EUROPEAN COMMISSION

Brussels, 18.6.2018
C(2018) 3947 final

Ms Margarida da Silva
Corporate Europe Observatory
26 Rue d'Edimbourg
1050 Ixelles
Belgium

DECISION OF THE SECRETARY-GENERAL ON BEHALF OF THE 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 - Gestdem 2018/1279

Dear Ms da Silva,

I am writing in reference to your e-mail of 25 May 2018, registered on 31 May 2018, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter: 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

Through your initial application of 26 February 2018, dealt with by the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, you requested access to 'all exchanges between Commissioner Dombrovskis, his office and his Cabinet, with Goldman Sachs since 1 June 2016'. You underlined that your application covers 'any emails, correspondence, meeting notes or telephone call notes'.

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

[1] Official Journal L 345 of 29.12.2001, p.94.
[2] Official Journal L 145, 31.05.2001 p.43

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 1 February 2016 - 2 March 2016, reference: Ares(2018)2111906 (hereafter: 'document 1');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 28 – 29 June 2016, reference: Ares(2016)3144264 (hereafter: 'document 2');

- Letter dated 28 July 2016 from Goldman Sachs Group to Vice-President Dombrovskis, reference: Ares(2016)4033019 (hereafter: 'document 3');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 1 – 7 February 2017, reference: Ares(2018) 2112023 (hereafter: 'document 4');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 8 - 10 March 2017, reference: Ares(2017)1264307 (hereafter: 'document 5');

- Letter dated 15 March 2017 from Goldman Sachs Group to Vice-President Dombrovskis, reference: Ares(2017)1346364 (hereafter: 'document 6');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 15 – 28 March 2017, reference: Ares(2017)1661648 (hereafter: 'document 7');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 27 March 2017 – 10 April 2017 reference: Ares(2018)2112119 (hereafter: 'document 8');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 3 - 4 May 2017, reference: Ares(2018)2112177 (hereafter: 'document 9');

- Letter dated 12 June 2017 from Goldman Sachs Group to Vice-President Dombrovskis, reference: Ares(2017)2941919 (hereafter: 'document 10');

- Letter dated 3 July 2017 from Goldman Sachs Group to Vice-President Dombrovskis, reference: Ares(2017)3334698 (hereafter: 'document 11');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 3 July 2017 – 1 September 2017, reference: Ares(2018)2112262 (hereafter: 'document 12');

- Letter dated 20 December 2017 from Goldman Sachs Group to Vice-President Dombrovskis, reference: Ares(2018)19165 (hereafter: 'document 13');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis, dated 16 January 2018 – 26 February 2018, reference: Ares(2018)2112328 (hereafter: 'document 14');

- E-mails exchange between Goldman Sachs Group and the Cabinet of Vice-President Dombrovskis dated 16 February 2018 – 8 March 2018, reference: Ares(2018)2112327 (hereafter: 'document 15').

In its initial reply of 4 May 2018, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union granted wide partial access to documents 1 – 9 and 11 - 15, with personal data redacted on the basis of the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

With regard to document 10, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union refused access to it, based on the exception protecting commercial interests provided for in the first indent of Article 4(2) of Regulation 1049/2001.

Additionally, in its initial reply, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union referred you to the publically available information concerning meetings held by Vice-President Dombrovskis and the members of his Cabinet, which is published in the Transparency Register of the European Commission.

Through your confirmatory application, you request a review of this position. In particular, you question the completeness of the list of documents identified at the initial stage. In this context, you refer to the information concerning the meetings of Vice-President Dombrovskis available in the Transparency Register and point out that according to that information, 'the Commissioner [Dombrovskis] has held one meeting with Goldman Sachs on 13 [October] 2017 in Washington for which there is no trace […] in the batch of document[s] [released at the initial stage]'. Consequently, you ask the European Commission to 'review and confirm if indeed there are any documents relating to this meeting'.

In your confirmatory application, you also contest the applicability of the exception in Article 4(1)(b) of Regulation 1049/2001 to the information redacted by the Directorate-General for Financial Stability, Financial Services and Capital Markets Union from the partially released documents 1 - 9 and 11 - 15.

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.

With regard to the completeness of the list of documents identified at the initial stage, the European Commission, following your confirmatory application, has carried out a renewed, thorough search for the documents requested. Following this renewed search, I confirm that the European Commission has not identified any documents concerning exchanges between Commissioner Dombrovskis, his office and his Cabinet, with Goldman Sachs since 1 June 2016 (other than those already identified) that would fall under the scope of your application for access to documents.

Given that no such documents have been identified, the European Commission is consequently not in a position to handle your application in so far as the argument relating to the completeness of the list of documents is concerned.

Indeed, according to Article 2(3) of Regulation 1049/2001, the right of access guaranteed by that Regulation applies only to existing documents.

With regard to the meeting on 13 October 2017 in Washington, the European Commission does not hold any documents falling under the scope of your request.

With regard to the documents identified at initial stage, I regret to inform you, following my review, that I have to confirm the decision of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union to refuse access to the withheld parts of documents 1 – 9 and 11 - 15 and to document 10, based on the exceptions protecting:

- privacy and the integrity of the individual (Article 4(1)(b) of Regulation 1049/2001), in so far as the relevant parts of documents 1 – 9 and 11 - 15 are concerned,

- commercial interests of a natural or a legal person (Article 4(2), first indent of Regulation 1049/2001), in so far as document 10 is concerned.

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'.

In your confirmatory application, you argue that '[t]he name of EU professional officials and, in turn, of professional registered interest representatives does not fall under the personal data category'.

The relevant undisclosed parts of documents 1 – 9 and 11 – 15 contain the names, surnames and contact details (email address) of staff members of the European Commission not holding any senior management position. They also contain the names, surnames, contact details and descriptions of the functions of third-party representatives.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, 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 all above-mentioned personal 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* ruling[3], when a request is made for access to documents containing personal data, 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 there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative[4].

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 subject[5]. This has been confirmed in the recent judgment in the *ClientEarth* case[6]. 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 data[7].

In your confirmatory application, you underline that '[t]here is a public interest in knowing which Commission officials met with Goldman Sachs lobbyists'.

Please note, however, that it is the European Commission's practice to grant in principle, access to the names and functions of Commissioners, their Cabinet members (other than administrative staff, such as secretaries) and staff in senior management positions. The Directorate-General for Financial Stability, Financial Services and Capital Markets Union applied this approach also in the case at hand.

The documents in question contain the exchanges concerning the organisational aspects of the meetings. The administrative staff members (for example secretaries) whose names appear in the documents concerned are not necessarily those who actually met the representatives of Goldman Sachs. Furthermore, the Vice-President Dombrovskis refused a number of meetings to which these exchanges relate. Consequently, revealing the names of the staff members in question would not bring any added value, to the 'public interest in knowing which Commission officials met with Goldman Sachs lobbyists'.

Furthermore, the information regarding meetings of the Vice-President and his Cabinet, as explained by the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, is available in the Transparency Register of the European Commission.

In any case, please be informed that the applicability of the exception in Article 4(1)(b) of Regulation 1049/2001 does not need to be weighed against any public interest (see also

---

3 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.

4 Ibid, paragraphs 77-78.

5 Ibid.

6 Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

point 4 of this decision). Consequently, the requirement relating to the necessity of the transfer of personal data included in documents 1 – 9 and 11 - 15 may not be considered as having been fulfilled in this case.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in documents 1 - 19 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 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 commercial interests of a natural or legal person

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, […], unless there is an overriding public interest in disclosure'.

Although in your confirmatory application you do not provide any argumentation to question the applicability of the above-mentioned exception to withheld document 10, I would like to provide additional explanations on how the disclosure of the document in question would undermine the interests protected by this exception.

Document 10 contains the detailed conclusions of the analysis carried out by Goldman Sachs in relation to impact of the potential policy changes on the issues concerning Central Counterparty Clearing House and the risk associated therewith. The analysis encompasses information on the relations of Goldman Sachs with its clients, description of risks and the assessment of various policy options concerning Central Counterparty Clearing Houses operations.

The above-mentioned information has to be considered as commercially sensitive business information of Goldman Sachs.

Its public disclosure, through the release of document 10 under Regulation 1049/2001, would clearly undermine the commercial interests of the above-mentioned economic operator. It can be presumed that the latter provided the commercially sensitive information contained in the documents under the legitimate expectation that it would not be publically released. The fact that the document bears the explicit confidentiality clause confirms this assumption.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operator in question. I conclude, therefore, that access to document 10 must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

---

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

3. PARTIAL ACCESS

The Directorate-General for Financial Stability, Financial Services and Capital Markets Union granted wide partial access to documents 1 – 9 and 11 - 15.

I have also examined the possibility of granting partial access to documents 10 in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible, given that the document concerned is covered in its entirety by the exception provided for in the first indent of Article 4(2) of Regulation 1049/2001, in the sense that even the minimum meaningful partial access would risk to reveal commercially sensitive business information.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 is absolute exception, and its applicability does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) 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.

As mentioned in point 2.1 of this decision, you underline in your confirmatory application that '[t]here is a public interest in knowing which Commission officials met with Goldman Sachs lobbyists'. The content of document 10, however, is not limited to the information regarding 'which Commission officials met with Goldman Sachs lobbyists'. Indeed, as explained in point 2.2 of this decision, the information included therein contain business sensitive information, which, if publically disclosed, would undermine the commercial interest of Goldman Sachs.

Even if the alleged existence of an overriding public interest outweighing the need to protect the information included in document 10, could be based on an alleged public interest in the subject matter and a general need for public transparency related thereto, I would like to refer to the judgment in the *Strack* case[8], 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. Instead, 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-disclosure[9].

In your confirmatory application, you do not refer to any particular overriding public interest that would warrant public disclosure of the specific type of information included in document 10.

---

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

[9] Ibid, paragraph 129.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the economic operators grounded in the first indent of Article 4(2) of Regulation 1049/2001.

The fact that the document requested was not drafted in the framework of the European Commission's legislative activities, for which the Court of Justice has acknowledged the existence of wider openness[10], provides further support to this conclusion.

5. MEANS OF REDRESS

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
Martin SELMAYR
Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

[10] Judgment of 29 June 2010, in Case *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, (ECLI: EU:C:2010:376), paragraph 60.