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**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT  
TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2016/626**

Dear Mr Teffer,

I refer to your e-mail of 31 March 2016, 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 documents<sup>2</sup> ('Regulation 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 8 February 2016, you requested access to:

*All technical notes and all technical assessments, sent by OLAF in 2015 and 2016 to any European Commission service, regarding the Anti-Contraband and Anti-Counterfeit Agreement between the EU, Member States and Philip Morris International (PMI).*

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

In its initial reply of 29 February 2016, the European Anti-Fraud Office ('OLAF') informed you that the disclosure of the documents you have requested was prevented by the exception of the right of access concerning the protection of the Commission's decision-making process, laid down in Article 4(3), first sub-paragraph of Regulation 1049/2001.

In your confirmatory application, you request a review of OLAF's position, arguing that the latter did not explain how the disclosure of the documents in question *would undermine the institution decision-making process*. In your view, there is also an overriding public interest in disclosure due to the ongoing *public debate about the merits of the Anti-Contraband and Anti-Counterfeit Agreement*.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

I would like to inform you at the outset that pursuant to Article 4 of the Commission's Detailed rules for the application of Regulation 1049/2001 (Decision 2001/937<sup>3</sup>), *where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352<sup>4</sup>, the decision-making power is delegated to the Director of OLAF*.

However, your application does not concern *OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352*, but rather *other operational activities* within the meaning of Article 2(5) of that Decision.

The present decision is therefore taken by the Commission's Secretary-General.

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 or service concerned at the initial stage.

Your application for access concerns the following six documents:

1. Note from OLAF to the Commission's Legal Service on the Future of the Anti-Contraband and Anti-Counterfeit Agreement between the EC, Member States and Philip Morris International (PMI) of 2004, ARES ref: Ares(2015)775339 – 24/02/2015;
2. Note from OLAF to Commission Services on the draft Staff Working Document assessing the implementation of the 2004 anti-fraud agreement with PMI (Inter-Service Consultation) plus attachment (draft Commission Staff Working Document), EU Restricted, ARES ref: ARES(2015)1494778 – 7/04/2015;
3. Note from OLAF to the Commission's Legal Service on the PMI agreement, ARES ref: ARES(2015)4945290 – 9/11/2015;

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<sup>3</sup> Commission Decision of 5 December 2001 amending its rules of procedure (Decision 2001/937/ EC, ECSC, Euratom): Detailed rules for the application of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 345 of 29.12.2001, p. 94.

4. Note from OLAF to the Commission's Legal Service, ARES ref: ARES(2015)5059313 – 13/11/2015;
5. Note from OLAF to the Commission's Secretary-General, Legal Service and DG SANTE on the future of anti-fraud agreement with PMI, ARES ref: ARES(2015)5058290 – 13/11/2015;
6. E-mail from OLAF to services on the re-launching of the Inter-Service consultation plus attachment (draft Commission Staff Working Document), ARES ref: Ares(2016)697846 – 9/02/2016.

Following this review, I regret to inform you that the refusal of OLAF to grant access to the above-mentioned documents has to be confirmed based on Article 4(3), first subparagraph of Regulation 1049/2001, for the reasons set out below.

Article 4(3) of Regulation 1049/2001 provides that *[a]ccess 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 six documents, to which you request access, concern the first anti-contraband and anti-counterfeit agreement (hereafter 'the Agreement'), which was concluded in 2004 between Philip Morris International (PMI), Member States and the EU. This Agreement is set to expire on 9 July 2016 and the Commission is currently reflecting on its future.

Disclosure of the requested documents at this stage would seriously undermine the decision-making process with regard to the possible prolongation of the Agreement, as it would put in the public domain internal, informal opinions of Commission staff, as well as preliminary views and positions of Commission officials, giving rise to premature, and potentially erroneous, inferences about this highly sensitive matter. All six documents identified as falling under your request are internal Commission documents, reflecting the inter-service discussions on the future of the Agreement and the possible way forward. Their disclosure, while the Commission is still considering this issue and exploring all possible options, would potentially result in the content of these documents being misunderstood, or misused, thus distorting or impairing the serenity of the ongoing internal decision-making process. It would also significantly restrict the Commission's ability to act unrestrainedly regarding all future discussions on the Agreement in question, as there is a real and not-hypothetical risk that third parties would attempt to exercise targeted influence on the Commission regarding the options and situations which are under consideration.

I would also like to inform you that in the context of its ongoing decision-making process pertaining to the future of the Agreement, the Commission has reached out to Member States. At the same time, the European Parliament, in a recent resolution of 9 March

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<sup>4</sup> 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), SEC(1999)802, OJ L 136, 31.5.1999, p. 20-22

2016<sup>5</sup>, urged the Commission not to extend the agreement. This is indicative of the fact that the future of the Agreement merits thorough reflection within the Commission before the institution can take a decision. To that end, the Commission should indeed remain free to undertake an internal debate on this pending issue without any external pressure.

Furthermore, the above-mentioned documents concern the preliminary stages of the definition of a possible a policy line to be taken by the Commission. I refer in this regard to the recent judgement of the General Court in Joint Cases T-424/14 and T-425/14, where the Court has acknowledged the existence of a general presumption that access to such preliminary documents, drafted as part of the early stages of the development of a possible policy initiative, is to be refused:

*[...] for the purposes of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal.*

*[...] it must be held that the general presumption may apply for as long as the Commission has not made a decision regarding a potential policy proposal, that is to say, until a policy initiative has been, depending on the circumstances, either adopted or abandoned.<sup>6</sup>*

Whilst it specifically concerned documents drafted in the framework of the completion of an impact assessment, the reasoning of the Court applies, *mutatis mutandis*, to other documents drafted as part of preliminary reflections on the development of policy proposals and discussions of possible policy options.

Indeed, when the Commission prepares and develops policy proposals, it must ensure that it acts in a fully independent manner. More specifically, it is important to protect the Commission's decision-making process from any influence exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution<sup>7</sup>, thereby seriously undermining the decision-making process.

In view of the above, I confirm the initial decision of OLAF that access to the six above-mentioned documents has to be refused, based on Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

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<sup>5</sup> European Parliament resolution of 9 March 2016 on the tobacco agreement (PMI agreement) (2016/2555(RSP)) (P8\_TA-PROV(2016)0082).

<sup>6</sup> Judgement of the General Court of 13 November 2015 in Joined Cases T-424/14 and T-425/14, *ClientEarth v Commission*, paragraphs 97 and 99.

<sup>7</sup> *Idem*, paragraphs 78 to 96.

### 3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) (protection of the decision-making process) of Regulation 1049/2001 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 argue that there is an overriding public interest in the public release of the documents in question, *as there has been, and there is currently, a public debate about the merits of the Anti-Contraband and Anti-Counterfeit Agreement, both in the public sphere, and among the elected representatives of the European citizens in the European Parliament.*

You consider it important that ahead of the Commission's decision the *media and the public have been able to weigh all the arguments, including those not covered by the technical assessment published by the Commission on 24 February.*

I would like to assure you that the Commission recognises the importance of the public debate about the effectiveness of the Agreement. Indeed, on 24 February 2016, the Commission published a comprehensive assessment of all relevant aspects regarding the past experience with the Agreement. This document includes also an evaluation of the current legislative framework and future tools in the fight against illicit trade in tobacco<sup>8</sup>.

In addition, Vice-President Georgieva has replied to oral questions brought up by Members of the European Parliament during the discussion on the future of the Agreement, held in plenary on 25 February 2016. Verbatim reports of the plenary debate are available here:

[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-  
//EP//NONSGML+CRE+20160225+SIT+DOC+PDF+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20160225+SIT+DOC+PDF+V0//EN&language=EN)

Finally, OLAF has published on its website a number of documents concerning the Agreement, including a questionnaire on the topic of the fight against the illicit tobacco trade and answers to frequently asked questions:

[https://ec.europa.eu/anti-fraud/investigations/eu-revenue/cigarette\\_smuggling\\_en](https://ec.europa.eu/anti-fraud/investigations/eu-revenue/cigarette_smuggling_en)

In view of the above, I consider that the public interest is well served by the proactive publication of the documents mentioned above. In light of all this publicly available information that allows for a well-informed public debate on the issue, I am unable to identify any public interest in the disclosure of the preliminary internal Commission views concerning the future of the Agreement. To the contrary, I consider that the public interest is best served by avoiding to take any measure which would negatively affect or

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<sup>8</sup> Technical assessment of the experience made with the Anti-Contraband and Anti-Counterfeit Agreement and General Release of 9 July 2004 among Philip Morris International and affiliates, the Union and its Member States is available at:

[https://ec.europa.eu/anti-fraud/sites/antifraud/files/technical\\_assessment\\_pmi\\_24022016\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/technical_assessment_pmi_24022016_en.pdf)

distort the above-described decision-making process and therefore refrain from disclosing internal, informal opinions of Commission staff and positions giving rise to premature, and potentially erroneous, conclusions about the topics under discussion, as explained above.

In consequence, I consider that, in this case, there is no overriding public interest that would outweigh the interest in safeguarding the protection of the ongoing decision-making process based on Article 4(3) of Regulation 1049/2001.

#### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 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. Partial access to the requested documents would result in documents which would be either meaningless or else give rise to misinterpretations, confusion and undue speculation.

I note in this regard that documents nr. 2 and 6 above contain, as enclosures, draft versions of the Commission's assessment of past experience with the Agreement (Commission's Staff Working Document), the final version of which was published on 24 February 2016. I regret to inform you that these draft texts cannot be released either, as by comparing the two draft versions of the assessment with the final paper, it can become apparent how the internal Commission thinking on this sensitive matter evolved.

In view of the fact that disclosing these elements is directly linked to the Commission's ongoing decision-making process pertaining to the future of the Agreement, I conclude that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

#### **5. MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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  
Alexander ITALIANER  
Secretary-General*