



EUROPEAN COMMISSION

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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° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/4896**

Dear Mr van Woerden,

I refer to your e-mail of 26 October 2017, registered on the same day, 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 documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application for access to documents of 28 August 2017, dealt with by the Commission's Directorate-General for Taxation and Customs Union (DG TAXUD), you requested access to:

- *Minutes and other reports of meetings of the European Commissions DG Taxud with the tobacco industry, their representatives, their affiliates, lobby groups and/or lawyers who present and protect their interests about the possible review of Directive 2011/64/EU which regulates taxation on tobacco products. This request also includes contact with think tanks, the e-cigarette industry and/or other nicotine based industry, packaging industries, buyers, sellers and retail representatives and their lobby organisations (between September 2016 and today),*

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

² Official Journal L 145 of 31.5.2001, p. 43.

- *All correspondence (including emails) between the European Commission's DG Taxud and the tobacco industry, their representatives, their affiliates, lobby groups and/or lawyers who present and/or protect their interests about the possible review of Directive 2011/64/EU which regulates taxation on tobacco products. This request also includes contact with think tanks, the e-cigarette industry and/or other nicotine based industry, packaging industries, buyers, sellers and retail representatives, and their lobby organisations (between September 2016 and today).*

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

1. Meeting report 'Round Table Tobacco meeting on the Impact Assessment on Directive 2011/64/EU', 7 September 2016 – Ares(2017)5500259,
2. Email from Public Advice (PA) Europe, Letter of the Secretary General of the PA International Foundation, 9 September 2016 – Ares(2016)5164489,
3. Letter from UNITAB 'Invitation to UNITAB's 35th congress in Sofia', 12 September 2016 – Ares(2017)5413931,
4. Letter to UNITAB, 'UNITAB's invitation to its 35th Congress to be held from 17 to 19 October 2016 in Sofia, Bulgaria', 6 October 2016 – Ares(2017)5795427,
5. Meeting report 'Impact assessment on Directive 2011/64 and the possible consequences on tobacco farmers', 13 October 2016 – Ares(2017)4280052,
6. Letter from Copa Cogeca 'contribution to the impact assessment of Directive 2011/64 on the structure and rates of excise duty applied to manufactured tobacco', 19 October 2016 – Ares(2017)6159454,
7. Letter to Copa Cogeca 'Impact Assessment on possible revision of Directive 2011/64/EU on the structure and rates', 15 November 2016 – Ares(2017)6431987,
8. Email 'Public consultation on excise duties on manufactured tobacco', 18 November 2016 – Ares(2016)6496369,
9. Meeting report 'Memorandum outlining a fair, focused and effective tax on borderline cigarillos', 12 December 2016 – Ares(2017)32505,
10. British American Tobacco (BAT) 'Presentation Fiscalis Project Group', January 2017 – Ares(2017)4948761,
11. Email to E-Dampfen on public consultation regarding excise duties applied to manufactured tobacco, 4 January 2017 – Ares(2017)38178,
12. Email to Open Gate Italie, 'Public consultation on excise duties on manufactured tobacco', 5 January 2017 – Ares(2017)54627,
13. Meeting report on Fiscalis Project Group classification and inclusion of (new) tobacco products in the scope of excisable tobacco products, 17 January 2017 – Ares(2017)4280308,
14. IBVTA Presentation to Fiscalis Group, 17 January 2017 – Ares(2017)4947491,

15. Document from Imperial Brands 'Taxation of electronic vapour products', 17 January 2017 – Ares(2017)494803,
16. Email from Imptob on the Fiscalis Project Group presentation, 18 January 2017 – Ares(2017)494803,
17. Email from BAT on BAT's presentation, 18 January 2017 – Ares(2017)494876,
18. Email from IBVTA, 'Presentation to the Fiscalis Project Group (Tobacco) 17January 2017', 27 January 2017 – Ares(2017)494749,
19. Email from Zigarrenmanufaktur, 13 February 2017 – Ares(2017)781977,
20. Letter from Unitab 'Public consultation on the excise duties applied to manufactured tobacco in the framework of the possible revision Council Directive 2011/64/EU', 15 February 2017 – Ares(2017)9376311,
21. Email to Health Diplomats regarding submission to the EC public consultation on excise duties applied to manufactured tobacco, 16 February 2017 – Ares(2017)857768,
22. Email to IBVTA regarding public consultation on excise duties applied to manufactured tobacco, 16 February 2017 – Ares(2017)863454,
23. Email to INNCO regarding submission on the Directive 2011/64/EU public consultation to amend TED, 16 February 2017 – Ares(2017)865037,
24. Email to IBVTA regarding public consultation on excise duties applied to manufactured tobacco, 16 February 2017 – Ares(2017)865286,
25. Eail from IVVA, 'Contribution to public consultation on excise duties applied to manufactured tobacco', 16 February 2017 – Ares(2017)876468,
26. Email from INNCO, 'TED public consultation', 16 February 2017 – Ares(2017)876697,
27. Email from Nicopure, 'Nicopure's comments on public consultation on excise duties applied to manufactured tobacco', 16 February 2017 – Ares(2017)889027,
28. Email to PMI, 'Public consultation', 16 February 2017 – Ares(2017)910355,
29. Email to Stubbe Tobacco on public consultation - excise duties applied to manufactured tobacco, 22 February 2017 – Ares(2017)957269,
30. Document from PMI 'Update on Excise & Customs classification of tobacco products', 6 March 2017 – Ares(2017)1197955,
31. Meeting report 'Meeting with Philip Morris International', 6 March 2017 – Ares(2017)1197955,
32. Meeting report 'Directive 2011/64/EU', 8 March 2017 – Ares(2017)1622073,
33. Document from PA Europe 'To combat borderline tobacco products' June 2017 – Ares(2017)3430255,

34. AKD 'Memorandum outlining a fair, focused and effective tax on borderline cigarillos', 21 June 2017 – Ares(2017)3430255,
35. Meeting report 'Directive 2011/64/EU', 29 June 2017 – Ares(2017)3381773,
36. Presentation Steward Redqueen 'Framework for a societally optimal excise duty on vape products', 30 June 2017 – Ares(2017)3397605,
37. Meeting report 'Directive 2011/64/EU', 30 June 2017 – Ares(2017)3397605,
38. Fontem Ventures 'Steward Redqueen study: scope & key findings', 6 July 2017 – Ares(2017)3397605,
39. Meeting report 'Directive 2011/64/EU', 6 July 2017 – Ares(2017)3430255,
40. Email 'summary report' dated 31 March 2017 – Ares(2017)5106144,
41. Email from BAT, 30 March 2017 – Ares(2017)1714420.

By letter of 20 October 2017, DG TAXUD:

- granted full access to documents (14), (30), (33), (36) and (39),
- granted wide partial access to documents (1) to (12), (15) to (29), (31), (32), (34), (35), (37), (38), (40) and (41) with the information constituting personal data redacted on the basis of the exception provided for in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual),
- granted partial access to document (13). The undisclosed parts of that document were redacted on the basis of the exceptions protecting privacy and the integrity of the individual and the decision-making process, provided respectively for in Article 4(1)(b) and Article 4(3) of Regulation 1049/2001.

Through your confirmatory application, you request a review of the position of DG TAXUD.

In your confirmatory application, you do not, in principle, contest the position of DG TAXUD in so far as the information redacted from documents (1) – (12) and (14) – (41) on the basis of the exception in Article 4(1)(b) of Regulation 1049/2001 is concerned.

With regard to document (13) you refer to the *attendee lists that are not attached to the document* and [you] *request those attendee lists to be released as well*. I interpret that your request relates only to the personal data included in the attendee lists *attached* to document (13), but not to the data of the Commission staff members which were redacted from part 2 of document (13).

Consequently, the scope of your confirmatory application is limited to the relevant parts of document (13) withheld on the basis of the exception in Article 4(3) of Regulation 1049/2001, as well as the attendee list attached thereto.

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 provided by the relevant service at the initial stage.

Following this review, I am pleased to inform you that further partial access is granted to document (13). The undisclosed parts of the document remain redacted on the basis of the exception provided for in the first subparagraph of Article 4(3) of Regulation 1049/2001 (protection of the decision-making process).

With regard to the attendee list attached to document (13), partial access thereto is granted, with certain parts redacted on the basis of the exception in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

The detailed reasons are set out below.

2.1 Protection of privacy and the 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 attendee list contains the names, surnames and contact details (e-mail addresses) of third-party representatives, such as Member States and companies listed under point 3 of document (13). These constitute personal data in the meaning of Article 2(a) of Regulation 45/2001³, which defines it as *any information relating to an identified or identifiable natural person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁴, when a request is made for access to documents containing personal data, the Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if

³ 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.

⁴ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁵.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁶.

Indeed, in the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that *whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*⁷. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data⁸.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the full disclosure of the attendee list attached to document (13) cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 to the redacted parts of that document is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

2.2 Protection of the decision-making process

Articles 4(3), first subparagraph 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.

⁵ Ibid, paragraphs 77-78.

⁶ Judgment of the Court of Justice of 16 July 2015 in case C-615/13P, *ClientEarth v EFSA*, (EU:C:2015:489), paragraph 47.

⁹ Ibid, paragraph 47.

Although in your confirmatory application you do not seem to question the applicability of the above-mentioned exception to the undisclosed parts of document (13), (instead, the argumentation is focused on the issue of the overriding public interest, which I will address in point 4 of this decision), I would like to provide additional explanations on how the disclosure of the documents in question would undermine the interests protected by this exception.

The undisclosed parts of document (13) contain information regarding the preliminary results of the study that is currently prepared by the consultancy *Economisti Associati*. They also contain a description of the results of the analysis of e-liquids, prepared by the Commission's Joint Research Centre (JRC). Both the study and the analysis provide input for the Commission's report presenting its position regarding future taxation of tobacco products and e-cigarettes. That position, which will take into account various policy options currently discussed, including those described in the undisclosed parts of the document, will also provide the basis for the potential revision of Directive 2011/64/EU⁹.

Therefore, public disclosure of the redacted parts of document (13) would reveal the policy options currently discussed, which in turn would result in an increased risk of exposing the Commission to external pressure from actors representing various, possibly conflicting, interests (i.e. industry and NGOs). Consequently, the internal decision-making process aimed at establishing the Commission position regarding the revision of Directive 2011/64/EU would be seriously undermined.

Please note in this respect that, in the *Muñiz*¹⁰ case, the Court held that access to documents can be refused on the grounds of Article 4(3), first subparagraph of Regulation 1049/2001, where disclosure of the documents requested would have a substantial negative impact on the decision-making process in question, in particular, where disclosure of the documents would lead to a real and reasonably foreseeable risk of external pressure¹¹ and/or an objectively justified risk of self-censorship¹².

As stated above, the information included in the redacted parts of document (13) remains relevant in the framework of the ongoing reflection process on the future taxation of tobacco products and the revision of Directive 2011/64/EU linked thereto.

Pursuant to Article 17(3) of the Treaty on Functioning of the European Union ('TFEU'), *[i]n carrying out its responsibilities, the Commission shall be completely independent.*

In this instance, in order to preserve its reflection process on the subject matter in question, the Commission has to preserve a certain room for manoeuvre and 'space to think' in the framework of its corresponding decision-making process.

⁸ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (EU:C:2014:2250), paragraph 106.

⁹ Council Directive of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (Official Journal L 176, 5.7.2011, p. 24–36).

¹⁰ Judgment of 18 December 2008 in case T-144/05, *Muniz v Commission*, (EU:T:2008:596).

¹¹ Ibid, para 86.

¹² Ibid, paras 89, 90.

Indeed, the Commission has the obligation to protect the soundness of its decision-making processes from undue influence, and to therefore ensure that documents drawn up for internal use or received in the context of internal deliberations are protected, so as to enable an adequate analysis and preliminary discussion within and between Commission services.

Against this background, I consider that the undisclosed parts of document (13) need to be protected against the risks associated with public disclosure, under the exception provided for under Article 4(3), first subparagraph of Regulation 1049/2001.

3. PARTIAL ACCESS

Partial access is granted to the attendee list attached to document (13).

Further partial access is herewith granted to document (13). The parts that remain redacted, as explained above, are covered by the exception provided for in the first subparagraph of Article 4(3) of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception provided for in Article 4(1)(b) of Regulation 1049/2001 is absolute, so it does not need to be balanced against the overriding public interest.

The exception laid down in Article 4(3) 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 *[i]t is necessary for the public to understand the decision making process to begin with and for the EU to be transparent about it especially when the tobacco industry is involved (...)*.

You thereby seem to allege that there is an overriding public interest outweighing the need to protect the undisclosed information in document (12), based on a general need for (full) public transparency. In this context, I would like to refer to the judgment in the *Strack* case¹³, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance but that an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁴.

In my view, such a pressing need has not been substantiated in this case. Furthermore, the report containing the Commission position regarding the future taxation of tobacco products, once finalised, will be made public by the Commission, together with the above-mentioned study of *Economisti Associati* and the analysis of the JRC.

¹³ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (EU:C:2014:2250), paragraph 128.

¹⁴ *Ibid*, paragraph 129.

Consequently, I consider that the public interest will be satisfied by the forthcoming proactive publication, by the Commission, of all of the above-mentioned documents. In any case, the need for full transparency does not outweigh in this case the need to protect the limited parts of the documents protected by the exceptions relating to the decision-making process.

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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

*For the Commission
Alexander ITALIANER
Secretary-General*

