



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,

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

Mr Marnix Kleinjan
Clingendael 7
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The Netherlands

Advance copy by email:
ask+request-6809-04df5e70@asktheeu.org

Subject: Your application for access to documents – Ref GestDem 2019/2434

Dear Mr Kleinjan,

I refer to your request of 13 April 2019 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001") and hereinafter registered as GestDem 2019/2434.

1. SCOPE OF YOUR REQUEST

In your application, you request access to the following documents:

“all communication, including emails, and documents (agenda, minutes, list of participants, etc.) related to the following meetings between Miguel Ceballos Baron and Heineken:

30/01/2019 - EU Trade Policy

27/03/2018 - EU-Mexico Association Agreement negotiations

25/01/2018 - Trade Agreement with Mexico

19/06/2017 - beer market in Mexico and Mercosur

20/02/2017 - Trade relations EU-Mexico”

We have identified 16 documents corresponding to the scope of your request. A list of these documents providing a description and indicating the level of disclosure is attached to this letter jointly with copies of the accessible documents.

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.

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.

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 you partial access to all **16** identified documents.

In documents **1-3, 5, 7, 8** and **11-15**, 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 2018/1725. Hence, the main content of these documents is accessible.

In documents **4, 6, 9, 10** and **16**, in addition to personal data, additional information was redacted as it is covered either by the exception set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) and/or by the exception set out in Article 4(2) first indent of Regulation 1049/2001 (protection of the commercial interest of a natural or legal person) and/or Article 4.(3) (protection of the institution’s decision-making process).

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2, 2.3 and 2.4. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

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.

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

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

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"*.⁶ In this 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"*⁷.

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"*.⁸ 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"*.⁹

Access to parts of the document **4**, **6** and **9** is not granted 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.

More generally, it remains important for the EU when negotiating with its counterpart 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.

There is a reasonably foreseeable risk that the public disclosure of the protected information would undermine and weaken the position of the EU as the European Commission has not

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

⁷ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁸ Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ *Id.*, paragraph 125.

yet proposed to the Council the decisions to sign and to conclude the relevant agreement with Mexico. It may also undermine the EU in any future trade negotiations. 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 above mentioned passages must, therefore, remain protected.

2.2 Protection of privacy and integrity of the individual

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹⁰ ('Regulation 2018/1725').

All the documents partially released contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information like signatures.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data "*means any information relating to an identified or identifiable natural person [...]*". The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.¹¹ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.¹²

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹⁴

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

¹² Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

¹³ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*, EU:C:2010:378, paragraph 59.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "*[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests*". Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, we do not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

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, including intellectual property [...] 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 indent¹⁴, 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 secrecy¹⁶. 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*

¹⁴ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

¹⁵ Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

¹⁶ See Article 339 of the Treaty on the Functioning of the European Union.

*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"*¹⁷.

Some passages in documents **4**, **10** and **16** as well as some parts of the annex to document **9** have been withheld because they contain business sensitive including details about commercial priorities, objectives, strategies, concerns and interests that they pursue in their respective domains.

All this information was shared with the Commission in order to provide useful input and support for the EU's objectives in its trade negotiations. Operators typically share information with the Commission so that the latter can determine how to best position itself in the negotiations in order to protect its strategic interests and those of its industry, workers and citizens. 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 internal and external policies of the EU and its international negotiations. 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.

2.4 Protection of the institution's decision-making process

Article 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.*"

The jurisprudence of the EU Courts has recognized that "*the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process*"¹⁸ and that the capacity of its staff to express their opinions freely must be preserved¹⁹ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court noted, the result of such self-censorship "*would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]*"²⁰.

Certain parts of the annex to document **9** have been withheld as its disclosure would seriously undermine the ongoing decision-making process related to trade negotiations with Mexico. These negotiations have not been entirely finished, as the European Commission has not yet submitted to the Council a proposal to sign and conclude them.

¹⁷ Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

¹⁸ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹⁹ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

²⁰ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

This decision making process needs to be preserved from external pressure in order to preserve the “thinking space” of the Commission, its room for manoeuvre and independence, and the atmosphere of trust in which internal discussions within the Commission and between institutions take place.

In particular, exposing internal views and considerations would be premature at this stage and would subject the Commission to external pressure, potential manipulation and unfounded conclusions both from external stakeholders and negotiating partners. It would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches and proposals. This would consequently undermine the decision-making process of the EU institutions by revealing specific elements taken into account for the ongoing discussions.

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 documents **4**, **10** and **16** and parts of the annex to document **9** 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 for its ongoing negotiations with third countries without undermining the commercial position of the entities involved.

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.C1)
BERL 7/706
1049 Bruxelles

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

Yours sincerely,

Sabine WEYAND

Encl.:

- Annex 1: List of documents
- Released documents