



EUROPEAN COMMISSION

Competition DG

The Director General

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COMP/B3/LF/NW/kd\*2020/091399

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By e-mail

**Subject: GESTDEM 2020/4241 – Your request of 1<sup>st</sup> of July 2020 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Horizontal Task COMP/HT.582 – Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading as of 2021**

Dear Sir,

Thank you for your message of 1 July 2020, registered under GESTDEM number 2020/4241, concerning Horizontal Task COMP/HT.582 – Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading as of 2021, in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001").

#### **1. DOCUMENTS CONCERNED**

In your message, you request access to all documents including but not limited to attendance lists, agendas, background papers, minutes/notes and email correspondence about or summarising, concerning the following meetings:

- Meeting between Executive Vice-President (EVP) Vestager's Cabinet and the European Cement Association (CEMBUREAU), regarding the revision of the ETS State aid Guidelines and the Guidelines on State aid for environmental protection and energy, that took place on May 15th.
- Meeting between EVP Vestager's Cabinet and the European Steel Association (EUROFER), regarding the revision of the ETS State aid Guidelines, that took place on May 5th.

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<sup>1</sup> Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43

- Meeting between EVP Vestager's Cabinet and European Chemical Industry Council (CEFIC) regarding the revision of the ETS State aid Guidelines, that took place on May 29th.
- Meeting between EVP Vestager's Cabinet and Verband der Chemischen Industrie e.V.(VCI) regarding to discuss 5 point plan of the German chemistry and pharma industry on the May 25th.

Your request concern three types of documents linked to the meetings, which are part of the administrative file of DG Competition concerning HT.582 - State aid Guidelines in the context of the ETS and HT 5371 - EEAG Revision, falling within the scope of Regulation 1049/2001:

- The contributions sent by the stakeholders, as background documents in,
- The internal briefings,
- The minutes of meetings.

A number of documents to which you have requested access to are already in the public domain. These documents are the contributions provided by the stakeholders to the Commission in the context of the public consultation on draft ETS State aid Guidelines, between January and March 2020 and the targeted Consultation for the Evaluation of the Guidelines on State aid for Environmental protection and Energy 2014-2020 (EEAG). These documents have been published on the Commission website<sup>2</sup>. I therefore refer you to these public sources.

## **2. APPLICABLE EXCEPTIONS**

Having carefully examined the requested documents, in accordance with Regulation 1049/2001, I have also come to the conclusion that for the documents you have requested access concerning the mentioned meetings, the internal briefings and the minutes of meetings, fall under the exceptions of Article 4 of Regulation 1049/2001. I note that only partial access may be granted to the briefings and minutes of the meetings above-mentioned.

I therefore attach the following documents partially redacted:

- 1) Briefing and minutes on the meeting between EVP Vestager's Cabinet and the European Steel Association (EUROFER), regarding the revision of the ETS State aid Guidelines, that took place on May 5th.
- 2) Briefing and minutes on the meeting between EVP Vestager's Cabinet and European Chemical Industry Council (CEFIC) regarding the revision of the ETS State aid Guidelines, that took place on May 29th.
- 3) Briefing and minutes on the meeting between Executive Vice-President (EVP) Vestager's Cabinet and the European Cement Association (CEMBUREAU),

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<sup>2</sup> [https://ec.europa.eu/competition/consultations/2020\\_ets\\_stateaid\\_guidelines/index\\_en.html](https://ec.europa.eu/competition/consultations/2020_ets_stateaid_guidelines/index_en.html)

regarding the revision of the ETS State aid Guidelines and the Guidelines on State aid for environmental protection and energy, that took place on May 15th.

- 4) Minutes and information on the meeting between EVP Vestager's Cabinet and Verband der Chemischen Industrie e.V.(VCI) regarding to discuss 5 point plan of the German chemistry and pharma industry on the May 25th.

Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

### **2.1. Article 4(3) of Regulation 1049/2001**

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of the requested documents at this stage might hurt the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001. Once access is granted, any potential requester receives access to the documents in question, irrespective of its legal standing, involvement or other specific interests it may have, as "*the purpose of the regulation is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it*".<sup>3</sup>

Pursuant to Article 4(3) first subparagraph, access to the documents drawn by the Commission or received by the Commission shall be refused if the disclosure of the documents would seriously undermine the Commission's decision-making process. This exception aim at protecting the Commission's decision-making process.

### **2.2. The briefings and the minutes of the meetings between the Commission and stakeholders**

In the context of the revision of the ETS State aid Guidelines and the Energy and Environmental Aid Guidelines (EEAG), the Commission is currently establishing the future provisions of the Guidelines. In order to do so, the Commission is assessing information from various sources. This includes extensive data provided by economic stakeholders, Member States and other sources, such as the work of an independent consultant. In this context, further input on the situation of different economic sectors has been obtained in the framework of a public consultation on the draft guidelines and during meetings between the Commission and stakeholders. All the relevant information obtained during these meetings requested by the stakeholders are ultimately fed into the Commission's Impact Assessment.

In order to prepare these meetings, the Commission uses internal briefings and minutes of meetings. The briefings describe the contributions provided by the sector, the different criteria analyzed for the sector, and the state of play of internal discussions. The discussions during the meetings are described in the minutes of the meetings.

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<sup>3</sup> See Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council*, paragraph 50; Case T-181/10, *Reagens SpA v Commission*, paragraph 143

### **2.3. The application of Article 4(3) of Regulation 1049/2001 to the briefings and the minutes of the meetings**

As previously explained, the requested documents are part of an Impact Assessment for the revision of the ETS State aid Guidelines and the revision of the EEAG. This Impact Assessment, and the analysis of the relevant information contained in it, is not yet completed. Indeed, in the context of the ongoing consultation of Member States and stakeholders, the Commission currently still receives input from stakeholders and Member States, on the different parameters also referred to in the requested documents.

The decision on the different parameters of the ETS State aid Guidelines and the revision of the EEAG has important social, economic and political implications. As highlighted in judgment T-516/11, *MasterCard and Others v Commission*, “the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to decision-making process”.<sup>4</sup> Especially in the context of the overall process for deciding the different options for the final ETS State aid Guidelines, the disclosure of one isolated aspect of the unfinished Impact Assessment would carry a high and serious risk that the decision-making process would be exposed to external pressure from the sectors concerned. The Commission services must instead be free to explore all available information and possible options in the preparation of the Commission’s decision free from external pressure. For these reasons, the disclosure of the requested documents would seriously undermine the Commission's decision-making process.

The importance of transparency in enabling citizens to participate in the Commission’s decision-making process is of paramount importance, in particular in relation to a complex and sensitive issue such as the draft ETS State aid Guidelines and the revised EEAG. For this reason, the revision process on the revised ETS Guidelines was supported by several consultation activities, including a public consultation on draft Guidelines.<sup>5</sup> Nevertheless, the public interest in obtaining access to the above-mentioned documents does not, at this stage, outweigh the need to protect the pending decision-making process regarding the revision of the ETS State aid Guidelines and also the revision of the EEAG.

This conclusion is supported by the fact that the Commission has conducted two public consultations to obtain input from all interested stakeholders and has, together with the launch of the current public consultation, published its preliminary views on the different parameters of the draft ETS State aid Guidelines, thus allowing stakeholders to provide targeted input into the ongoing decision-making process concerning the revision of the draft ETS State aid Guidelines.

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<sup>4</sup> See Judgment of the General Court of 9 September 2014 in case T-516/11, *MasterCard and Others v Commission*, paragraph 71

<sup>5</sup> All consultation activities can be found at the following links: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2041-Revision-of-the-ETS-State-aid-Guidelines> and [https://ec.europa.eu/competition/state\\_aid/legislation/ets\\_en.html](https://ec.europa.eu/competition/state_aid/legislation/ets_en.html)

Consequently, parts of the requested documents are covered by the exception set out in Article 4(3) first subparagraph of Regulation 1049/2001 and have been redacted from the copies of the documents disclosed within this reply.

#### **2.4. Overriding public interest in disclosure**

Pursuant to Article 4(3) of Regulation 1049/2001, the exception to the right of access contained in that Article must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of the applicant) and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4 (3) of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose that parts of the documents to which access has been hereby denied. Consequently, I do not see overriding public interest in the disclosure of the briefings and minutes of the meetings above-mentioned in a non-redacted version.

#### **2.5. The application of Article 4(1)(b) of Regulation 1049/2001 to the briefings and the minutes of the meetings**

With regard to these documents, a complete disclosure of the identified documents is also prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain personal data. The parts redacted in the attached documents due to this exception are indicated with P. All other redacted parts, without an indication, are falling under the exception of Article 4(3) of Regulation 1049/2001 as explained under 2.3 of this letter.

Article 9(1)(b) of the Data Protection Regulation<sup>6</sup> does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

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<sup>6</sup> Regulation (EU) 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/EC, OJ L 295, 21.11.2018, p. 39.

### **3. MEANS OF REDRESS**

If you want this position to be reviewed you should write to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen (15) working days in which to do so from receipt of this reply after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

European Commission  
Secretariat-General  
Transparency, Document Management & Access to Documents (SG.C.1)  
BERL 7/076  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu).

Yours faithfully,

(e-signed)

Olivier GUERSENT

**Annexes: Copies of 8 documents**