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Directorate-General for Trade

The Director General

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***By registered letter with acknowledgment of receipt***

Lora Verheecke  
Corporate Europe Observatory  
26 Rue d'Edimbourg  
1050 Bruxelles  
Belgium

***Advance copy by email:***  
[ask+request-3998-2f925c6c@asktheeu.org](mailto:ask+request-3998-2f925c6c@asktheeu.org)

**Subject: Your application for access to documents – Ref. GestDem No 2017/0981**

Dear Ms Verheecke,

I refer to your email of 16 February 2017 in which you make a request for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

You request access to *"all communication, including emails, and documents (agenda, minutes, list of participants, etc) related to the meeting between Maria Asenius and Pedro Velasco Martins and Dow Europe GmbH (Dow) on 7th February 2017"*.

We have identified the following documents that fall under the scope of your request:

- The meeting request from Fipra International on behalf of Dow Chemicals (Ares(2016)7141106) ("**document 1**"); and
- the report of the meeting which took place on 7 February 2017 ("**document 2**"), which contains four documents in attachment, all registered with the same number (Ares(2017)679544):
  - An article of the Bruegel think tank: "The European Union's growing innovation divide" ("document 2.1")<sup>2</sup>.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- The presentation made by EuropaBio at the oral hearing of the ongoing competition proceedings ("document 2.2").
- A Financial Times article: "Trump picks Dow Chemical's Liveris as manufacturing adviser" ("document 2.3")<sup>3</sup>.
- A Financial Times article: "Dow and DuPont seek to address Brussels' antitrust concerns" ("document 2.4")<sup>4</sup>.

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

In accordance with settled case law<sup>5</sup>, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question pose a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2) and 4(3) of Regulation 1049/2001, the institution is required “*to ascertain whether there is any overriding public interest justifying disclosure*”<sup>6</sup>.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents<sup>7</sup>, “*the exceptions to that right [...] must be interpreted and applied strictly*”<sup>8</sup>.

Having carefully examined the documents identified above in light of the applicable legal framework, I inform you that **partial access is granted to documents 1 and 2**. Three of the annexes to document 2 (2.1, 2.3 and 2.4) are publicly available online.

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<sup>2</sup> This document is publicly available at: <http://bruegel.org/2016/04/the-european-unions-growing-innovation-divide/>.

<sup>3</sup> This document is publicly available at: <https://www.ft.com/content/ae176ca-bf2c-11e6-9bca-2b93a6856354>.

<sup>4</sup> This document is publicly available at: <https://www.ft.com/content/1668a5c0-e16a-11e6-9645-c9357a75844a>.

<sup>5</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

<sup>6</sup> *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

<sup>7</sup> See Regulation (EC) No 1049/2001, recital (4).

<sup>8</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

As regards document 1, only personal data have been redacted, pursuant to Article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001")<sup>9</sup>. Hence, the main content of this document is accessible.

As regards document 2, in addition to personal data, part of the document has been withheld under the exceptions set out in article 4(2) first and third indents of Regulation 1049/2001 (protection of commercial interests and protection of the purposes of investigations, respectively).

I regret to inform you that access is not granted to document 2.2, as it is fully covered by the exceptions of article 4(2) first and third indents of Regulation 1049/2001.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 2.1 and 2.2. Section 3 provides an assessment of whether there exists an overriding public interest in the disclosure of the withheld part of document 2 and of document 2.2. Copies of the accessible versions of these documents are enclosed.

## **2.1 Protection of privacy and integrity of the individual**

Article 4(1)(b) of Regulation 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".

The Court of Justice has ruled that "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety"<sup>10</sup>.

Article 2(a) of Regulation 45/2001 provides that "'personal data' shall mean any information relating to an identified or identifiable natural person [...]". The Court of Justice has confirmed that "there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'"<sup>11</sup> and that "surnames and forenames may be regarded as personal data"<sup>12</sup>, including names of the staff of the institutions<sup>13</sup>.

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<sup>9</sup> Regulation (EC) No 45/2001 of the European Parliament and the 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, 12.1.2001, p. 1.

<sup>10</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

<sup>11</sup> Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>12</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>13</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish *"the necessity of having the data transferred"* and additionally *"if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*<sup>14</sup>.

Documents 1 and 2 contain names and other personal information that allow the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore these personal data shall remain undisclosed. However, in line with the Commission's commitment to ensure transparency and accountability<sup>15</sup>, the names of the members of Cabinet (not in administrative positions) and of the Director-General are disclosed. The names of staff occupying senior management positions (Deputy Director-General and Director) are also disclosed. For Dow, the names of the President for Europe and of the Director of Government Affairs in Europe are also disclosed, as well as the name of the Director of Fipra International.

## **2.2 Protection of the purpose of investigations and of commercial interests**

Article 4(2) third indent, of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits"*.

Article 4(2) first indent, of Regulation 1049/2001 provides that *"[t]he 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"*.

In accordance with the case-law of the Court of Justice, the 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 1049/2001 and two different exceptions can, as in the present case, be closely connected*<sup>16</sup>.

In some administrative proceedings (including the investigative powers of the Commission in competition), the Commission relies on submissions by the parties concerned which invariably contain sensitive data, including information related to the economic activities of undertakings. The Court of Justice confirmed this in its *Odile*

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<sup>14</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

<sup>15</sup> See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

<sup>16</sup> Judgement in *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 34.

*Jacob* judgment, where it stated<sup>17</sup> that (...) *the Commission gathers, in the context of such a procedure, sensitive information about the commercial strategies of the undertakings concerned, their sales figures, their market shares or their business relations, so that access to documents in such a procedure can undermine the protection of the commercial interest of those undertakings. Accordingly, the exceptions relating to the protection of commercial interests and that of the purpose of investigations are closely connected.*

Document 2.2 is the presentation made by EuropaBio in the oral hearing of the competition proceedings of the merger between Dow and DuPont. The Court of Justice has recognised the existence of a general presumption of non-disclosure for merger documents<sup>18</sup>. This general presumption applies even after the decision in the merger has been taken<sup>19</sup>.

Document 2 is the report of the meeting with Dow Chemicals, in which the company mentioned some aspects of the merger with DuPont. The information redacted in this document was shared with the Commission in confidence in order to provide useful input and support for the EU's objectives in the trade policy agenda.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent<sup>20</sup>, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy<sup>21</sup>. Accordingly, it must be information that is "*known only to a limited number of persons*", "*whose disclosure is liable to cause serious harm to the person who has provided it or to third parties*" and for which "*the interests liable to be harmed by disclosure must, objectively, be worthy of protection*"<sup>22</sup>.

I consider that there exists a reasonably foreseeable and not purely hypothetical risk that this information may be exploited by competitors to their advantage and be used to undermine the commercial positions of the companies and entities concerned.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) first and third indents of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

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<sup>17</sup> Judgement in *Commission v Odile Jacob*, C-404/10, EU:C:2012:393, paragraph 115.

<sup>18</sup> Judgement in *Commission v Agrofert Holding*, C-447/10, EU:C:2012:394, paragraphs 59 and 64.

<sup>19</sup> *Id.*, paragraph 67.

<sup>20</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>21</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>22</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

Accordingly, the presence of an overriding public interest in disclosure has also been assessed. In the present case, there is no such evidence. On the contrary, the prevailing interest in this case rather lies in protecting the purpose of the Commission's investigations and in the protection of the legitimate confidentiality interests of the stakeholders concerned.

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

In accordance with Article 4(6) of the Regulation, we have also examined the possibility of granting partial access to document 2.2. However, it follows from the assessment made above that the document is manifestly and entirely covered by the exceptions mentioned above.

Please note also that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file<sup>23</sup>.

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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make 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 Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/282  
1049 Bruxelles  
or by e-mail to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Jean-Luc DEMARTY

Enclosures:

- Released documents

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<sup>23</sup> Judgement in *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.