, as no need to obtain these data could be established and there are no reasons to think that the legitimate rights of the individuals concerned would not be prejudiced by the transfer of these data.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that there would be *a clear overriding public*

¹⁰ Idem, paragraphs 77 and 78.

¹¹ Idem, paragraph 78.

¹² Judgement of the General Court of 23 November 2011 in case T-82/09, *Dennekamp v Parliament*, paragraph 34.

¹³ Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014 on the publication of information on meetings held between Members and Directors-General of the Commission and organisations or self-employed individuals.

interest in the disclosure of the documents for the following reasons: the full transparency regarding interactions with the tobacco industry that would lie with the Commission as signatory to the World Health Organisation's Framework Convention on Tobacco Control (hereafter 'FCTC'), as well as the necessity *to enable the public to scrutinise the nature of the relations between DG Trade and the tobacco industry and to assess the extent to which the EU-Japan FTA (free trade agreement) (and TTIP) (Transatlantic Trade and Investment Partnership) poses a risk to tobacco control policies.*

Regarding the FCTC, its Article 5(3) provides that *in setting and implementing their public health policies with respect to tobacco control, parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.* Whilst it is correct that this provision is binding upon the EU as party to the FCTC, the documents in question relate exclusively to trade matters and not to public health policies with respect to tobacco control. Moreover, this provision indicates that FCTC parties shall apply it in accordance with the applicable (national) law, in this case EU law. In this respect, the exceptions of Regulation 1049/2001 impose an obligation on the Commission not to disclose (parts of) documents covered by an exception, in case of the exceptions of Article 4(2) and (3) unless there is an overriding public interest in favour of disclosure. As indicated below, I consider that there are no elements capable of demonstrating the existence of an overriding public interest in this case. Finally, the guidelines for the implementation of Article 5(3) that you mention in your application are of a non-binding nature.

You argue that citizens should be able to scrutinise the relationship between the Commission services and the tobacco industry and to assess the risk of ongoing trade negotiations to tobacco control policies. Whilst I fully recognise the importance of transparency in enabling citizens to follow trade negotiations, I take the view that this public interest does neither outweigh the public interest in protecting the Commission's international relations and decision-making process, nor the commercial interests of the companies in question in this case.

Please note also that, contrary to the exceptions of Article 4(2) and (3), Articles 4(1)(a) and 4(1)(b) are absolute exceptions, which do not require the institution to balance the exceptions defined therein against a possible public interest in disclosure.

Consequently, I consider that there are no elements capable of demonstrating the existence of an overriding public interest in disclosure of the parts of the documents in question.

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



for Catherine Day
HUBERT SZWARCZYŃSKI

Annexes (4)