



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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

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Subject: Your application for access to documents – Ref GestDem No 2018/4307

Dear Mr Verbeek,

I refer to your request of 6 August 2018 for access to documents under Regulation (EC) No 1049/2001¹ (hereafter ‘Regulation 1049/2001’), registered under the above mentioned reference number on GestDem 2018/4307.

Please accept our apologies for the delay in answering to your request. Even though the scope of the request was narrowed down, a high number of other requests for access to documents are being processed by the Directorate-General for Trade (hereafter ‘DG TRADE’) at the same time, and as a result your reply has taken longer than expected to finalise.

1. SCOPE OF YOUR REQUEST

You requested access to:

- any documents, including briefings, reports, memo's and correspondence (emails, letters, faxes etc.), in which the Indonesia-EU Vision Group was mentioned (between December 2009 and 6 August 2018);

¹ 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.

- a list of meetings, as well as agendas and minutes or any other reports of such meetings, between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of the Indonesia-EU Vision Group (between December 2009 and 6 August 2018).

On 13 September 2018 we informed you that we had identified 84 documents falling under the scope of your request and that we could only deal with a maximum of 25 documents in your request. Hence, we asked you to narrow down the scope of your request, in accordance with Article 6(3) of Regulation 1049/2001. This article provides that in the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

In order to help you taking an informed decision to narrow down the scope of your request, we sent you, on 21 September 2018, a list with titles of the 84 documents identified.

Given your expressed interest in obtaining access to the briefings, we informed you on 25 September that the scope of your request would cover the first 25 briefings included in the list sent to you on 21 September.

A list of the documents falling within the scope of the request is enclosed in Annex 1. For each of the documents the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Please note that after closer reading of documents 9, 11 and 24, we have come to the conclusion that they were erroneously identified and they do not fall within the scope of your request or they are duplicated. We have therefore replaced them by documents 26, 27 and 28. Copies of the accessible documents are enclosed.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², 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 poses a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception. Third, if the institution 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*”³.

² 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.

³ *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.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, *"the exceptions to that right [...] must be interpreted and applied strictly"*⁵.

Having examined the requested documents under the applicable legal framework, I am pleased to grant full access to document 20, with regard to the parts related to your request, as well as to document 25 and 28.

Partial access is granted to documents 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 26, and 27.

In particular, in documents 13, 14, 15, 16, 19, 23 and 26, only names and other personal data have been redacted pursuant to Article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001⁶ ("Regulation 45/2001"). Hence, the main content of these documents is accessible.

In documents 1, 2, 3, 4, 5, 8, 10, 12, 17, 18, 21, 22 and 27, in addition to personal data redacted pursuant to Article 4(1)(b) of Regulation 1049/2001, additional information was redacted in accordance with Article 4(1)(a) third indent (protection of the public interest as regards international relations). In documents 6 and 7, in addition to these two exceptions, additional information has been redacted in accordance with article 4(2) first indent (protection of commercial interests) of Regulation 1049/2001.

Please note that parts of documents that do not relate to your request have been marked as falling out of scope.

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2 and 2.3.

2.1 Protection of the public interest as regards international relations

Article 4(1)(a) 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 public interest as regards: [...] international relations".

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*.⁷ In this

⁴ Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁶ 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.

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

context, the Court of Justice has acknowledged that the institutions enjoy "*a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest*"⁸.

The General Court found 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 "*have a negative effect on the negotiating position of the European Union*" as well as "*reveal, indirectly, those of other parties to the negotiations*".⁹ Moreover, "*the positions taken by the 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. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union*".¹⁰

The EU and Indonesia are currently negotiating a free trade agreement.

Certain passages in documents 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 17, 18, 21, 22 and 27 have been withheld as their disclosure would reveal strategic interests, priorities and business concerns of the EU. As such, this information could indirectly reveal negotiating priorities, strategic objectives and tactics, which the EU could consider pursuing in its trade negotiations.

Internal comments and considerations about the political or economic situation of the country or about the interlocutors of the meetings have been also protected, as their disclosure could be misunderstood and misinterpreted by our trading partners or by third parties.

There is a reasonably foreseeable risk that the public disclosure of the protected information would undermine and weaken the position of the EU in its ongoing trade negotiations with Indonesia. Indeed, the information contained in these documents would allow the EU's trading partner to draw conclusions with respect to certain detailed positions, concerns, views and strategies of the Commission and of its Member States. This in turn may allow the counterpart to extract specific concessions from the EU in the context the ongoing negotiations, thus to the disadvantage of the EU's international relations, and the interests of its citizens, consumers and economic operators

The EU, when negotiating with its counterpart - in this case Indonesia - needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Exposing internal views and considerations would weaken the negotiating capacity of the EU and consequently, the protection of the public interest as regards international relations. The abovementioned passages must, therefore, remain protected.

⁸ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁹ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

¹⁰ *Id.*, paragraph 125.

2.2 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 applicable legislation in this field is Regulation 45/2001. 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”¹¹.

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’”¹² and that “surnames and forenames may be regarded as personal data”¹³, including names of the staff of the institutions¹⁴.

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”¹⁵.

Documents 1, 2, 3, 4, 5, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 26 and 27 contain personal information, such as names, job-titles or telephone numbers that allow the identification of natural persons.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested without including these personal data.

However, the names of the senior management of the Commission (e.g. the Commissioner or the Director-General for Trade) or of Heads of Delegations have been disclosed. For third parties, the names of the main representatives (such as President, Minister, Ambassador) have been also disclosed.

¹¹ 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.

¹² 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.

¹³ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁴ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁵ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

2.3 Protection of commercial interests

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 [...] unless there is an overriding public interest in disclosure”.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent¹⁶, 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 secrecy¹⁷. 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”¹⁸.

Some passages in documents 6 and 7 have been redacted because they contain business sensitive information provided by companies in the framework of anti-dumping or anti-subsidy investigations, which if disclosed could lead to a risk of retaliation.

All this information was shared with the Commission in order to provide input for the investigations. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission, are key elements for the success of the policies of the EU. Sharing publicly specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future. The abovementioned passages must, therefore, remain protected.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 applies 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. Accordingly, we have also considered whether the risks attached to the release of the withheld parts of document 6 are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions without undermining the commercial position of the entities involved.

¹⁶ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁷ See Article 339 of the Treaty on the Functioning of the European Union.

¹⁸ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

In case you disagree with the assessment contained in this reply you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, 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, Document Management & Access to Documents (SG-C.1)
BERL 5/282
1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

- Annex 1: List of documents
- Documents (partially) disclosed